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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2016-CP-07-02712

APPELLATE CASE NO. 2020-000617

Beachwalk Hotel & Condominium Association, Inc.
and Beachwalk Hilton Head, LLC

Appellants,

vs.

The Town of Hilton Head Island and/or The Town
of Hilton Head Island Board of Zoning Appeals and
SDC Properties, Inc.,

Respondents.

RECORD ON APPEAL – VOLUME II OF VI

Kathleen McDaniel, Esq.
BURNETTE SHUTT & McDANIELI, PA
Post Office Box 1929
Columbia, SC 29202
(803) 904-7913

Thomas C. Taylor, Esq.
Law Offices of Thomas C. Taylor, LLC
Post Office Box 5550
Hilton Head Island, SC 29938

Attorney for Appellants

Brian Earl Hulbert, Esq.
Hulbert Law Office
26 Fish Dance Ct.
Bluffton, SC 29910

and

Gregory Milam Alford
Alford Law Firm, LLC
P.O. Box 8008
Hilton Head Island, SC 29938

*Attorneys for Respondent The Town of Hilton
Head Island and/or The Town of Hilton Head
Island Board of Zoning Appeals*

Barry L. Johnson, Esq.
Stephen Harrison Williams, Esq.
William Lamar Johnson, II Esq.
The Victoria Building, Suite 200
10 Pinckney Colony Road
Okatie, SC 29909

Attorneys for Respondent SDC Properties, Inc.

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STATE OF SOUTH CAROLINA

) BEFORE THE BOARD OF ZONING APPEALS OF
) THE TOWN OF HILTON HEAD ISLAND, SOUTH
) CAROLINA

COUNTY OF BEAUFORT

) APPLICATION FOR APPEAL
) NO. APL-001673-2016



MEMORANDUM ON SUBPOENA AND TOWN RESPONSE

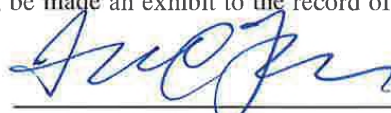
In her Memorandum of August 1, 2018, Nicole Dixon “interprets” the LMO in a manner to say that the average density requirement of LMO Section 16-3-106.G.4 simply does not apply to Parcel E. Because that position is such a tortured interpretation of the LMO--basically amounting to the disregarding of a mandatory provision of the LMO--the Petitioners/Appellants immediately sought to determine if there was any precedent for the Town’s staff position.

Pursuant to S.C. Code Annot. Section 6-29-790, the attached Subpoena was issued to Teri Lewis on August 3, 2018, *requiring* the Town to produce any and all documents that showed any precedent of the staff taking the position that one or more sections of the LMO applied or apply only prospectively to new proposed development or that one or more sections of the LMO do not apply to a development that was previously approved under prior regulations and partially constructed. The Town staff, by the subpoena, was also *required* to produce any documentation showing that they had ever before taken the position that LMO Section 16-3-106.G did not apply to a tract of land in a PD-2 Overlay District. The subpoena also *required* production of all documents showing any prior “interpretations” by the LMO official that the provisions of an LMO overlay district did not or do not control over the provisions of the LMO base zoning district.

Not surprisingly, on August 21, 2018, Town Attorney Brian Hulbert notified the Petitioners/Appellants that “the Town has no documentation to provide in response to your subpoena.” (See email of Mr. Hulbert to Tom Taylor attached.)

By its failure to locate and provide any documentation establishing a precedent for this tortured interpretation of the LMO, the Town staff has admitted that there is no precedent in the Town’s history for the staff taking the position that a basic, crystal-clear mandate of the LMO may simply be ignored on a whim.

Petitioners/Appellants respectfully request that this memorandum, the Subpoena of August 3, 2018 and Mr. Hulbert’s email reply of August 21, 2018, be made an exhibit to the record of the rehearing on this appeal on August 27, 2018.



Thomas C. Taylor
Counsel for Petitioners/Appellants

August 27, 2018

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Tom Taylor

From: Hulbert Brian <brianh@hiltonheadislandsc.gov>
Sent: Tuesday, August 21, 2018 11:48 AM
To: Lewis Teri; Tom Taylor
Cc: Gregg Alford; Barry Johnson; dlfingerhut@afdny.com; Law Office of Chester C. Williams; Donna Taylor; Hulbert Brian
Subject: RE: request for copies of subpoenaed documents in Beachwalk

Tom,

It looks like the Town has no documents to provide in response to your subpoena.

R/

Brian Hulbert
 Staff Attorney and Town Prosecutor
 Hilton Head Island, SC 29928
 843 341-4633

From: Lewis Teri
Sent: Tuesday, August 21, 2018 11:31 AM
To: Hulbert Brian; Tom Taylor
Cc: Gregg Alford; Barry Johnson; dlfingerhut@afdny.com; Law Office of Chester C. Williams; Donna Taylor
Subject: RE: request for copies of subpoenaed documents in Beachwalk

Brian-

I have consulted with Nicole and we have not located any additional documents. The decisions that were reached were as a result of documents that already exist as a part of the record.

Regards-
 Teri B. Lewis, AICP
 LMO Official
 Community Development Department
 One Town Center Court
 Hilton Head Island, SC 29928
 (843) 341-4698(p)
 (843) 842-8907(f)
teril@hiltonheadislandsc.gov

From: Hulbert Brian
Sent: Tuesday, August 21, 2018 11:29 AM
To: Tom Taylor; Lewis Teri
Cc: Gregg Alford; Barry Johnson; dlfingerhut@afdny.com; Law Office of Chester C. Williams; Donna Taylor; Hulbert Brian
Subject: RE: request for copies of subpoenaed documents in Beachwalk

Teri,

Can you tell me if you have located any documents related to Mr. Taylor's subpoena in the subject case? Thx.

Brian Hulbert
Staff Attorney and Town Prosecutor
Hilton Head Island, SC 29928
843 341-4633

From: Tom Taylor [<mailto:tom@thomastaylorlaw.com>]

Sent: Tuesday, August 21, 2018 11:26 AM

To: Hulbert Brian

Cc: Gregg Alford; Barry Johnson; dlfingerhut@afdnyc.com; Law Office of Chester C. Williams; Donna Taylor

Subject: request for copies of subpoenaed documents in Beachwalk

Brian—Good morning. Please see my attached letter requesting copies of the subpoenaed documents, if any have been located, by this Friday if possible. If we can get them early, it will significantly expedite the hearing on Monday. Thanks for your consideration.

All counsel are copied along with the Chairman.

Tom

Thomas C. Taylor

Law Office of Thomas C. Taylor, LLC
22 Bow Circle, Suite A
Hilton Head, SC 29928
843-785-5050 (office)
843-785-5030 (fax)
843-301-6900 (cell)

Mailing Address:
P.O. Box 5550
Hilton Head, SC 29938

CONFIDENTIAL COMMUNICATION: The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify this Law Office by telephone call or e-mail immediately and return the original message to me and destroy all printed and electronic copies. Nothing in this e-mail is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly stated. The intentional interception or dissemination of electronic mail not belonging to you, may violate federal and/or state law.

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SUBPOENA BOARD OF ZONING APPEALS

SOUTH CAROLINA		TOWN OF HILTON HEAD ISLAND	
		CASE NO: APL-001673-2016	SUBPOENA FOR (CIRCLE ONE) ~~PERSON~~ <i>ll</i> • DOCUMENT OR OBJECTS
TO: Teri Lewis			
• YOUR ARE HEREBY COMMANDED to appear at a hearing before the Board of Zoning Appeals in the Town Council Chambers located at One Town Center Court, Hilton Head Island, South Carolina at the place, date and time specified below to testify in the above-entitled case.			
PLACE One Town Center Court, Hilton Head Island, SC 29928	TOWN COUNCIL CHAMBERS	DATE AND TIME August 27, 2018; 1:00 p.m.	
YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s)			
LIST DOCUMENT(S) OR OBJECT(S):			
See attached Exhibit A.			
This subpoena shall remain in effect until you are granted leave to depart by the Board or by an officer on behalf of the Board. This Subpoena is issued in accordance SC Laws Section 6-29-790, and other applicable provisions of law.			
CHAIRMAN OF THE BOARD OF ZONING APPEALS (BZA) David Fingerhut <i>David Fingerhut</i>		DATE: August <u>3</u> , 2018	
BY CHAIRMAN OF THE BZA			
THIS SUBPOENA IS ISSUED UPON APPLICATION OF : Thomas C. Taylor, Esq. Law Office of Thomas C. Taylor, LLC. Post Office Box 5550 Hilton Head Island, SC 29938		APPELLANTS'S NAME AND ADDRESS: Beachwalk Hotel Condominiums Association and Beachwalk Hilton Head. LLC c/o Thomas C. Taylor, Esq.	

STATE OF SOUTH CAROLINA	)	BEFORE THE
	)	BOARD OF ZONING APPEALS
	)	FOR THE
	)	TOWN OF HILTON HEAD ISLAND, SC
	)	
COUNTY OF BEAUFORT	)	APPLICATION FOR APPEAL
	)	APL-001673-2016

**EXHIBIT A
TO SUBPOENA TO TERI LEWIS**

- A. Any and all written interpretations of, or determinations under, the Land Management Ordinance (the "LMO") or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that one or more sections or provisions of the LMO applied or apply only prospectively to new proposed development; or that one or more sections or provisions of the LMO did not apply or do not apply to a development that was previously approved under prior regulations and partially constructed.
- B. Any and all written interpretations of, or determinations under, the LMO or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that one or more provisions of LMO Section 16-3-106.G did not or do not apply to a tract or parcel of land located in a PD-2 Overlay District.
- C. Any and all written interpretations of, or determinations under, the LMO or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that one or more provisions of LMO applied to or apply to an existing development in a manner that restrict or limit the density of development on any tract or parcel below that which was allowed under a previous provisions or versions of the LMO.
- D. Any and all written interpretations of, or determinations under, the LMO or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that the provisions of an LMO overlay district did not or do not control over the provisions of the LMO base zoning district.

EXHIBIT

2

TOWN CENTER PUD
ANALYSIS OF PUD USES
APPROVED AND PROPOSEDApproved 5/6/87
PROPOSED

CHANGE

Uses	PUD AS APPROVED			PROPOSED			CHANGE
	Area (Acres)	S.F. or Units	Density	Area (Acres)	S.F. or Units	Density	
Commercial/Office	2.3	36,000	15652 sf/A	1.4	21,913	15652 sf/A	14087 sf reduction
Commercial/Retail	4.3	52,000	12093 sf/A	3.0	36,279	12093 sf/A	15721 sf reduction
Hotel/Motel	1.0	50 rms.	50rm/A	2.6	94 rms.		44 room increase
Common Open Space	—	—	—	1.3	—	24 rm/A	
Residential	7.5	222 u.	29.6 u/A	6.8	200 u.	29.4 u/A	22 unit reduction
TOTALS	15.1	88,000 sf 242 u.	5828 sf/A 16 du/A	15.1	58,192 sf 238 u.	3854 sf/A 15.67 du/A	29808 sf reduction 4 unit reduction

* The total area required for the proposed 94 room motel as a special exception within the PD-1 Zoning District (at 24 rooms/acre) is 3.9 acres. The motel would have to be developed on a 3.9 acre site or as shown in the table. The acreage not utilized for the motel would be set aside as common open space not to be used for any other development or open space requirements.

May 5, 1987

ATTACHMENT H

15.1
- 2.9

91 HOTEL	15.1	6.026 r/ac
5262 SF COMM	15.1	348.48 SF/ac
19.8	15.1	13.113 units/ac

~~57000 SF/acre~~



	TOWN OF HILTON HEAD ISLAND COMMUNITY DEVELOPMENT DEPARTMENT		
	One Town Center Court	Hilton Head Island, SC 29928	843-341-4757 FAX 843-842-8908

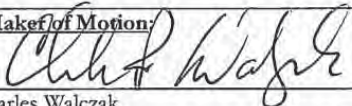
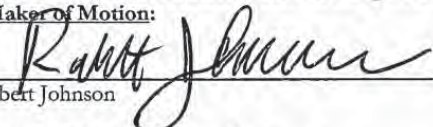
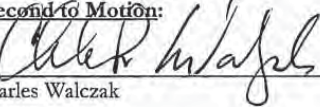
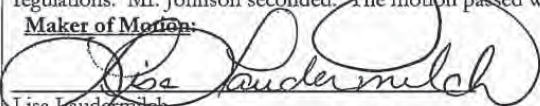
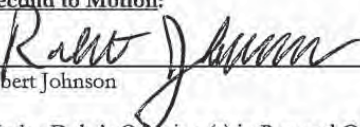
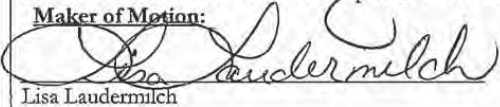
BOARD OF ZONING APPEALS NOTICE OF ACTION

Case #:	Name of Development:	Re-Hearing Date:
APL-1673-2016	Waterside – Spinnaker Welcome Center	August 27, 2018

Parcel or Location Data:	Appellant
30 Waterside Drive Resort Development Zoning District R552 018 000 0202 0000 Corridor Overlay District Waterside (Town Center) PD-2 Overlay	Chester C. Williams Law Office of Chester C. Williams, LLC 17 Executive Park Road, Suite 2 PO Box 6028 Hilton Head Island, SC 29938

Brief Description: Staff received an Appeal on September 6, 2016 from Chester C. Williams on behalf of Beachwalk Hotel & Condominium Association, Inc and Beachwalk Hilton Head, LLC. The appellant appealed staff's determination, dated August 23, 2016, that the proposed development of the Spinnaker Welcome Center is permitted as proposed with Development Plan Review Application DPR-001056-2016. On November 28, 2016, the Board of Zoning Appeals denied the appeal and upheld staff's determination. The appellant filed a Petition for Reconsideration on December 2, 2016, requesting that the BZA reconsider their decision to uphold staff's determination. This was heard by the BZA at the January 23, 2017 meeting. No action was taken by the Board at that meeting, and as a result, the Motion to Reconsider APL-001673-2016 was deemed denied. On December 30, 2016, the appellant filed an appeal of the BZA's decision to the Circuit Court. The appeal was heard by the Circuit Court on December 18, 2017. Judge Duke's found that after presentations and questioning at the hearing by all parties, the record was unclear on certain issues he believes are important for appropriate judicial review of the appeal, including the basis for the BZA's decision. He remanded the appeal back to the BZA for a rehearing and to answer three specific questions.

BZA Action: At their meeting on August 27, 2018, the following action was taken by the Board in connection with APL-1673-2016: • Motion to dismiss for lack of standing by Mr. Barry Johnson and the Town: Mr. Walczak moved to deny counsel's motion to dismiss for lack of standing. Mr. White seconded. The motion passed with a vote of 6-0-0.

<u>Maker of Motion:</u>  Charles Walczak	Date: <u>8/30/18</u>
<u>Second to Motion:</u>  John White	Date: <u>8-31-18</u>
• Judge Duke's Question (a) in Remand Order (Is Parcel E in a PD-2 Overlay District established by the LMO?): Mr. Johnson made a motion to affirm that Parcel E is in a PD-2 Overlay District established by the LMO. Mr. Walczak seconded. The motion passed with a vote of 6-0-0.	
<u>Maker of Motion:</u>  Robert Johnson	Date: <u>8/30/18</u>
<u>Second to Motion:</u>  Charles Walczak	Date: <u>8/30/18</u>
• Judge Duke's Question (b) in Remand Order (If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?): Ms. Laudermilch made a motion that Parcel E is subject to the LMO's PD-2 Overlay District regulations. Mr. Johnson seconded. The motion passed with a vote of 6-0-0.	
<u>Maker of Motion:</u>  Lisa Laudermilch	Date: <u>8-30-18</u>
<u>Second to Motion:</u>  Robert Johnson	Date: <u>8/30/18</u>
• Judge Duke's Question (c) in Remand Order, Part 1 (If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E...): Ms. Laudermilch moved that because we've determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E. Mr. Walczak seconded. The motion passed with a vote of 6-0-0.	
<u>Maker of Motion:</u>  Lisa Laudermilch	Date: <u>8-30-18</u>
<u>Second to Motion:</u>	Date:

<u>Charles Walczak</u>	<u>8/30/18</u>
Charles Walczak • Judge Duke's Question (c) in Remand Order, Part 2 (...must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?): Mr. Walczak moved that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E. Vice Chairman Cutrer seconded. The motion passed with a vote of 6-0-0.	
<u>Charles Walczak</u>	<u>8/30/18</u>
Charles Walczak Maker of Motion: Date:	
<u>Jerry Cutrer</u>	<u>8/30/18</u>
Jerry Cutrer Second to Motion: Date:	
Jerry Cutrer • Regarding the Appeal: Vice Chairman Cutrer made a motion that the BZA uphold the determination by the Town Staff and deny the appeal of the appellant based on the following Findings of Fact: • That Parcel E is in a PD-2 Overlay District established by the LMO. • Because Parcel E is in a PD-2 Overlay District, Parcel E is subject to the LMO's PD-2 Overlay District regulations. • That the development of Parcel E is governed by the PD-2 Overlay District regulations and the existing development on the other parcels within that PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E. • With the further Finding of Fact, that the property is composed of three separate, significant parcels, and one not significant with that being the road right-of-way. There is a hotel property, a Spinnaker property, and a proposed Welcome Center property. The hotel property conforms to the current LMO, as well as the PD-2 Overlay District. The Spinnaker property, Parcel F, complies with the current LMO, as well as the PD-2 Overlay District because it is a legally nonconforming development with respect to density. And that Parcel E, if developed to 7,500 square feet would also comply with both the LMO and PD-2 Overlay District because it would be less than the allowed 8,000 square feet. • And further, that failure to sustain the Staff's determination would, pursuant to the Lucas vs. South Carolina Coast Council case, cause all economic utility to be zoned out of existence and that would result in a taking which we should not do. Mr. Johnson seconded. The motion failed with a vote of 3-3-0. For the motion: Cutrer, Johnson, White. Against the motion: Fingerhut, Laudermilch, Walczak. Because it was a 3-3 split vote, the Motion failed and the Board's original decision on November 28, 2016 to uphold staff's determination and deny the appeal still stands.	
<u>Jerry Cutrer</u>	<u>8/30/18</u>
Jerry Cutrer Maker of Motion: Date:	

Second to Motion:

Robert Johnson

Date:

8/30/18

Appeal To Circuit Court:

If you believe the Board erred in its decision, you have the right to appeal the decision to Circuit Court. You have two options to appeal to Circuit Court:

1. You may file a petition with the clerk of court in and for the county, in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within 30 days after the decision of the Board is mailed (South Carolina Code of Laws 6-29-820A). The mailing date of this decision is **August 31, 2018**.
2. You may file a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with South Carolina Code of Laws Section 6-29-825. Any notice of appeal and request for pre-litigation mediation must be filed within 30 days after the decision of the board is postmarked.

Chairman of BZA:

Date:

8/30/18

Note: This decision must be delivered to the parties of interest via certified mail.

Exhibit E to Appellants' Return (4 pages)

	TOWN OF HILTON HEAD ISLAND COMMUNITY DEVELOPMENT DEPARTMENT
One Town Center Court	Hilton Head Island, SC 29928
843-341-4757	FAX 843-842-8908

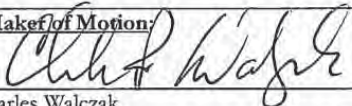
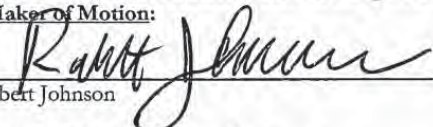
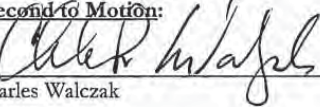
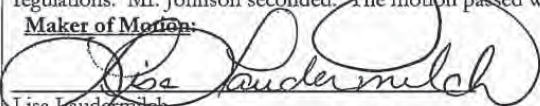
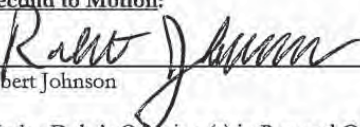
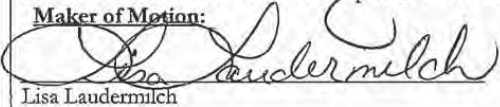
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<u>Jerry Cutrer</u> Jerry Cutrer	<u>8/30/18</u>

Second to Motion:

Robert Johnson

Date:

8/30/18

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Chairman of BZA:

Date:

8/30/18

Note: This decision must be delivered to the parties of interest via certified mail.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
	)	
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	NOTICE OF SDC PROPERTIES, INC.'S
Appellants/Petitioners,	)	MOTION AND MOTION FOR SUMMARY
	)	JUDGMENT
vs.	)	
	)	
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS, and SDC	)	
PROPERTIES, INC.	)	
	)	
Respondents/Defendants.	)	
	)	

**TO: THOMAS C. TAYLOR, ESQUIRE, CHESTER C. WILLIAMS, ESQUIRE,
ATTORNEYS FOR BEACHWALK HOTEL & CONDOMINIUMS ASSOCIATION, INC.
AND BEACHWALK HILTON HEAD, LLC, APPELLANTS/PETITIONERS:**

YOU WILL PLEASE TAKE NOTICE that on or after ten days from the date of service hereof, or at such other date, and at such place, as the Court shall direct, the Respondent/Defendant, SDC Properties, Inc. (SDC), will, and does hereby move, pursuant to South Carolina Rules of Civil Procedure 56 and 12(b)(6), for summary judgment against Appellants/Petitioners, seeking dismissal with prejudice of their appeal/petition, on the ground that Appellants/Petitioners lack standing to bring or maintain the appeal/petition.

In further support of this motion, SDC respectively asserts that the Appellants/Petitioners have not alleged nor demonstrated, nor can they demonstrate, a special or particularized injury as required by the Town of Hilton Head Island Land Management Ordinance ("LMO") Section 16-2-103(T)(2)b), and therefore do not qualify as an "aggrieved party" with standing entitling them

to maintain the within appeal/petition, all pursuant to LMO Section 16-2-103(T)(2)(a). For these reasons, Appellants/Petitioners lack standing to bring or maintain this case. SDC will submit a Memorandum of Points and Authorities in Support of this motion as and when required.

Respectfully submitted,

JOHNSON & DAVIS, PA

/s/ Barry L. Johnson

Barry L. Johnson, Attorney at Law
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
barry@jd-pa.com

Bluffton, SC
October 1, 2018

*Attorneys for Respondent/Defendant
SDC Properties, Inc.*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2016-CP-07-2712
Beachwalk Hotel & Condominium Association, Inc. and Beachwalk Hilton Head, LLC	)	
	)	
	)	
Appellants/Petitioners	)	
vs.	)	APPELLANTS'/PETITIONERS'
	)	MEMORANDUM IN OPPOSITION TO
The Town of Hilton Head Island and/or the Town of Hilton Head Island Board of Zoning Appeals, and SDC Properties, Inc.	)	SDC PROPERTIES, INC.'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	
Respondents/Defendants	)	
	)	

INTRODUCTION

This matter is before the Court on the appeal by Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (collectively, the "Appellants") of the decision of the Board of Zoning Appeals (the "BZA") of the Town of Hilton Head Island, South Carolina (the "Town") dated November 28, 2016 to uphold the determination made by Nicole Dixon, CFM, Senior Planner for the Town in her determination letter of August 23, 2016 to Chester C. Williams, Esq., counsel for the Appellants, that the proposed development of the Spinnaker Welcome Center as contemplated by the Development Plan Review Application DPR-001056-2016 (the "DPR Application"), is permitted under applicable Town requirements of the Town's Land Management Ordinance (the "LMO"), pursuant to Section 6-29-820 of the Code of Laws of South Carolina (1976), as amended.

Following the filing of this appeal by the Appellants, SDC Properties, Inc. ("SDC"), the owner of the tract of land referred to as Parcel E that is the subject of the DPR Application, was added to the case as a necessary party.

THE COURT'S QUESTIONS

Following briefing by all parties and the submission to the Court of a certified copy of the proceedings held before the BZA, including the hearing by the BZA on Application for Appeal

APL-001673-2016 on November 28, 2016 and the hearing before the BZA on the Appellants' Petition for Reconsideration on January 23, 2017, a hearing pursuant to Section 6-29-840 of the Code of Laws of South Carolina (1976), as amended, was held before Hon. Marvin E. Dukes, III, sitting as a Special Circuit Judge, on November 16, 2017. Following that hearing, Judge Dukes requested that counsel for each party provide the Court with their position on whether the BZA heard, properly considered, and addressed three questions:

- a. Is Parcel E in a PD-2 Overlay District established by the LMO?
- b. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?
- c. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Following further briefing by the Appellants and SDC and a telephone conference among Judge Dukes and counsel for all parties on December 18, 2017, Judge Dukes issued an Order on April 20, 2018 in which he found that the record of the proceedings before the BZA was unclear and insufficient for review, and that he required further information from the BZA for his consideration. That Order states, in pertinent part, as follows:

Despite extensive presentations and questioning at the hearing before the BZA on November 28, 2016, I find the record is unclear as to certain issues that I believe are important for appropriate judicial review of this appeal, including the basis for the BZA's decision. Thus, I determine that the certified record of the proceedings before the BZA in Application for Appeal APL-001673-2016 is insufficient for review, and I hereby remand this matter to the BZA for a rehearing and direct the BZA to specifically focus upon and answer the following questions for the Court's further consideration:

1. Is Parcel E in a PD-2 Overlay District established by the LMO?
2. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?
3. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

On August 27, 2018, in response to the Court's Order, the BZA held a further hearing on this appeal to answer the Court's three questions. During that hearing, Counsel for SDC Properties, Inc. raised the issue of "standing" for the first time and without the introduction of any evidence regarding the standing argument, moved the BZA to dismiss the petition for lack of standing. The BZA voted to deny the motion to dismiss for lack of standing. On October 1, 2018, SDC Properties, Inc. filed the instant Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

"Summary judgment is **only** appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 329 (2009). "In determining whether any trial issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Id. at 329, 330. "[I]n cases applying the preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence** in order to withstand a motion for summary judgment." Id. at 330 (emphasis added).

Webster's dictionary defines "*scintilla*" as "*a crumb, spec, glimmer, hint, bit or trace [of evidence].*" *Meriam-Webster.com*. Meriam-Webster, 2017 (2 Feb, 2017) (emphasis added). In the case at hand, Appellants/Petitioners have shown more than a mere scintilla of evidence and, therefore, summary judgment should be denied.

DISCUSSION

The narrative attached to the Appellants/Petitioners' original appeal application in this matter alleges that both Appellants, Beachwalk Hilton Head, LLC (hereinafter sometimes referred to as "BHH") and the Beachwalk Hotel & Condominium Association, Inc. (hereinafter sometimes referred to as "BHCA"), have standing to pursue the appeal of the Spinnaker Welcome Center development because they are owners of land that is contiguous with Parcel E; they are owners of property subject to the Waterside PUD Covenants (as is the owner of Parcel E); and they are owners of property subject to the rights in and to, the properties comprising the Waterside PUD Tract under the Town-approved 1987 Master Plan for the Waterside PUD, and therefore have standing under SC Code Annot. Sect. 6-29-800(B) and LMO Section 16-2-103.T. These assertions of fact are not challenged by SDC Properties.

In addition, the Appellants/Petitioners further crave reference to the Assignment of Declarant Rights to BHH (see Exhibit A to this Memorandum), as an additional basis for standing. While not specifically raised in the earlier narrative referenced above, the Assignment of Declarant Rights that was recorded on August 12, 2016 in Record Book 3505 at Page 3332, is additional

proof of the Appellants/Petitioners standing under SC Code Annot. Sect. 6-29-800(B) and LMO Section 16-2-103.T.

As to a “particularized injury” that SDC Properties contends in this motion that the Appellants/Petitioners lack, the Appellants’ main argument in this appeal is that there is not available density left in the Waterside PD-2 Overlay District for the development of the Spinnaker Welcome Center. We contend that even without the development of the Welcome Center on Parcel E, the overall density in the Waterside PD-2 Overlay District already exceeds the maximum density permitted under the LMO. The PD-2 average density requirement of the LMO is a limitation that affects all owners of property with the Waterside PD-2 Overlay District, including not just SDC Properties, Inc. , as the owner of Parcel E, but also BHH and BHCA. Thus, because the overall Waterside PD-2 Overlay District is already non-conforming with the LMO’s maximum density limitation, allowing the development of the Spinnaker Welcome Center will increase that nonconformity, which presents the potential for a material adverse impact on BHH and BHCA if and when the Beachwalk Hotel tract is redeveloped. This is exactly the sort of particularized injury to which BHH and BHCA will be subject to if the Spinnaker Welcome Center development is allowed to proceed.

CONCLUSION

The Appellants/Petitioners having shown much more than a mere scintilla of evidence that they have standing, SDC Properties, Inc.’s Motion for Summary Judgment must be denied.

LAW OFFICE OF THOMAS C. TAYLOR, LLC

/Thomas C. Taylor

Thomas C. Taylor

P.O. Box 5550

Hilton Head Island, SC 29926

Telephone: 843-785-5050

Facsimile: 843-785-5030

E-mail: tom@thomastaylorlaw.com

SC Bar No. 5499

ATTORNEY FOR THE APPELLANTS/
PETITIONERS BEACHWALK HOTEL &
CONDOMINIUMS ASSOCIATION, INC.,
and BEACHWALK HILTON HEAD, LLC

Hilton Head Island, South Carolina
January 15, 2019

and of other good and valuable consideration, the receipt and sufficiency of which are acknowledged, PAA, by quitclaim, without warranty, does hereby fully, completely, and irrevocably assign, transfer, convey, and set-over unto BHH any and all rights and privileges reserved to or held by PAA under the Declaration, as the Declarant thereunder or otherwise, such that BHH shall hereafter be the Declarant under the Declaration.

IN WITNESS WHEREOF, Pope Avenue Associates, a South Carolina general partnership has caused this Assignment to be signed and sealed this 11 day of August 2016.

**SIGNED, SEALED, AND
DELIVERED IN THE PRESENCE
OF:**

POPE AVENUE ASSOCIATES, a
South Carolina general partnership

By: [Signature] (L.S.)
Robert L. Graves, General
Partner

[Signature]
Jay C. Williams

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

ACKNOWLEDGEMENT

I, the undersigned Notary Public, do hereby certify that Robert L. Graves, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this 11 day of August 2016.

Jay C. Williams (SEAL)
Notary Public for ~~North Carolina~~ South Carolina
My Commission Expires: 11.16.20



©2016 Chester C. Williams, LLC
X:\Clients\Active\01787-002 BH&CA\2016-08-10 Assignment of Declarant Rights v2.docx

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2016-CP-07-2712
Beachwalk Hotel & Condominium	)	
Association, Inc. and Beachwalk	)	
Hilton Head, LLC	)	
	)	
Appellants/Petitioners,	)	
	)	
vs.	)	APPELLANTS/PETITIONERS' AMENDED
	)	MEMORANDUM IN OPPOSITION TO
	)	SDC PROPERTIES, INC.'S
The Town of Hilton Head Island	)	MOTION FOR SUMMARY JUDGMENT
and/or the Town of Hilton Head	)	
Island Board of Zoning Appeals,	)	
and SDC Properties, Inc.	)	
	)	
	)	
Respondents/Defendants	)	
	)	

INTRODUCTION

This matter is before the Court on the appeal by Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (collectively, the “Appellants/Petitioners”) of the decision of the Board of Zoning Appeals (the “BZA”) of the Town of Hilton Head Island, South Carolina (the “Town”) dated November 28, 2016 to uphold the determination made by Nicole Dixon, CFM, Senior Planner for the Town, in her determination letter of August 23, 2016 to Chester C. Williams, Esq., counsel for the Appellants, that the proposed development of the Spinnaker Welcome Center as contemplated by the Development Plan Review Application DPR-001056-2016 (the “DPR Application”), is permitted under applicable Town requirements of the Town’s Land Management Ordinance (the “LMO”), pursuant to Section 6-29-820 of the Code of Laws of South Carolina (1976), as amended.

Following the filing of this appeal by the Appellants/Petitioners, SDC Properties, Inc. (“SDC”), the owner of the tract of land referred to as Parcel E that is the subject of the DPR Application, was added to the case as a necessary party.

THE COURT’S QUESTIONS

Following briefing by all parties and the submission to the Court of a certified copy of the proceedings held before the BZA, including the hearing by the BZA on Application for Appeal APL-001673-2016 on November 28, 2016 and the hearing before the BZA on the Appellants’ Petition for Reconsideration on January 23, 2017, a hearing pursuant to Section 6-29-840 of the Code of Laws of South Carolina (1976), as amended, was held before Hon. Marvin E. Dukes, III, sitting as a Special Circuit Judge, on November 16, 2017. Following that hearing, Judge Dukes requested that counsel for each party provide the Court with their position on whether the BZA heard, properly considered, and addressed three questions:

- a. Is Parcel E in a PD-2 Overlay District established by the LMO?
- b. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO’s PD-2 Overlay District regulations?
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Following further briefing by the Appellants/Petitioners and SDC and a telephone conference among Judge Dukes and counsel for all parties on December 18, 2017, Judge Dukes issued an Order on April 20, 2018 in which he found that the record of the proceedings before the

BZA was unclear and insufficient for review, and that he required further information from the BZA for his consideration. That Order states, in pertinent part, as follows:

Despite extensive presentations and questioning at the hearing before the BZA on November 28, 2016, I find the record is unclear as to certain issues that I believe are important for appropriate judicial review of this appeal, including the basis for the BZA's decision. Thus, I determine that the certified record of the proceedings before the BZA in Application for Appeal APL-001673-2016 is insufficient for review, and I hereby remand this matter to the BZA for a rehearing and direct the BZA to specifically focus upon and answer the following questions for the Court's further consideration:

1. Is Parcel E in a PD-2 Overlay District established by the LMO?
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THE AUGUST 27, 2018 REHEARING BY THE BZA

On August 27, 2018, in response to the Court's Order referenced above, the BZA held a further hearing on this appeal to answer the Court's three questions. During that hearing, Counsel for SDC Properties, Inc. raised the issue of "standing" for the first time and without the introduction of any evidence regarding the standing argument, moved the BZA to dismiss the

petition for lack of standing. The BZA voted 6-0 to deny the Motion To Dismiss For Lack Of Standing. On August 30, 2018, the BZA issued its “Board of Zoning Appeals Notice of Action” from the August 27, 2018 hearing. In that Notice of Action, it states:

BZA Action: At their meeting on August 27, 2018, the following action was taken by the Board in connection with APL-1673-2016: Motion to dismiss for lack of standing by Mr. Barry Johnson and the Town: Mr. Walczak moved to deny counsel’s motion to dismiss for lack of standing. Mr. White seconded. The motion passed with a vote of 6-0-0.

The BZA’s Notice of Action dated August 30, 2018 denying the Motion to Dismiss for Lack of Standing, was a final decision of the BZA. Under the Town’s Land Management Ordinance setting forth the Town’s BZA appeal process, specifically at Section 16-2-103A, it is provided that “Appeals from the final decision of the Board of Zoning Appeals on an application for an Appeal are governed by S.C. Code Ann. Section 6-29-820.” S.C. Code Annot. Section 6-29-820 provides that a person who may have a substantial interest in any decision of the BZA “may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. *The appeal must be filed within thirty days after the decision of the board is mailed.*” [Emphasis added.] No appeal to the Circuit Court was ever filed by SDC Properties or the Town from the BZA’s unanimous rejection of the Motion To Dismiss For Lack Of Standing, as was formalized in the BZA’s Notice of Action dated August 30, 2018 and mailed on August 31, 2018. See Exhibit 1 to this Amended Memorandum.

On October 1, 2018, SDC Properties, Inc. filed the instant Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

“Summary judgment is **only** appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law.” Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 329 (2009). “In determining whether any trial issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Id. at 329, 330. “[I]n cases applying the preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence** in order to withstand a motion for summary judgment.” Id. at 330 (emphasis added).

Webster’s dictionary defines “*scintilla*” as “*a crumb, spec, glimmer, hint, bit or trace [of evidence].*” *Meriam-Webster.com*. Meriam-Webster, 2017 (February 2, 2017) (emphasis added). In the case at hand, Appellants/Petitioners have shown more than a mere scintilla of evidence and, therefore, summary judgment should be denied.

DISCUSSION

Both SDC Properties, Inc. and the Town are barred from arguing the issue of lack of standing to this Court because they both failed to properly appeal the BZA’s Notice of Action containing the formal denial of SDC’s and the Town’s Motion To Dismiss For Lack Of Standing to the Circuit Court within thirty days of August 31, 2018, as is required by S.C. Code Section 6-29-820. Having failed to properly perfect an appeal as to that claim, it has been waived and is barred.

Reserving the argument above that SDC Properties and the Town have waived their right to argue this issue by having failed to properly appeal it, the Appellants/Petitioners respond further to the Motion for Summary Judgment on this issue of standing as follows:

First, as of March 8, 2019 (and as it apparently has been since the date of the original filing of the Appellants/Petitioners appeal to the BZA), the Town's official website contains an application form for appeal of administration determinations as is attached as Exhibit 2. While the form itself is only one page, it has a two-page attachment that sets out the procedure for a Request for Appeal. The form states it is for use by "any person aggrieved by a decision, interpretation or determination of the [LMO] Official" and goes on to define who an "aggrieved person" is by a definition that includes "any property owner within 350 feet of the property for which a decision or determination has been rendered." Under that definition, both Beachwalk Hilton Head, LLC and Beachwalk Hotel & Condominiums Association, Inc. are "aggrieved persons" for purposes of the Spinnaker Welcome Center appeal. A review of the Record on this appeal confirms that the original appeal application filed by the Appellants/Petitioners to the BZA did include the two page attachment to the application form, and that Nicole Dixon's November 14, 2016 memorandum to the BZA on the Spinnaker Welcome Center appeal includes the two-page attachment to the appeal application form as part of Exhibit A to that memorandum. Therefore, the Town's definition of an "aggrieved party" is in the formal record of this appeal and is before this Court presently.

Secondly, the narrative attached to the original appeal to the BZA alleges that both of the Appellants/Petitioners have standing to pursue the appeal of the Spinnaker Welcome Center development because they are owners of land that is contiguous with the Parcel E; they are owners of property subject to the Waterside PUD Covenants (as is the owner of Parcel E); and they are

both owners of property in—and have rights in and to—the properties comprising the Waterside PUD tract under the Town-approved 1987 Master Plan for the Waterside PUD. Thus, the Appellants/Petitioners have further standing claims pursuant to S.C. Code Section 6-29-800(B) and LMO Section 16-2-103(T). These assertions of fact have not been challenged by SDC Properties nor the Town and thus must be accepted as true for purposes of consideration of this motion.

Next, the Court may take judicial notice of the fact that the Assignment of Declarant Rights to Appellant/Petitioner Beachwalk Hilton Head, LLC (hereinafter sometimes referred to as “BHH”) offers another avenue of appropriate standing. On August 11, 2016, Pope Avenue Associates assigned to BHH the rights of the Declarant under that certain Declaration of Covenants, Conditions and Restrictions for Waterside PUD, and the document (a copy of which is attached hereto as Exhibit 3) was recorded on August 12, 2016 in Record Book 3505 at Page 3332.

As to a “particularized injury” that SDC Properties contends in its motion that the Appellants/Petitioners lack, the Appellants/Petitioners’ main argument in this appeal is that there is not available density left in the Waterside PD-2 Overlay District for the development of the Spinnaker Welcome Center. We contend that even without the development of the Welcome Center on Parcel E, the overall density in the Waterside PD-2 Overlay District already exceeds the maximum density permitted under the LMO. The PD-2 average density requirement of the LMO is a limitation that affects all owners of property with the Waterside PD-2 Overlay District, including not just SDC Properties, Inc. as the owner of Parcel E, but also Appellants/Petitioners BHH and the Beachwalk Hotel Condominium Association, Inc. Thus, because the overall

Waterside PD-2 Overlay District is already non-conforming with the LMO's maximum density limitation, allowing the development of the Spinnaker Welcome Center will increase that nonconformity, which presents the potential for a material adverse impact on BHH and BHCA if and when the Beachwalk Hotel tract is redeveloped. This is exactly the sort of particularized injury to which BHH and BHCA will be subject to if the Spinnaker Welcome Center development is allowed to proceed.

CONCLUSION

The Appellants/Petitioners having shown much more than a mere scintilla of evidence that they have standing, SDC Properties, Inc.'s Motion for Summary Judgment must be denied.

LAW OFFICE OF THOMAS C. TAYLOR, LLC

/Thomas C. Taylor

Thomas C. Taylor

P.O. Box 5550, Hilton Head Isl., SC 29926

Telephone: 843-785-5050 Fax: 843-785-5030

E-mail: tom@thomastaylorlaw.com

SC Bar No. 5499

ATTORNEY FOR THE APPELLANTS/
PETITIONERS BEACHWALK HOTEL &
CONDOMINIUMS ASSOCIATION, INC.,
and BEACHWALK HILTON HEAD, LLC

Hilton Head Island, South Carolina
March 8, 2019

		TOWN OF HILTON HEAD ISLAND COMMUNITY DEVELOPMENT DEPARTMENT	
One Town Center Court	Hilton Head Island, SC 29928	843-341-4757	FAX 843-842-8908

BOARD OF ZONING APPEALS

NOTICE OF ACTION

Case #:	Name of Development:	Re-Hearing Date:
APL-1673-2016	Waterside – Spinnaker Welcome Center	August 27, 2018

Parcel or Location Data:	Appellant
30 Waterside Drive Resort Development Zoning District R552 018 000 0202 0000 Corridor Overlay District Waterside (Town Center) PD-2 Overlay	Chester C. Williams Law Office of Chester C. Williams, LLC 17 Executive Park Road, Suite 2 PO Box 6028 Hilton Head Island, SC 29938

Brief Description:

Staff received an Appeal on September 6, 2016 from Chester C. Williams on behalf of Beachwalk Hotel & Condominium Association, Inc and Beachwalk Hilton Head, LLC. The appellant appealed staff's determination, dated August 23, 2016, that the proposed development of the Spinnaker Welcome Center is permitted as proposed with Development Plan Review Application DPR-001056-2016.

On November 28, 2016, the Board of Zoning Appeals denied the appeal and upheld staff's determination.

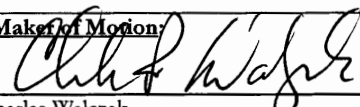
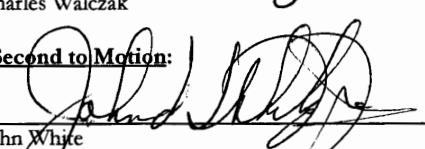
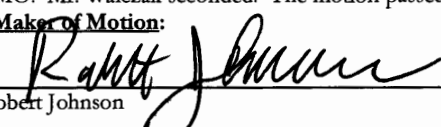
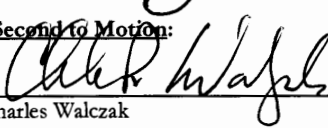
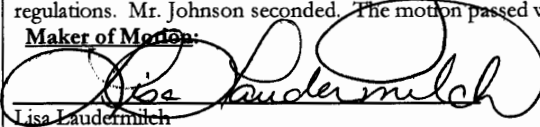
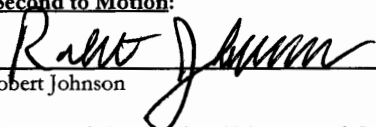
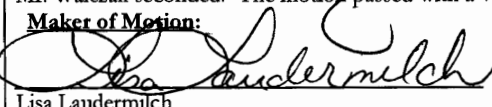
The appellant filed a Petition for Reconsideration on December 2, 2016, requesting that the BZA reconsider their decision to uphold staff's determination. This was heard by the BZA at the January 23, 2017 meeting. No action was taken by the Board at that meeting, and as a result, the Motion to Reconsider APL-001673-2016 was deemed denied.

On December 30, 2016, the appellant filed an appeal of the BZA's decision to the Circuit Court. The appeal was heard by the Circuit Court on December 18, 2017. Judge Duke's found that after presentations and questioning at the hearing by all parties, the record was unclear on certain issues he believes are important for appropriate judicial review of the appeal, including the basis for the BZA's decision. He remanded the appeal back to the BZA for a rehearing and to answer three specific questions.

BZA Action:

At their meeting on August 27, 2018, the following action was taken by the Board in connection with APL-1673-2016:

- Motion to dismiss for lack of standing by Mr. Barry Johnson and the Town:
Mr. Walczak moved to deny counsel's motion to dismiss for lack of standing. Mr. White seconded. The motion passed with a vote of 6-0-0.

Maker of Motion:  Charles Walczak	Date: 8/30/18
Second to Motion:  John White	Date: 8-31-18
• Judge Duke's Question (a) in Remand Order (Is Parcel E in a PD-2 Overlay District established by the LMO?): Mr. Johnson made a motion to affirm that Parcel E is in a PD-2 Overlay District established by the LMO. Mr. Walczak seconded. The motion passed with a vote of 6-0-0.	
Maker of Motion:  Robert Johnson	Date: 8/30/18
Second to Motion:  Charles Walczak	Date: 8/30/18
• Judge Duke's Question (b) in Remand Order (If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?): Ms. Laudermilch made a motion that Parcel E is subject to the LMO's PD-2 Overlay District regulations. Mr. Johnson seconded. The motion passed with a vote of 6-0-0.	
Maker of Motion:  Lisa Laudermilch	Date: 8-30-18
Second to Motion:  Robert Johnson	Date: 8/30/18
• Judge Duke's Question (c) in Remand Order, Part 1 (If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E...): Ms. Laudermilch moved that because we've determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E. Mr. Walczak seconded. The motion passed with a vote of 6-0-0.	
Maker of Motion:  Lisa Laudermilch	Date: 8-30-18
Second to Motion:	Date:


Charles Walczak

8/30/18

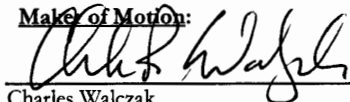
- Judge Duke's Question (c) in Remand Order, Part 2 (...must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?):

Mr. Walczak moved that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E.

Vice Chairman Cutrer seconded. The motion passed with a vote of 6-0-0.

Maker of Motion:

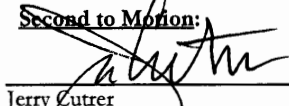
Date:


Charles Walczak

8/30/18

Second to Motion:

Date:


Jerry Cutrer

8/30/18

- Regarding the Appeal:

Vice Chairman Cutrer made a motion that the BZA uphold the determination by the Town Staff and deny the appeal of the appellant based on the following Findings of Fact:

- That Parcel E is in a PD-2 Overlay District established by the LMO.
- Because Parcel E is in a PD-2 Overlay District, Parcel E is subject to the LMO's PD-2 Overlay District regulations.
- That the development of Parcel E is governed by the PD-2 Overlay District regulations and the existing development on the other parcels within that PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E.
- With the further Finding of Fact, that the property is composed of three separate, significant parcels, and one not significant with that being the road right-of-way. There is a hotel property, a Spinnaker property, and a proposed Welcome Center property. The hotel property conforms to the current LMO, as well as the PD-2 Overlay District. The Spinnaker property, Parcel F, complies with the current LMO, as well as the PD-2 Overlay District because it is a legally nonconforming development with respect to density. And that Parcel E, if developed to 7,500 square feet would also comply with both the LMO and PD-2 Overlay District because it would be less than the allowed 8,000 square feet.
- And further, that failure to sustain the Staff's determination would, pursuant to the Lucas vs. South Carolina Coast Council case, cause all economic utility to be zoned out of existence and that would result in a taking which we should not do.

Mr. Johnson seconded. The motion failed with a vote of 3-3-0.

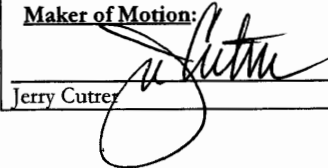
For the motion: Cutrer, Johnson, White.

Against the motion: Fingerhut, Lauderemilch, Walczak.

Because it was a 3-3 split vote, the Motion failed and the Board's original decision on November 28, 2016 to uphold staff's determination and deny the appeal still stands.

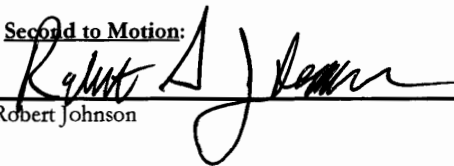
Maker of Motion:

Date:


Jerry Cutrer

8/30/18

Second to Motion:


Robert Johnson

Date:

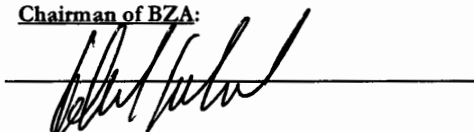
8/30/18

Appeal To Circuit Court:

If you believe the Board erred in its decision, you have the right to appeal the decision to Circuit Court. You have two options to appeal to Circuit Court:

1. You may file a petition with the clerk of court in and for the county, in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within 30 days after the decision of the Board is mailed (South Carolina Code of Laws 6-29-820A). The mailing date of this decision is **August 31, 2018**.
2. You may file a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with South Carolina Code of Laws Section 6-29-825. Any notice of appeal and request for pre-litigation mediation must be filed within 30 days after the decision of the board is postmarked.

Chairman of BZA:



Date:

8/30/18

Note: This decision must be delivered to the parties of interest via certified mail.



Town of Hilton Head Island
Community Development Department

One Town Center Court
Hilton Head Island, SC 29928
Phone: 843-341-4757 Fax: 843-842-8908

www.hiltonheadislandsc.gov

FOR OFFICIAL USE ONLY

Date Received: _____

Accepted by: _____

App. #: APL _____

Meeting Date: _____

Applicant/Agent Name: _____ Company: _____

Mailing Address: _____ City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____ E-mail: _____

APPEAL (APL) SUBMITTAL REQUIREMENTS

If you are interested in submitting your appeal electronically please call 843-341-4757 for more information.

The following items must be attached in order for this application to be complete:

_____ A detailed narrative stating the Town Official or Body who made the decision, the date of the decision being appealed, the decision being appealed, the basis for the right to appeal, the grounds of the appeal, cite any LMO Section numbers relied upon; **and** a statement of the specific decision requested of the review body.

_____ Any other documentation used to support the facts surrounding the decision.

_____ Filing Fee - \$100.00 cash or check made payable to the Town of Hilton Head Island.

To the best of my knowledge, the information on this application and all additional documentation is true, factual, and complete. I hereby agree to abide by all conditions of any approvals granted by the Town of Hilton Head Island. I understand that such conditions shall apply to the subject property only and are a right or obligation transferable by sale.

I further understand that in the event of a State of Emergency due to a Disaster, the review and approval times set forth in the Land Management Ordinance may be suspended.

Applicant/Agent Signature: _____ Date: _____

REQUEST FOR APPEAL PROCEDURES

Appeal of Administrative Decisions Request

This is a request to appeal to the Board or Commission by any person aggrieved by a decision, interpretation or determination of the Official. An aggrieved person is defined as any property owner within 350 feet of the property for which a decision or determination has been rendered, and may include persons owning property beyond 350 feet if it is determined by the Board or Commission that such property owners may be affected by a decision or determination of the Official or the Board or Commission. An application for appeal shall be filed (received by the Official or postmarked) not later than 14 calendar days after receipt of the decision being appealed in order to be considered by the Board or Commission.

PROCEDURES

A. Submission of Application

1. Submit the application by the deadline indicated for each meeting on the appropriate Public Hearing Schedule.
2. For an appeal of administrative decisions request, please submit the Appeal Application Form, along with the items listed as submittal requirements on that form.
3. An application check-in conference is required for all applications to determine whether the application meets the minimum requirements for acceptance. The application check-in conference must be scheduled by appointment with the Community Development Department staff.

B. Public Notice Requirements

1. Public notice to be published is required for an appeal request.
2. **Published Notice** - A Public Notice shall be placed by the Official in a local newspaper of general circulation within the Town for not less than 30 calendar days prior to the meeting for the purpose of notifying the public.

C. Staff Review and Report

1. In an appeal, the Official will prepare a staff report which provides in detail staff's decision/interpretation of the Land Management Ordinance or Town Design Guide.
2. The Official shall provide a copy of the report to the Board or Commission and the appellant (applicant) before the scheduled meeting.

D. Meeting Conduct

1. The Board of Zoning Appeals is comprised of seven members, appointed by Town Council.
The Planning Commission is comprised of nine members, appointed by Town Council.
The Design Review Board is comprised of seven members, appointed by Town Council.
2. The Chairman of the Board or Commission opens the meeting and reads the procedures to be followed during the meeting.
3. In an appeal, staff will present the Official's interpretation of the LMO or the Design Guide. The applicant will then have an opportunity to present why they are appealing staff's decision.
4. The Board or Commission may have questions for Town staff or the applicant.
5. The Board or Commission will then deliberate until a decision is reached. During the deliberations, members may address questions to staff or the applicant, but no person shall participate in these discussions unless addressed by the Chairman or a Board or Commission member.
6. The Chairman will then ask for a motion.
7. In an appeal, at the conclusion of the proceeding on the appeal, the Board or Commission will either: affirm the action of the Official, modify the action of the Official, or reverse the action of the Official.

E. Written Notification of Decision

1. Within 10 calendar days after a decision has been made by the Board or Commission, a copy of the written decision shall be sent to the applicant or appellant and the property owner.
2. A copy of the notice shall be filed in the office of the Official, where it shall be available for public inspection during regular office hours.

F. Appeals from the Decision of the Board or Commission

1. A person who may have a substantial interest in any decision of the Board or Commission, or an officer or agent of the appropriate governing authority may appeal from a decision of the Board or Commission to the Circuit Court of Beaufort County. The appeal must be filed within 30 days after the decision of the Board or Commission is mailed.
2. A property owner whose land is the subject of a decision of the Board or Commission may appeal to the Circuit Court of Beaufort County or by filing a notice with the circuit court accompanied by a request for pre-litigation in mediation. The notice of appeal and request for pre-litigation in mediation must be filed within 30 days after the decision of the board is mailed.

ELECTRONICALLY FILED - 2019 Mar 08 3:00 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

and of other good and valuable consideration, the receipt and sufficiency of which are acknowledged, PAA, by quitclaim, without warranty, does hereby fully, completely, and irrevocably assign, transfer, convey, and set-over unto BHH any and all rights and privileges reserved to or held by PAA under the Declaration, as the Declarant thereunder or otherwise, such that BHH shall hereafter be the Declarant under the Declaration.

IN WITNESS WHEREOF, Pope Avenue Associates, a South Carolina general partnership has caused this Assignment to be signed and sealed this 11 day of August 2016.

**SIGNED, SEALED, AND
DELIVERED IN THE PRESENCE
OF:**

POPE AVENUE ASSOCIATES, a
South Carolina general partnership
By: [Signature] (L.S.)
Robert L. Graves, General
Partner

[Signature]
[Signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

ACKNOWLEDGEMENT

I, the undersigned Notary Public, do hereby certify that Robert L. Graves, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this 11 day of August 2016.

[Signature] (SEAL)
Notary Public for ~~North Carolina~~ South Carolina
My Commission Expires: 11.16.20



©2016 Chester C. Williams, LLC
X:\Clients\Active\01787-002 BH&CA\2016-08-10 Assignment of Declarant Rights v2.docx

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION, INC.	)	
and BEACHWALK HILTON HEAD, LLC,	)	
	)	
Appellants/Petitioners,	)	MEMORANDUM IN SUPPORT OF SDC
	)	PROPERTIES, INC.'s MOTION FOR
vs.	)	SUMMARY JUDGMENT
	)	
THE TOWN OF HILTON HEAD ISLAND	)	
and/or THE TOWN OF HILTON HEAD	)	
ISLAND BOARD OF ZONING APPEALS,	)	
and SDC PROPERTIES, INC.	)	
	)	
Respondents/Defendants.	)	
_____	)	

INTRODUCTION

Respondent/Defendant SDC Properties, Inc. (“SDC”), has moved the Court to grant summary judgment (Rule 56, *SCRCP*) in favor of SDC because the Appellants/Petitioners Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC, are not “aggrieved parties” under state and local law and, therefore, lack standing under South Carolina Rules of Civil Procedure 12(b)(6) and 56 to maintain their instant appeal/petition. Appellants/Petitioners have not alleged, nor demonstrated, a “specific or particularized injury” such as would satisfy the requirements of the Town of Hilton Head Island Land Management Ordinance (“LMO”) Section 16-2-103(T)(2)(b) and, therefore, Appellants do not qualify as an “aggrieved party” entitled to maintain the appeal/petition pursuant to LMO Section 16-2-103(T)(2)(a). Accordingly, Appellants/Petitioners lack proper standing to maintain this appeal/petition. SDC respectfully asserts that this Court should grant summary judgment against the appellants/petitioners, and in favor of SDC.

ARGUMENT

Summary judgment must be granted in favor of the Respondents because Appellants lack standing because they failed to allege or demonstrate a specific or particularized injury as required by the applicable LMO provision and South Carolina state law, and constitutional law.

The Appeal/Petition filed in this case, on this point, states as follows: “The Appellants own property adjacent to the proposed ‘Spinnaker Welcome Center’ and are an aggrieved party in that their personal, pecuniary, or property rights will be affected by Ms. Dixon’s determination letter. *See, e.g.,* S.C. Attorney General’s Opinion letter dated February 17, 2009 to Hon. John Wade, stating that an ‘aggrieved party’ generally refers to ‘a party where personal, pecuniary, or property rights have been adversely affected by another person’s actions or by a Court’s decree or judgment.’” (Appellants/Petitioners’ Second Amended Notice of Appeal and Petition, filed July 24, 2017, page 10, ¶4)

The Appellants/Petitioners misperceive applicable law, and the cited S.C. Attorney General’s Opinion letter does not take into account specific code provisions of the Town of Hilton Head Island’s Land Management Ordinance.

Appellants do not allege “a special or particularized “injury”.

The only way to demonstrate the non-existence of an allegation in a pleading, etc., is to review those documents. The relevant documents are:

- 1) Appellants’ Application for Appeal (to BZA) dated September 6, 2016, including attachment 1 (“narrative”) thereto, especially part “VI Standing” (p.8)
- 2) Appellants’ Notice of Appeal and Petition, filed in this Court on December 30, 2016.

*Appellants there cite S.C. Code §6-29-820 (A) and Town of Hilton Head Island LMO §16-2-307.A for the proposition that appeals from boards of appeals may be taken by any person “who may have a substantial interest” in a board’s decision (p.9) **IN FACT, THERE IS NO LMO § 16-2-307.A. APPELLANTS ARE MISTAKEN.**

*Appellants then allege that a S.C. Attorney General's Opinion Letter, dated February 17, 2009 states that an "aggrieved party" generally refers to "a party where personal, pecuniary or property rights have been adversely affected by another person's actions or by Court's decree or judgment." (p.10)

*Appellants allege that they are aggrieved parties because their "personal, pecuniary, or property rights will be affected by Ms. Dixon's Determination letter", against which Appellants filed this appeal. (p.10)

*Appellants did not provide any allegation of the special or particularized way(s) in which Ms. Dixon's Determination letter, or the BZA's approval thereof, would impact Appellants.

*The referred S.C. Attorney General's opinion does not apply to Town zoning, staff, or boards of zoning appeal, but to "another person's actions or by a Court decree or judgment" That opinion is not adequate as a basis for Appellants' claims of standing. This AG opinion is not binding on this court.

- 3) The Record before the BZA (Round 2) is complete with demonstration by Appellants that they have not, and cannot, allege or prove a special or particularized injury, under LMO § 16-2-103.T.

Subject matter jurisdiction is lacking because Appellants lacks standing.

A. *When a party lacks standing to sue, his claims must be dismissed.*

"Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States." *Pye v. U.S.*, 269 F.3d 459, 466 (4th Cir. 2001) (citing *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 102 (1998)). Standing to sue is necessary in order for a court to exercise subject matter jurisdiction. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 332425, 82 L.Ed.2d 556 (1984).

Under S.C. law, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Rule 12(h)(3), *SCRCP*. The "or otherwise" mandates that the court, even *sua sponte* so dismiss. The principle

is also followed in federal courts under the analogous Federal Rule of Civil Procedure. *Adams v. Bain*, 697 F.2d 1213, 1219 (4CCA, 1982).

The emphasis in the LMO (Section 16-2-103.T.2 on a “special or particularized injury” is based on sound constitutional principles.

B. *A party invoking standing must first establish constitutional standing, and next establish prudential standing. See e.g. Lujan, 504 U.S. at 560.*

1. Constitutional standing

Article III of the United States Constitution limits the judicial power of the federal courts to resolution of actual cases and controversies. United States Constitution Art. III, § 2. (*See Flast v. Cohen*), 392 U.S. 83, 88 99, S.Ct. 1942, 1949, 20 L. Ed.2d 947 (1968). In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III . . . To establish constitutional standing, the party invoking federal jurisdiction must establish three elements:

First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Mylonakis v. M/TGeorgiosM., (F.Supp. 2d , 2012 WL 6042 197, *21) (S.D. Tex. Dec. 4, 2012) (quoting *Lujan*, 504 U.S. 555, 560-61) (emphasis added).

The South Carolina Court of Appeals now regards this same issue, under S.C. Code Section 6-29-1150(c) (allowing “any party in interest” to appeal staff actin, provided that the party meets the standard of real party in interest. *Citizens for Quality Rural Living*,

Inc. v. Greenville County Planning Commission and RMDC, Inc., Appellate Case No. 2017-000170, Opinion No. 5629, filed February 27, 2019 (S.C. Ct. App.)

See, Bank of Am., N.A. v. Draper, 405 S.C. 214, 220, 746 S.E2d 478, 481 (Ct. App. 2013) (defining a real party in interest for purposes of standing as a “party with a real, material, or substantial interest in the outcome of the litigation” (quoting *Hill v. S.C. Dept. of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010))).

The discussion below, in Section D, is here fully incorporated by reference.

2. Prudential standing

After establishing constitutional standing to bring suit, a plaintiff must also establish prudential standing. “[P]rudential standing encompasses [1] the general prohibition on a litigant’s raising another person’s legal rights, [2] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and [3] the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law revoked.” *Warth*, 422 U.S. at 500 (internal quotations omitted).

C. The burden to establish standing is on the party making the claim.

The party claiming standing bears the burden of establishing it. *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997). In order to meet this burden, the claimant must first allege facts sufficient to support standing on the face of the pleading. However, “[s]ince [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff’s case” the claimant also bears the burden of establishing “each element . . . in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. Standing may not be “inferred argumentatively from averments in the pleadings,” *Grace v. Am. Cent. Ins.*

Co., 109 U.S. 278, 284 (1883), but “must affirmatively appear in the record.” *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

D. *Plaintiff has not alleged sufficient facts nor produced evidence sufficient to support a finding of constitutional or prudential standing.*

The first necessary element of constitutional standing is “injury in fact.” “Injury in fact” has been defined as “an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent ...” *Lujan*, 504 U.S. 555, 560. This is directly analogous to the Town of Hilton Head Island LMO requirement (Section 16-2-103(T)) of a “special or particularized injury”.

Further, “[t]he right of appeal does not exist in every case [] and can only be claimed under some constitutional or statutory provision conferring such right. (Case citations omitted), *Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission and RMDC, Inc.*, Appellate Case No. 2017-000170, Opinion No. 5629, filed February 27, 2019 (S.C. Ct. App.).

The South Carolina Court of Appeals has described an “aggrieved party” as a party that has standing to appeal when the judgment or decree operates on his or her rights of property, bears directly on his or her interest, or imposes on that party a burden or obligation. *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001); *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002). Furthermore, there is “no material distinction in general standing principles juxtaposed to the ability of an aggrieved party to appeal.” *Kelley v. Bank of America*, 379 S.C. 437, 444, 665 S.E.2d 237, 244 (S.C. Ct. App. 2008).

In order for an injury to be “particularized,” it must affect the plaintiff in a personal and individual way. *Lujan v. Defenders of Wildlife* 504 U.S. 555, 560, 112 S.Ct. 2130, 2135 (1992);

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 73, 753 S.E.2d 846, 852 (S.C. 2014). Special damages in a zoning enforcement action generally are the diminution in the value of the plaintiff's property due to the violating use, if a party fails to claim that the party in violation of the zoning ordinance fails to plead or prove his property value was diminished by the violation the claim may be properly dismissed. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58 (2007).

In South Carolina, a party will have standing when there is a statutory basis for its legal action. "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. South Carolina Department of Social Services*, 402 S.C. 311, 315, 741 S.E.2d 515, 519 (2013).

The Town of Hilton Head Island LMO states that any person "aggrieved" by the staff's decision or interpretation of the LMO may file an appeal with the BZA. *LMO §16-2-103(T)(2)(a)*. Under the LMO, a party is considered aggrieved "if there is some special or particularized injury to that person or that person's property resulting from the decision or written interpretation." *LMO §16-2-103(T)(2)(b)*. The appellants/petitioners have failed to so allege their standing as aggrieved parties, having suffered some special or particularized injury" sufficient to avail themselves of the standing to maintain this appeal/petition.

Appellants have not alleged any injury resulting from the BZA's ruling that affects their rights of property, or bears directly on their interest, or imposes a burden or obligation to the Appellants. Appellants lack of any injury resulting from the BZA's ruling results in a lack of legal standing with which to bring any appeal.

As the record now shows, it is now clear that the appellants/petitioners have also failed to demonstrate, and cannot demonstrate, their proper standing under the LMO, for this

appeal/petition, even if the court were to construe their standing allegations as sufficient to survive scrutiny under Rule 12(b)(6). Thus, disposition under Rule 56 is appropriate, in this case.

Pursuant to this Court's order dated April 20, 2018, the Town of Hilton Head Island's Board of Zoning Appeals (BZA) held a remand hearing on August 27, 2018, the transcript of record of which having just been recently prepared. The representations to the Court by counsel for appellants/petitioners at the August 27, 2018 BZA hearing made it abundantly, indisputably, and profoundly clear that Beachwalk is not an "aggrieved party" in this matter, because it has not sustained any "special or particularized injury", as required.

To document, now in the record of this case, that Beachwalk lacks ordinance-based standing to maintain this appeal/petition, the Court's attention is invited to the following excerpts from the transcript of the August 27, 2018 BZA remand hearing:

- a. BZA MEMBER CUTRER: ". . .your clients are the aggrieved party in this case. How are they aggrieved? How will these parties be injured if this property is developed as proposed? (P. 16, 9-13)

BEACHWALK ATTORNEY WILLIAMS: Our clients are owners of property that's located in the waterside PUD and are (sic) such are bound by all the terms of the waterside PUD and all the LMO regulations that govern PUD's, including the average density regulations, including the open space regulations, including the impervious, pervious regulations. In trying to figure out what our clients can do with their property, because sooner or later I think everybody knows something's going to be done with the Beachwalk Hotel. It's . . . I can't tell you when but I suspect sooner something will happen and at that point it's important to understand what

the rules are. Nicole's been through the rules here with the proposed development, the welcome center, and we think she got it wrong, so we need to make sure that we understand and protect our client's interest with respect to what happens in the future on the Beachwalk Hotel property because it is all part and parcel of the same PUD overlay. (P. 16, 14-25 and P. 17, 1-15)

BZA MEMBER CUTRER: But the Beachwalk Hotel property is not Parcel E. (P. 17, 16-17)

BEACHWALK ATTORNEY WILLIAMS: Correct. (P. 17, 18)

- b. TOWN OF HILTON HEAD ISLAND ALFORD: Good afternoon. Greg Alford. I represent the Town of Hilton Head Island in a courtroom recently I represented a decision made by this body although not all the same members. You know, things get too complicated, too quickly I think. People over think stuff. I think one of the first questions asked today Mr. Cutrer was, why? Why are you doing this? What's your interest? Are you aggrieved? And Mr. Williams' answer was well, we just want to know the rules. Well, then you're not aggrieved. Either you're aggrieved or you're not. The standing issue is this whole other -- you know, you've got a right to bring a claim if you're within a certain geographic distance but you have to be aggrieved. On the record, he basically conceded that they're not aggrieved. (P. 108, 16-25 and P. 109, 1-13)
- c. BZA MEMBER CUTRER: I have one question. (P. 147, 21)

MR. FINGERHUT: Mr. Alford, I think we have one more question. (P. 147, 22-23)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: I hope I have one more answer. (P. 124, 24-35)

BZA MEMBER CUTRER: In your opinion, if Parcel E -- let me backup. The appellants are the owners of units in the hotel so I'm going to call them the hotel owners. (P. 148, 1-5)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: A and C. (P. 148, 6)

BZA MEMBER CUTRER: Parcel, they have certain rights to redevelop that property because it's already been developed once but they have rights with respect to the 2.6 acres that comprise the property. If Parcel E were developed as proposed by the developer, in your opinion, how would the appellants, Beachwalk Hotel be injured? (P. 148, 7-16)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: Honest answer, I don't know. I could offer some conjecture. The way that they want to do the math and exclude the nine acres of common property which I think skews the math and then I think there's even part of the code -- I think the fear that they have, being honest with you, is that any other development out there might impede their ability to come back and ask for whatever else might be there. In other words, if there was -- if there was X amount within that PD-22 development. (P. 148, 17-25 and P. 149, 1-7)

BZA MEMBER CUTRER: They've got 2.6 acres. (P. 149, 8-9)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: Yes, sir.
(P. 149, 10)

BZA MEMBER CUTRER: Zoning permits 35 hotel units per acre. You
can do the math. (P. 149, 11-13)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: Right. (P.
149, 14)

BZA MEMBER CUTRER: They've got the right to tear that property
down and rebuild it to however many -- by 35 -- (P. 149, 15-17)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: Same
number, really, yeah. You know what, to answer your question, under that
current zoning none. Now, the answer the way it's set up, none, because
they only have X amount of acres and they don't have any commitment to
open spaces -- so yeah. (P. 149, 18-24)

BZA MEMBER CUTRER: And they have -- am I correct that Beachwalk
Hotel has no right to Parcel E. (P. 149, 25 and P. 150, 1-2)

TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: None.
None. So you're right, they wouldn't have any. (P. 150, 3-4)

BZA MEMBER CUTRER: Thank you. (P. 150, 5)

d. Q If Parcel E were developed as proposed by the developer, how
would Beachwalk Hotel owners be injured with respect to the rights they
have and their property? (P. 152, 5-8)

A I don't know that. I'm not aware that they would be. I'm not aware
that they would be injured. (P. 152, 9-11)

e. BZA MEMBER CUTRER: You answered me what your feeling is. Let's go to Parcel A and C of the 2.6 acres owned by your client. Under the RD District there are one, two, three, four possible uses for that property. (P. 179, 12-18)

BEACHWALK ATTORNEY WILLIAMS: I'm sorry, underneath? (P. 179, 19-20)

BZA MEMBER CUTRER: - RD zoning. I'll tell you the answer. There are four possible uses because there are four allowed uses under the RD zoning; hotel, residential, nonresidential and B&B. So you have 2.6 acres currently being used by a vacant hotel and the hotel allows 35 rooms per acre. 2.6 times 35 is 91 units and that's what's there. This property could be redeveloped with another new 91 torn down and redeveloped with 91 hotel units. If the owner chose to do residential, 2.6 acres times 16 to the acre it would allow them 41 residential units. If they choose to do or chose to do nonresidential, i.e. commercial, 2.6 acres times 8,000 square feet would allow 20,800 square feet of nonresidential and if they chose to do a B and B, ten units or ten rooms to the acre would give them 26 B and B units and so your client's property could be redeveloped with 91 hotel units or 41 residential units or 20,800 square feet of residential - pardon me nonresidential or 26 B and B units. Those are all the rights which your clients have. If Parcel E is developed as proposed, how is your client prejudiced in any of these development opportunities? How are you injured? And please tell me an answer other than we'd like to see the Town code – (P. 179, 21-25 and P. 180, 1-25 and P. 181, 1-9)

- f. If Parcel E is developed, how is your client's prejudiced from doing any of those things within the setback and impervious, pervious . . . (P. 182, 17-20)
- g. MR CUTRER: You know, I've asked the question to you, Mr. Johnson (SDC attorney), Mr. Alford, Ms. Dixon and I've gotten, what the impact? None. None. None and . . . (P. 184, 14-18)
 BEACHWALK ATTORNEY WILLIAMS: And I don't know because . . . (P. 184, 19-20)
 BZA MEMBER CUTRER: So, in the absence of any evidentiary material at this hearing I don't see how your client has standing for this appeal. (P. 184, 21-24)
 BEACHWALK ATTORNEY WILLIAMS: and you're entitled to your opinion. And the people that said you had standing, we've standing and I think we do have standing and I think . . . (p. 184, 25 and P. 185, 1-4)
 MR CUTRER: All right. (P. 185, 5)
- h. BEACHWALK ATTORNEY WILLIAMS: “. . .but, you know, all our client wants everybody to do is play by the rules that everybody else has to play by. (P. 193, 22-24)
- i. BZA ATTORNEY TAYLOR: Because the question that has been repeatedly asked by Mr. Cutrer, today, about standing is one that has already been decided in this case and, believe me, Greg handed it very smoothly like he does but this question is one of pleadings which has already been in front of Judge Dukes and if there was any question to our standing he would have already addressed it and everybody in here knows

that. It was before Judge Dukes, there was no question about but what we had happen here today was someone who came from this Board and raised that issue repeatedly, you saw lawyers come to it like blood in the water. That issue is not before you. It was not raised by staff. It was not raised by lawyers. It has not been adjudicated by Judge Dukes. It is clearly something that only one member of this Boards wants to hammer out today and, once again, it came in that everybody came to it. It's the same as Barry's argument about it being a take. That issue is not before this Board. Everybody may have an idea about it. It may not seem fair to people but the issue of whether or not this is a taking has not been litigated. You all who have been on this Board for two years and who have heard this will remember, this is about one thing. This is about whether the density requirements of the PD-2 Overlay District apply. Nicole testified in November of 2016 that if you accept that Chet's math is right. It's as simple as that. I'd ask that you all please remember what your job is when y'all go back to the jury room, y'all go back to your executive session room. It's not to give gifts to one side or to punish another, it's to independently evaluate the facts that were in front of you to come to a fair resolution. (P. 197, 23-25 and P. 198, 1-25 and P. 199, 1-19)

- j. SDC ATTORNEY JOHNSON: No sir, I've been waiting a few minutes now notwithstanding the comments just made by my friend, Tom Taylor. This is the first occasion when in the record there had been established that the appellants are not aggrieved parties and I base what we have learned about that today as the foundation for a motion I'm about to make

and the motion is for you to dismiss the appeal for lack of standing. The Town code in Section 16-2-103, T as in Tom, Sections 2 says that 'Any person who's aggrieved by the decision or interpretation of an LMO official or other administrative official may appeal. Subsection B -- that's in Subsection A. Subsection B says 'For purposes of this subsection a person is aggrieved if there are some special or particularized injury to that person or that person's property resulting from a decision or written interpretation.' The record is clear. They do not have a particularized or special injury to themselves as legal persons or their property resulting from the decisions of the LMO official. They don't have standing. The matter should be dismissed where it stands. The standing is a jurisdictional issue. It can be raised at any time. Thank you. (P. 197, 25 and P. 200, 1-25 and P. 201, 1-9)

BZA CHAIRMAN FINGERHUT: Counsel? Fair enough. Mr. Alford. (P. 201, 10-11)

k. TOWN OF HILTON HEAD ISLAND ATTORNEY ALFORD: I'll about be. I join in Mr. Johnson's (SDC attorney's) motion. I think this motion should be dismissed. I think --1 disagree with Mr. Taylor when he says that it's not something for you to consider. Jurisdiction can be raised at any time. Standards can be raised at any time and, keep in mind, we all agreed with Judge Dukes that this would be a full rehearing. Everything's on the table. They wanted testimony, goose/gander. They said, no, we want you to hear this testimony. Okay, it's a rehearing. It's a new day.

That issue's on the table now. They've conceded. They have no injury.
(P. 201, 12-25 and P. 202, 1-3)

- l. BEACHWALK ATTORNEY WILLIAMS: Mr. Johnson is incorrect when he says this is the first time it's been raised. We specifically . . . we had standing when we filed the initial appeal. It's all in the record. (P. 202, 4-9)

BZA CHAIRMAN FINGERHUT: Anything else on this particular issue?
(P. 202, 10-11)

BEACHWALK ATTORNEY WILLIAMS: No. (P. 202, 12)

- m. BZA CHAIRMAN FINGERHUT: So that closes the arguments of the appeal. Let's discuss the standing issue first. (P. 203, 4-7)

BZA MEMBER CUTRER: After receiving my lecture from Mr. Taylor I apologize for using the wrong word. I have referred to 'standing' several times and I think what I was really talking about was grievance or injured and I don't have the citation Mr. Johnson (SDC attorney) just gave us but it speaks to injury and grievance. Mr. Johnson, would you like me to refresh that for us, sir? Section 16-2-103 T, Capital T. 16-2-103 and -My iteration is on page 2-54. Let me get there. So that's page 2 -- (P. 203, 1-21)

SDC ATTORNEY JOHNSON: It's print it out the same. It's up on the screen, too, and you can see -- (P. 203, 22-24)

SDC ATTORNEY JOHNSON: Yes, sir. You see up here at the top it's got the code section of which this is the subsection. (P. 204, 2-5)

BZA MEMBER CUTRER: Okay. So I want to apologize for using the word 'standing' and what I was really trying to get to is whether this is an aggrieved party that's going to suffer injury from the ruling that the Town has -- determined -- Town has made so thank you for that citation. (P. 204, 6-13)

THE COURT: Any of you have any particular thoughts on standing? Mr. Cutrer, would you like to start? (P. 204, 14-16)

MR. ROBERT JOHNSON: I should note, is this piece of property contiguous with E and -- (P. 204, 17-19)

BZA CHAIRMAN FINGERHUT: Yes. (P. 204, 20)

SDC ATTORNEY JOHNSON: It's contiguous. (P. 204, 21-22)

BEACHWALK ATTORNEY WILLIAMS: Parcel E is contiguous with the Beachwalk Hotel site -- (P. 204, 23-25)

BZA MEMBER CUTRER: I'd like to find it my book. (P. 203, 25 and P. 204, 1)

BZA CHAIRMAN FINGERHUT: Mr. Walczak? (P. 206, 1)

BZA MEMBER WALCZAK: I agree with that interpretation. I also agree - I also agree that it should be -- this was brought back to us. I wasn't here the first time but this was sent back to us because of a judge's decision. (P. 206, 2-8)

BZA CHAIRMAN FINGERHUT: Yes. (P. 206, 10-15)

BZA MEMBER WALCZAK: So I think we should honor that judge's decision and take it as it was said, a brand new hearing and I think the --

really, the issue is the interpretation of the code and I just -- that's where we should be at. (P. 206, 10-15)

BZA CHAIRMAN FINGERHUT: Okay. Any other thoughts on standing? (P. 206, 16-17)

BZA MEMBER LAUDERMILCH: No. I agree. Sometimes there -- it always seems to me like the attorneys use either bigger words or focus on issues that get beyond common sense but I totally agree with the property contiguous. I would argue increased density could, not necessarily does, but could, reduce future property value in the eyes of a prospective buyer, so, I do think -- I agree with the fact that the location of the tract, the fact that it's contiguous, I think it has a very direction impact. To me there's standing. (P. 206, 18-25 and P. 207, 1-7)

BZA CHAIRMAN FINGERHUT: Mr. White? (P. 207,8)

BZA MEMBER WHITE: I agree. You know, it may not have a direct impact but it has a potential impact. (P. 207, 9-11)

BZA MEMBER WALCZAK: Correct. (P. 207,12)

BZA MEMBER LAUDERMILCH: Correct. (P. 207,13)

BZA MEMBER CUTRER: Well, as I've stated, a number of times, it's not clear to me that the appellant has a valid grievance and so, in that regard I don't personally see that there's any relief due them but the appellant is the owner of Parcels A and C, which is currently developed to its maximum density as a hotel. The hotel doesn't operate, I suppose that's irrelevant, but the parcel can be developed under the current zoning as a hotel, 91 units, as residential, 41 units, as nonresidential 20,800 square feet or as a B and

B 26 unit rooms for B and B. So, whether or not Parcel E is developed it's just now clear to me in that the appellant has any valid aggrievance or would in any way be injured. I've asked that question numerous times and the answer that I get from the appellants is, we want to make sure that the Town code is complied with, which strikes me as some what disingenuous so I don't think that there . . . the testimony, today, we have a new hearing, which we do, I don't see, in my mind, that the testimony, today, as established that there's a valid aggrievance or injury to the appellant. Going on . . . maybe I should stop there. (P. 207, 14-25 and P. 208, 1-22)

BZA CHAIRMAN FINGERHUT: Let's keep on. We're going to dispose of the motion and then go the next step. (P. 207, 23-25)

BZA MEMBER CUTRER: It seems to me that - well, the testimony is that Parcels A and C conform to the current LMO of 35 units per -- 35 hotel rooms per acre. Parcel E, which is the proposed welcome center, if developed, as requested would have 7,500 square feet out of an allowable 8,000 per acre, you actually have a little more than an acre so -- Parcel E, if developed as proposed, would comply with the current LMO. Parcel F is a bit of a problem. With 198 units and 5,262 square feet of nonresidential but it was built prior to the 2014 LMO and what the testimony today I believe has been is that we've got to comply with the current LMO. So we've heard testimony that Parcel F, under the Town code, would be treated as a legally nonconforming development with respect to density. You can't make them tear down units in the Spinnaker Development, so it's a legally nonconforming development with respect to density, which

my understanding means it's okay that it's there, you're free to redevelop it. You couldn't put as many units as you got now.

So, the question becomes, these three different parcels, the hotel parcel, the Spinnaker parcel and the welcome center parcel, do they comply or would they comply with the current LMO?

The hotel does. The welcome center site would and the Spinnaker Development does because it's a legally nonconforming development with respect to density and our LMO provides for that. (P. 209, 1-25 and P. 210, 1-18)

BZA CHAIRMAN FINGERHUT: You're still on the standing issue, right? (P. 210, 19-20)

BZA MEMBER CUTRER: No, I'm not -- (P. 210, 21)

BZA CHAIRMAN FINGERHUT: No, no, no. We're going to decide that first and -- (P. 210, 22-23)

BZA MEMBER CUTRER: All right. (p. 210, 24)

BZA CHAIRMAN FINGERHUT: - a position (= motion) from counsel and we're discussing how we're going to resolve that issue and get it out of the way, one way or the other. I'd like to hear a motion from a Board member on the question of counsel's motion to dismiss? (P. 210, 25 and P. 211, 1-6)

BZA MEMBER WALCZAK: Well, as I've said, earlier, you know, it was sent here to us to make a decision and I don't think we should summarily dismiss it as they suggest, so whatever appropriate motion is for that I so move. (P. 211, 7-12)

BZA CHAIRMAN FINGERHUT: So your motion is deny counsel the motion to dismiss for lack of standing? (P. 211, 13-15)

BZA MEMBER WALCZAK: Correct. (P. 211, 16)

BZA CHAIRMAN FINGERHUT: Is there a second? (P. 211, 17)

BZA MEMBER WHITE: I'll second it. (P. 211, 18)

BZA CHAIRMAN FINGERHUT: Thank you, Mr. White. Any further discussion on that voting? (P. 211, 19-21)

BZA MEMBER CUTRER: So just to be clear, this is a motion to deny --

BZA CHAIRMAN FINGERHUT: Correct. This is a motion to deny the motion to dismiss for standing. (P. 211, 24-25 and P. 212, 1)

BZA MEMBER CUTRER: Okay. (P. 212, 2)

BZA CHAIRMAN FINGERHUT: Teresa, will you please call the roll? (P. 212, 3-4)

BZA MEMBER HALEY: Mr. Walczak? (P. 212, 5)

BZA MEMBER WALCZAK: For the motion. (P. 212, 6)

BZA MEMBER HALEY: Mr. Johnson? (P. 212, 7)

SDC ATTORNEY JOHNSON: For the motion. (P. 212, 8)

BZA MEMBER HALEY: Mr. Fingerhut? (P. 212, 9)

BZA CHAIRMAN FINGERHUT: For the motion. (P. 212, 10)

BZA MEMBER HALEY: Mr. Cutrer? (P. 212, 12)

BZA MEMBER CUTRER: For the motion. (P. 212, 13)

BZA MEMBER HALEY: Mr. White? (P. 212, 14)

BZA MEMBER WHITE: For the motion. (P. 212, 15)

BZA MEMBER HALEY: Ms. Laudermilch? (P. 212, 16)

BZA MEMBER LAUDERMILCH: For the motion. (P. 212, 17)

BZA CHAIRMAN FINGERHUT: Okay, thank you. Now we just have the appeal. (P. 212, 18-20)

2. The explanation offered by Beachwalk's counsel to the BZA understanding issue was this by Mr. Williams, ". . . all our client wants everybody to do is play by the rules and everybody else has to play by," (P. 193, 22-24). That does not describe, express, or define a "special or particularized injury".
3. The sum of the matter is found in several places, including this observation by BZA MEMBER CUTRER: ". . . it's just not clear to me in that the appellant (Beachwalk) has any valued aggrievance (sic) or would in any way be injured. I've asked that question numerous times and the answer I get from the appellant (Beachwalk) is, we want to make sure that the Town code is complied with, which strikes me as some what (sic) disingenuous so I don't think that there - - the testimony, today, we have a new hearing, which we do, I don't see, in my mind that the testimony, today, has established that there's a valid aggrievance or injury to the Appellant." (P. 208, 9-20)
4. BEACHWALK ATTORNEY WILLIAMS: Parcel E is contiguous with the Beachwalk Hotel site - - (P. 204, 23-25)
5. MR. ROBERT JOHNSON: Which is your client? (P. 205, 1)
6. BEACHWALK ATTORNEY WILLIAMS: Yes. (P. 205, 3)
7. MR. ROBERT JOHNSON: Yes. (P. 205, 4)
8. BZA CHAIRMAN FINGERHUT: How do you feel that impacts on standing in your experience? (P. 205, 5-7)

9. MR. ROBERT JOHNSON: In my experience, if there was a distance of, you know, could be hundred yards, could be ten feet. If there's a distance between it there's some -- there could be some discussion or argument that you can't be aggrieved from a thousand feet away. I mean you've got to have some -- you know, can you see this building? Can you see that building. Can you -- (P. 205, 8-18)
10. BZA CHAIRMAN FINGERHUT: What's your view in this case? (P. 205, 19-20)
11. MR. ROBERT JOHNSON: Well, I think that because it's contiguous there could be an argument to the aggrieved only through the fact that it's contiguous. (P. 205, 21-25)
12. Among the predicates of the above-cited conclusion by BZA Member Cutrer, is this colloquy between BZA Member Cutrer and Beachwalk Attorney Mr. Williams, as follows:

“BZA MEMBER CUTRER: So in the absence of any evidentiary material presented to this Board that your client is going to be harmed by the development of Parcel E, we’ve heard the testimony. You know, I’ve asked the question to you, Mr. Johnson, Mr. Alford, Ms. Dixon and I’ve gotten, what’s the impact? None. None. None and . . . (P. 184, 10-18)

BEACHWALK ATTORNEY WILLIAMS: And I don’t know because . . . (P. 184, 19-20)

BZA MEMBER CUTRER: So, in the absence of any evidentiary material at this hearing I don’t see how your client has standing in this appeal.” (P. 184, 21-24)
13. This is the first time there has been a record established that the Beachwalk does not, even arguably, sustain a special or particularized injury, the documented basis

for the instant summary judgment motion. Upon learning of this, at the BZA Remand Hearing, Respondent/Defendant SDC Properties, Inc. moved the BZA to dismiss the appeal for lack of standing, for the reasons set forth hereinabove, and as stated at the BZA Remand Hearing.

At the end of testimony in the 8/27/18, BZA Remand Hearing, SDC Properties, Inc. moved for dismissal on Appellant's lack of standing (Motion denied)

Thus, as stated, Appellants have failed to allege or show facts sufficient to establish constitutional or prudential standing, which are required to maintain this suit. As so artfully stated by the First Circuit in *In re Dein Host, Inc.*, 835 F.2d 402, 407, "as surely as strawberries do not grow in the sea, ... standing has not taken root in the wilderness of this record. Like a fish out of water or in the wood, appellant has no purchase in his own right sufficient to permit him to prosecute this appeal."

Therefore, Respondent SDC Properties, Inc. respectfully requests that its motion for summary judgment and/or as to dismiss be granted for lack of standing.

The Main Issue

This Court's review of the BZA decision

A. Standard of Review

S.C. Code Ann. § 6-29-840 prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. That section provides that "[t]he findings of fact by a board of zoning appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A).

However, a reviewing court in a zoning case may rely on uncontroverted facts which appear in the record, but not in a zoning board's findings." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000).

A zoning board's factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the findings. *Boehm v. Town of Sullivan's Island Board of Zoning Appeals, et al.*, Opinion No. 5546, filed March 28, 2018. In reviewing questions on appeal, the court should determine only whether the decision of the board is correct as a matter of law. *Id.* However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. An abuse of discretion occurs when a board's decision is unsupported by the evidence or controlled by an error of law. *Id.* “[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact.” *Id.* (quoting *Helicopter Sols., Inc. v. Hinde*, 441 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) and *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E. 326, 329 (2009)). “Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance.” *Id.* quoting *Helicopter Sols*, 414 S.C. 1 at 9-10, 776 S.E.2d at 757 (quoting *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329).

B. The lawyers have debated, and the BZA debated, whether the Parcel E development rights under the current LMO are controlled (1) as the Appellants allege and argue, by a general PUD – average density calculations under LMO § 16-3-106.G., or (2) as the Respondents allege and argue, by a site-specific density calculation based on LMO § 16-10-102.B.

The BZA debated this, including in a Motion by Member Cutrer and split vote (3 for and 3 against) so that the BZA could not determine the issue. (TR. 8/277/2018 BZA hearing, p. 250, l. 1- p. 252, l. 3). Thus, the BZA on remand did not overturn the decision it made at the first

BAZ hearing of this case, in which the BZA upheld the Staff Determination approving SDC's permit.

Thus, contrary to the Beachwalk Motion for Summary Judgment pending before the court, the interpretation issue is very much disputed and the BZA has not made any clear error of law, not were there decisions controlled by an error of law, nor were they arbitrary or capricious.

CONCLUSION

For the reasons outlined above, the Respondents Motion for Summary Judgment should be granted.

Respectfully submitted,

JOHNSON & DAVIS, PA

/s/ Barry L. Johnson

Barry L. Johnson, Attorney at Law
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
barry@jd-pa.com

*Attorney for Respondent/Defendant
SDC Properties, Inc.*

Bluffton, SC
March 11, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
BEACHWALK HOTEL &	)	Case No.: 2016-CP-07-2712
CONDOMINIUM ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	
Appellants/Petitioners,	)	PLAINTIFF'S <u>S.C.R.Civ.R. 59 (e)</u>
	)	NOTICE OF MOTION AND MOTION
vs.	)	TO ALTER OR AMEND JUDGMENT
	)	
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF HILTON	)	
HEAD ISLAND BOARD OF	)	
ZONING APPEALS, and, SDC	)	
PROPERTIES, INC.,	)	
	)	
Respondents/Defendants.	)	

You will please take notice that the Appellants/Petitioners, by and through their undersigned counsel of record, will, ten (10) days after the filing of this Notice of Motion and Motion or at such other time that may be set by the Court, move the Hon. Marvin E. Dukes III to alter or amend his Order (Ending Case) entered in this matter on September 11, 2019, and reconsider certain matters properly encompassed in the Order.

As the basis for this Motion, the Plaintiff would show unto this Honorable Court that the Court's decision to uphold the decision of the Board of Zoning Appeals for the Town of Hilton Head Island (the "BZA") on this appeal and deny the appeal of the Petitioners/ Appellants, disregards the evidence in the case which shows that Nicole Dixon's Determination Letter was in error as a matter of law. Further, the Court's Order overlooks the BZA's finding made during the

remand hearing, “that because we’ve [*i. e.*, the BZA] determined Parcel E is subject to the LMO’s PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E and that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with an proposed development for Parcel E.” Based on that BZA finding, which this Honorable Court must accept, unless it is arbitrary, capricious, or has no reasonable relation to a lawful purpose (which the Petitioners/ Appellants argue it is not), it was an error of law for the BZA to then have ignored the agreed facts that if the existing density of the other parcels within the PD-2 Overlay District is taken into account, there was no density left to build the proposed Welcome Center. Simply put, the BZA cannot find that they must take into account the existing development on other parcels within the PD-2 Overlay District, and fail to do so in reaching a decision, and this Honorable Court should not follow the BZA’s lead by upholding that failure. Further, there is no legal evidence to support the BZA’s denial of the appeal, and/or the BZA acted arbitrarily or unreasonably, and/or the BZA abused its discretion.

Further, the Order of September 11, 2019 contains a provision on page 7 at Paragraph 11 which inadvertently states that the Petitioners/Appellants lack standing when the Court has previously ruled, and so rules in the Order at page 5, “I have determined that the Appellants/Petitioners do have standing....” Paragraph 11 at page 7 should be deleted from the Order.

This Motion may be supported by Affidavits and/or a Memorandum in Support.

I SO MOVE.

Law Office of Thomas C. Taylor, LLC

S/Thomas C. Taylor

Thomas C. Taylor

SC Bar No.: 5499

P.O. Box 5550

Hilton Head Isl., SC 29938

Phone: 843-785-5050

Fax: 843-785-5030

Email: tom@thomastaylorlaw.com

ATTORNEY FOR APPELLANTS/
PETITIONERS

Hilton Head Island, South Carolina
September 12, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	MEMORANDUM IN OPPOSITION TO
Appellants/Petitioners,	)	PLAINTIFFS' RULE 59(e) MOTION
	)	FILED SEPTEMBER 13, 2019,
vs.	)	SUBMITTED BY
	)	RESPONDENT/DEFENDANT SDC
THE TOWN OF HILTON HEAD	)	PROPERTIES, INC.
ISLAND and/or THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS, and SDC	)	
PROPERTIES, INC.	)	
	)	
Respondents/Defendants.	)	
	)	

Respondent/Defendant SDC Properties, Inc. ("SDC") by and through its undersigned counsel of record, here submits its Memorandum in Opposition to the Plaintiffs' Rule 59(e) Motion, all with regard to the Order (Ending Case) entered by the Honorable Marvin H. Dukes, III on September 11, 2019, including, as Appellants/Petitioners (sometimes called "Beachwalk") assert, reconsideration of certain matters encompassed in that Order.

Plaintiffs assert six (6) bases for their motion:

1. The Court's decision to uphold the decision of the Board of Zoning Appeals for the Town of Hilton Head Island (the "BZA") on this appeal and deny the appeal of the Petitioners/Appellants disregards the evidence in the case which shows that Nicole Dixon's Determination Letter was in error as a matter of law;

2. The Court's Order overlooks the BZA's finding made during the remand hearing, "that because we've [*i.e.*, the BZA] determined Parcel E is subject to the LMO's PD-2 Overlay

District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E and that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E.”;

3. Based on that BZA finding, it was an error of law for the BZA then to have ignored the agreed facts that if the existing density of the other parcels within the PD-2 Overlay District is taken into account, there was no density left to build the proposed Welcome Center;

4. There is no legal evidence to support the BZA’s denial of the appeal;

5. The BZA acted arbitrarily or unreasonably, and/or that the BZA abused its discretion;

6. The Court’s Order of September 11, 2019 contains a provision on page 7 at Paragraph 11 which inadvertently states the Petitioners/Appellants lack standing when the Court has previously ruled, and so rules in the Order at page 5, with the suggestion that Paragraph 11 at page 7 should be deleted from the Order.

BACKGROUND

This case’s now long history is notable because it has been thoroughly contested, much briefed for the BZA and the Court, and much argued, and much ruled upon. Now, after the Court’s thorough Order (Ending Case) filed September 11, 2019, we are back here on the Rule 59(e) motion filed by the Appellants/Petitioners.

Rule 59(e), SCRCP, provides simply, “A motion to alter or amend the judgment shall be served not later than ten (10) days after receipt of written notice of the entry of the order.” This Rule affords no other insight into its scope and intent.

The Order (Ending Case) of September 11, 2019 (“Order”) is well-thought out, thorough, and fully supported by the evidence and the law.

First, as to item #6 of the above-stated items as the bases for this Rule 59(e) motion, while SDC agrees that the Court overruled SDC’s motion for summary judgment which had argued that the Appellants/Petitioners lacked standing and therefore jurisdiction, SDC does not find the text of the Order in item #11 at page 7 as saying anything directly about standing. Therefore, SDC sees that item #6 is without merit as the Court considers this Rule 59(e) motion.

Second, SDC asks the Court’s consideration, on evaluating this Rule 59(e) motion, that the Court’s determination of the above-stated items #1 and #2 as among the bases for this motion, will directly lead the Court to the answers to the remaining, above-stated, items #3, #4, and #5.

Third, procedurally, Appellants/Petitioners have availed themselves of a large number of “bites at the apple” without success. SDC respectfully urges the Court to deny this Rule 59(e) motion, because every conceivable point of contention as to the evidence, the inferences reasonably to be drawn from them, and the applicable law has already been presented, briefed, argued, and ruled upon. Other than delay, nothing is gained by this additional “bite at the apple”. The procedural history of this case, in summary, looks like this:

June 29, 2016: last submittal of revision to SDC’s Application for Development Plan Review and Approval (DPR)

July 28, 2016: TOHHI Notice of Action Issued, approving DPR

August 23, 2016: TOHHI (Nicole Dixon) Determination Letter, following objection by Beachwalk’s attorney Chester C. Williams, Esquire

November 28, 2016: BZA hearing on Beachwalk's appeal of the Determination Letter

December 30, 2016: Beachwalk's appeal to the Circuit Court (delayed during BZA motion for reconsideration of the November 28, 2016 BZA hearing

January 23, 2017: BZA hearing on Beachwalk's motion for reconsideration of the decision it made on November 28, 2016

March 28, 2017: Joinder of SDC into the Beachwalk appeal to the Circuit Court

April 17, 2017: Beachwalk's Amended Appeal and Petition

July 24, 2017: Beachwalk's Second Amended Appeal and Petition

November 11, 2017: First Circuit Court hearing on the Appeal and Petition

March 2 and 12, 2018: Parties extensive briefing in response to the Court's Post-Hearing Questions

April 20, 2018: Circuit Court Order remanding case to the BZA for consideration of three Post-Hearing Questions

August 1, 2018: TOHHI (Nicole Dixon)'s Staff Report to BZA for remand hearing

August 9, 2018: Beachwalk's Memorandum for remand hearing before BZA

August 27, 2018: Remand hearing conducted by BZA, with its answers to the Court's three Post-Hearing Questions

October 1, 2018: SDC's Motion for Summary Judgment, filed

October 24, 2018: Beachwalk's Motion for Summary Judgment, filed

January 15, 2019: Beachwalk's Memorandum in Opposition to SDC's Motion for Summary Judgment

March 8, 2019: Beachwalk's Amended Memorandum in Opposition to SDC's Motion for Summary Judgment

March 11, 2019: SDC's Memorandum in Support of its Motion for Summary Judgment

March 12, 2019: Hearing on the Beachwalk Appeal, following the BZA remand hearing and hearings on the two Motions for Summary Judgment

September 11, 2019: Order (Ending Case), by Judge Dukes

September 13, 2019: Beachwalk's Rule 59(e) motion

ARGUMENT

First, as to all issues raised in the Rule 59(e) motion (except base item #6), SDC incorporates herein by reference all the evidence contained in the transcribed testimonies of the BZA hearings, and the submissions for same by the Town of Hilton Head Island in the Record on Appeal, and in its update incident to the BZA remand hearing.

Second, as to the same issues, SDC specifically incorporates its Brief in Reply to the Court's Post-Hearing Questions, filed March 12, 2018 (SDC's Brief).

Third, as to the same issues, SDC specifically incorporates the Order (Ending Case) by Judge Dukes, filed September 11, 2019.

Fourth, the foregoing establish the requisite elements of facts in the record to justify the Determination Letter, and the three BZA hearings already had, under the principles of Vulcan Materials Company v. Greenville County Board of Zoning Appeals, 266 S.C. 81, 221 S.E.2d773 (Ct. App. 1976).

Fifth, the foregoing, and the elucidation of the LMO/legal issues before the Circuit Court and the BZA, as presented in SDC's Brief, especially at pp. 3 – 26, and the citations therein from

the Record on Appeal, make clear that neither the Town of Hilton Head's official, Nicole Dixon in her Determination Letter, nor the BZA in its three lengthy hearings in this matter, acted in any manner that was arbitrary, capricious, or it abuse of its discretion.

Sixth, the decisions to date in this case, keep the subject property from having been down-zoned to the point of having no economic utility as being unbuildable, and that is reasonable result, to be desired in any zoning case.

CONCLUSION

SDC respectfully urges the Court to deny the instant Rule 59(e) motion made by Beachwalk. Beachwalk has already tried, prematurely, to appeal this case to the SC Court of Appeals and it was dismissed, with remittitur filed back in the Circuit Court. This case has already been thoroughly contested, much briefed for the BZA and the Court, much argued, and much ruled upon, and there is nothing left but redundancy. There is nothing here for the Court to alter or amend its thorough and detailed Order (Ending Case) filed September 11, 2019.

Respectfully submitted,

JOHNSON & DAVIS, PA

/s/Barry L. Johnson

Barry L. Johnson, Attorney at Law
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
barry@jd-pa.com

Bluffton, SC
November 19, 2019

Attorney for SDC Properties, Inc.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
BEACHWALK HOTEL & CONDOMINIUM ASSOCIATION, INC. and BEACHWALK HILTON HEAD, LLC,	)	Case No.: 2016-CP-07-2712
	)	
Appellants/Petitioners,	)	MEMORANDUM IN SUPPORT OF
	)	PLAINTIFF'S S.C.R.Civ.R. 59 (e)
vs.	)	MOTION
	)	TO ALTER OR AMEND JUDGMENT
THE TOWN OF HILTON HEAD ISLAND and/or THE TOWN OF HILTON HEAD ISLAND BOARD OF ZONING APPEALS, and, SDC PROPERTIES, INC.,	)	
	)	
Respondents/Defendants.	)	

Introduction

This matter is before the Court following the entry of the Court's ORDER (Ending Case) filed on September 11, 2019. The Appellants/Petitioners timely filed their S.C.R.Civ.P. 59(e) Motion to Alter or Amend Judgment on September 13, 2019. The issues in the case are well known to the Court: the Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (collectively, the "Appellants") initially appealed the decision of the Board of Zoning Appeals (the "BZA") of the Town of Hilton Head Island, South Carolina (the "Town") dated November 28, 2016 to uphold the determination made by Nicole Dixon, CFM, Senior Planner for the Town, in her determination letter of August 23, 2016 to Chester C. Williams, Esq., counsel for the Appellants, that the proposed development of the Spinnaker Welcome Center as contemplated by the Development Plan Review Application DPR-001056-2016 (the "DPR Application"), is permitted under applicable Town requirements of the Town's Land Management Ordinance (the "LMO"), pursuant to Section 6-29-820 of the Code of Laws of South Carolina (1976), as amended.

Following the filing of this appeal by the Appellants, SDC Properties, Inc. ("SDC"), the owner of the tract of land referred to as Parcel E that is the subject of the DPR Application, was added to the case as a necessary party. This Court initially held a merits hearing on November 16, 2017. Following that hearing, this Court requested that counsel for each party provide the Court with their position on whether the BZA heard, properly considered, and addressed three questions:

- a. Is Parcel E in a PD-2 Overlay District established by the LMO?
- b. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?
- c. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Following further briefing by the Appellants and SDC¹ and a telephone conference among Judge Dukes and counsel for all parties on December 18, 2017, the Court issued an Order on April 20, 2018 holding that the record of the proceedings before the BZA was unclear and insufficient for review, and that the Court required further information from the BZA for its consideration. The BZA was ordered to further consider these questions:

1. Is Parcel E in a PD-2 Overlay District established by the LMO?
2. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?
3. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into

¹ The Town did not submit a brief on its position on the three questions of interest to Judge Dukes.

account in connection with any proposed development of Parcel E?

The BZA's Rehearing on the Court's Questions

On August 27, 2018, in response to the Court's Order, the BZA held a further hearing on this appeal to answer the Court's three questions.² During a hearing that lasted for over five hours, and after presentations by the Appellants, SDC, and the Town, the BZA, on several motions each duly made and seconded with regard to the Court's questions, voted to answer the Court's questions³ as follows:

1. Is Parcel E in a PD-2 Overlay District established by the LMO?

Answer: The BZA unanimously voted to "affirm that Parcel E is in a PD-2 Overlay District established by the LMO."⁴

2. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?

Answer: The BZA unanimously voted "that Parcel is subject to the LMO's PD-2 Overlay District regulations."⁵

3. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Answer: The BZA unanimously voted "that because we've determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into consideration the

² A copy of the transcript of the BZA's August 27, 2018 hearing on the remand of this appeal is attached to the Appellants'/Petitioners' Return To Court's Questions filed September 7, 2018 as Exhibit D.

³ See the August 31, 2018 Notice of Action by the BZA on the remand of this appeal, a copy of which is attached as Exhibit E to the referenced "Return" filed September 7, 2018.

⁴ See the BZA's Notice of Action, and the transcript of the August 27, 2018 hearing, beginning at Page 213, Line 3 through Page 214, Line 5.

⁵ See the BZA's Notice of Action, and the transcript of the August 27, 2018 hearing, beginning at Page 214, Line 6 through Page 215, Line 17.

existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E”; and “that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E.”⁶

Ms. Dixon testified during the August 27, 2018 BZA hearing that the only real difference between the Town’s position and the Appellants’ position in this appeal is on the issue of the applicability of the PD-2 Overlay District’s average density regulations in LMO Section 16-3-106.G.4.a to the proposed development of Parcel E.⁷ She also testified that LMO Section 16-3-106.G.4 contains no language that limits its effect to only new PD-2 Overlay Districts.⁸

As to the third question, the BZA unanimously voted to confirm that the existence of the Waterside PD-2 Overlay District and the LMO’s PD-2 Overlay District regulations **must** be taken into consideration with respect to any development of Parcel E, and further to confirm that the existing development on the other parcels within the Waterside PD-2 Overlay District **must** be taken into account in connection with any proposed development of Parcel E. Note, in particular, that the BZA did not carve out or otherwise except the average density regulations of LMO Section 16-3-106.G.4.a from its answer to the Court’s third question, meaning that the BZA has affirmed the applicability of the average density regulations of LMO Section 16-3-106.G.4.a to any proposed development of Parcel E.

A substantial portion of the discussion by and among the members of the BZA and the parties to this appeal during the August 27, 2018 hearing focused on what effect the existing development on the other parcels within the Waterside

⁶ See the BZA’s Notice of Action, and the transcript of the August 27, 2018 hearing, beginning at Page 243, Line 24 through Page 244, Line 24, and beginning at Page 248, Line 7 through Page 249, Line 7.

⁷ See the transcript of the August 27, 2018 hearing, beginning at Page 189, Line 25 through Page 190, Line 16.

⁸ See the transcript of the August 27, 2018 hearing, beginning at Page 189, Line 25 through Page 190, Line 9.

PD-2 Overlay District has on the proposed development of Parcel E, and whether or not the PD-2 Overlay District average density regulations in LMO Section 16-3-106.G.4.a are applicable to the proposed development of Parcel E. The competing results of the Appellants' position and the Town's and SDC's position on this issue are clear: On the one hand, if the PD-2 Overlay District's average density regulations are applicable to the development of Parcel E, then development on Parcel E is foreclosed, because there is already more density on the various tracts in the Waterside PD-2 Overlay District than is now permitted under current LMO regulation.⁹ On the other hand, if the PD-2 Overlay District's average density regulations are not applicable to the development of Parcel E, then further development is possibly permitted on Parcel E.

By unanimously agreeing that Parcel E is subject to the LMO's PD-2 Overlay District regulations and that the existing development on the other parcels in the Waterside PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E, the BZA had to have relied on LMO Sections 16-3-101.B and 16-3-301.B, which say that if any land

⁹ The transcript of the BZA's hearing on August 27, 2018 shows there was some sentiment among the Town Staff and some members of the BZA that following the requirements of the current LMO, in particular the PD-2 Overlay District average density regulations of LMO Section 16-3-106.G.4.a, makes Parcel E "unbuildable" or "worthless", a position fostered by Barry L. Johnson, Esq., counsel for SDC. For example, see (1) the comment by Gregory M. Alford, Esq., counsel for the Town, that it "Puts the Town in a tough spot" at Page 146, Lines 9-10 of the transcript of the August 27, 2018 hearing; (2) BZA member Robert Johnson's comments beginning on Page 174, Line 12 through Page 175, Line 5 of the transcript; (3) Page 189, Lines 21-22 of the transcript, where Ms. Dixon states, "And staff does not think we can determine that the lot [referring to Parcel E] is unbuildable."; and (4) the last paragraph of BZA Member Jerry Cutrer's motion in the Notice of Action and beginning at Page 251, Line 22 through Page 252, Line 2 of the transcript, in which he refers to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Appellants respectfully remind the Court that the record clearly shows that Parcel E could have been developed by the SDC's predecessor in title to Parcel E, and also by SDC itself, pursuant to the vested use and density rights recognized by the March 3, 1995 Categorical Exemption before the Categorical Exemption expired on 3 March 2000. The fact is, SDC, for reasons unknown to the Appellants, chose not to develop Parcel E prior to the expiration of the Categorical Exemption, and thus SDC assumed the risk of not relying on the "use it or lose it" benefit conferred on Parcel E by the Categorical Exemption". Taken in this context, any inability to further develop Parcel E is not a harsh result, but rather is a self-inflicted predicament.

is located in an overlay district, then the LMO's regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district, and also on LMO Sections 16-3-102.C and 16-3-106.D, which say that the standards governing an overlay zoning district **shall** control over the base zoning district regulations, whether they are more restrictive or less restrictive than the base zoning district.

The BZA's response to the Court's three questions provided this Court with the information it needed in order to complete its judicial review of this matter.¹⁰

Given the BZA's Answers, this Court must hold that the BZA made an error of law in upholding the determination of Nicole Dixon dated November 28, 2016

The substantive issue in this appeal is the applicability of the PD-2 Overlay District average density regulations in LMO Section 16-3-106.G.4.a to the development of Parcel E.

Since the BZA determined that (1) Parcel E is in a PD-2 Overlay District established by the LMO; and (2) Parcel E is subject to the LMO's PD-2 Overlay District regulations; and (3) that the LMO's PD-2 Overlay District regulations must be taken into consideration in the development of Parcel E, and the existing development on the other parcels within the Waterside PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E, the simple math conclusively shows that there is no density available

¹⁰ The Appellants note for the Court's benefit that after voting to answer all of the Court's questions affirmatively, the BZA then strayed beyond Judge Dukes' remand mandate and considered a motion made and seconded to again deny the appeal and uphold Ms. Dixon's determination. After discussion, the question was called and the motion to again deny this appeal failed on a tie vote, 3 in favor, and 3 against. Thereafter, the BZA took no further action in connection with the Court's Order. In particular, the Appellants believe it is important to note that the BZA could not muster a majority vote to deny this appeal the second time around.

in the Waterside PD-2 Overlay District to support the proposed development of Parcel E for the Spinnaker Welcome Center.

The Town has argued that the existing development within the Waterside PD-2 Overlay District does not have to be taken into account with any proposed development of Parcel E, because that is the way the Town Staff “interprets” the LMO. The BZA’s answer to the Court’s third question unequivocally rejected that argument, since no part of the LMO’s PD-2 Overlay District regulations is excepted from that answer.

There is only one method under the LMO’s PD-2 Overlay District regulations to take the existing development on the other tracts in the Waterside PD-2 Overlay District into account when considering the proposed development of Parcel E, and that is by use of the average density regulations of LMO Section 26-3-106.G.4.a. That is what had to be done here. Ms. Dixon testified under oath during the November 28, 2016 BZA hearing that if the development of Parcel E must conform to the current LMO requirements for a PD-2 Overlay District, then the Appellants’ average density calculations for the 15.1 acres in the Waterside PD-2 Overlay District set forth on Pages 13 and 14 of the narrative attached to Application for Appeal APL-001673-2016 are correct,¹¹ thereby acknowledging that the existing development in the Waterside PD-2 Overlay District already exceeds the maximum density permitted under the LMO. BZA Chairman Fingerhut noted Ms. Dixon’s agreement with the Appellants’ calculations of the average density for the Waterside PD-2 Overlay District during the November 28, 2016 BZA hearing,¹² and also walked Gregory M. Alford, Esq., counsel for the Town, through the same calculations for the average density for the Waterside PD-2 Overlay District during the August 27, 2018 BZA hearing.¹³

¹¹ See the transcript of the November 28, 2016 BZA hearing, at Page 70, Lines 17-25, and Page 71, Lines 1-10. .

¹² See the transcript of the August 27, 2018 hearing at Page 107, Lines 7-16.

¹³ See the transcript of the August 27, 2018 hearing beginning at Page 140, Line 22 through Page 143, Line 9.

Further, under questioning by BZA Member Lisa Laudermitlch during the August 27, 2018 hearing, Mr. Alford reluctantly agreed that the Appellants' method of calculating the average density for the Waterside PD-2 Overlay District is correct, and that the existing density on the tracts in the Waterside PD-2 Overlay District exceeds available density for the 15.1 acres in the Waterside PD-2 Overlay District.¹⁴

The only logical, legally supportable end result to this appeal is that since there is no remaining density available for further development of the properties in the Waterside PD-2 Overlay District, compliance with current LMO requirements results in no further development of Parcel E.¹⁵

Since the BZA's answers to the Court's questions are that Parcel E is in a PD-2 Overlay District, that the PD-2 Overlay District regulations apply to Parcel E, that the LMO's PD-2 Overlay District regulations must be taken into consideration in the development of Parcel E, and that the existing development on the other parcels within the Waterside PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E, it follows, as the record of this appeal establishes, that, considering the existing densities on the tracts in the Waterside PD-2 Overlay District, there is no density remaining in Waterside PD-2 Overlay District for allocation to Parcel E, and therefore Parcel E cannot be developed.

This Court must accept and apply the LMO's regulations. In matters of statutory construction, our Supreme Court has stated:

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Charleston County Sch. Dist. v. State Budget &

¹⁴ See the transcript of the August 27, 2018 hearing beginning at Page 145, Line 22 through Page 146, Line 9.

¹⁵ Again, any inability to develop Parcel E is SDC's own self-imposed hardship resulting from its decision to not avail itself of the development protections afforded by the now expired Categorical Exemption when it could have.

Control Bd., 313 S.C. 1, 5, 437 S.E. 2d. 6,8 (1993). “The determination of legislative intent is a matter of law.” Eagle Container Co. v. County of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894(2008). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. “ Hodges v. Rainer, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000).

“ If a statute’s terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense.” Etiwan Fertilizer Co. v. South Carolina Tax Comm’n, 217 S.C. 354, 360, 60 S.E. 2d 682, 684(1950). “The prime object, of course, in the construction of a statute is to ascertain and give effect to the legislative intent.” Id.

This Court’s decision to uphold the decision of the Board of Zoning Appeals on this appeal and deny the appeal of the Petitioners/ Appellants, disregards the evidence in the case which shows that Nicole Dixon’s Determination Letter was in error as a matter of law. Further, the Court’s Order overlooks the BZA’s finding made during the remand hearing, “that because we’ve [*i. e.*, the BZA] determined Parcel E is subject to the LMO’s PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E and that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with an proposed development for Parcel E.” Based on that BZA finding, which this Honorable Court must accept, (unless it is arbitrary, capricious, or has no reasonable relation to a lawful purpose), it was an error of law for the BZA to then have ignored the agreed facts that if the existing density of the other parcels within the PD-2 Overlay District is taken into account, there was no density left to build the proposed Welcome Center. Simply put, the BZA

cannot find that they must take into account the existing development on other parcels within the PD-2 Overlay District, and fail to do so in reaching a decision, and this Honorable Court should not follow the BZA's lead by upholding that failure. Further, there is no legal evidence to support the BZA's denial of the appeal, and/or the BZA acted arbitrarily or unreasonably, and/or the BZA abused its discretion.

Further, the Court's Order of September 11, 2019 contains a provision on page 7 at Paragraph 11 which inadvertently states that the Petitioners/Appellants lack standing when the Court has previously ruled, and so rules in the Order at page 5, "I have determined that the Appellants/Petitioners do have standing...." Paragraph 11 at page 7 should be deleted from the Order.

Law Office of Thomas C. Taylor, LLC

S/Thomas C. Taylor

Thomas C. Taylor

SC Bar No.: 5499

P.O. Box 5550

Hilton Head Isl., SC 29938

Phone: 843-785-5050

Fax: 843-785-5030

Email: tom@thomastaylorlaw.com

ATTORNEY FOR APPELLANTS/
PETITIONERS

Hilton Head Island, South Carolina
November 22, 2019

BEFORE THE BOARD OF ZONING
 APPEALS OF THE TOWN OF HILTON HEAD ISLAND
 STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT

BEACHWALK HOTEL & CONDOMINIUMS
 ASSOCIATION, INC. AND
 BEACHWALK HILTON HEAD, LLC.
 2016-CP-07-1294

APPLICATION FOR APPEAL NUMBER
 APL-001673-2016

-----/

The hearing in front of the Hilton Head
 Island Board of Zoning Appeals, was taken
 pursuant to Notice and agreement, before Amanda
 Bowen, Stenographic Reporter and Notary Public,
 at the Hilton Head Library, 11 Beach City Road,
 Hilton Head Island, South Carolina, on the 28th
 day of November 2016, commencing at or about the
 hour of 3:15 p.m.

1 APPEARANCES of COUNSEL:

2 FOR THE APPELLANTS:

3 THOMAS C. TAYLOR, ESQUIRE

Law Office of Thomas C. Taylor, L.L.C.

4 22 Bow Circle

Suite A

5 Hilton Head Island, South Carolina 29928

843.785.5050

6 tom@thomastaylorlaw.com

7 -AND-

8 CHESTER C. WILLIAMS, ESQUIRE

Chester C. Williams, L.L.C.

9 17 Executive Park Road

Suite 2

10 Hilton Head Island, South Carolina 29938

843.842.5411

11 firm@ccwlaw.net

12
13 ALSO PRESENT:

Board Members

14 Barry Johnson, Esquire

15
16
17 - - -
18
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21
22
23
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25

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1 MR. STANFORD: Next on our agenda
2 is a request for an appeal from Chester
3 Williams on behalf of Beachwalk Hotel &
4 Condominiums Association, Inc. and
5 Beachwalk Hilton Head, LLC. The
6 appellant is appealing staff's
7 determination dated August 23, 2016,
8 that the proposed development of the
9 Spinnaker Welcome Center at 30
10 Waterside Drive is permitted as
11 proposed with the Development Plan
12 Review, which is the Application Number
13 DPR-001056-2016. This is the
14 identification number 1673-2016. And
15 so we would like to hear from the town
16 in conjunction with that.

17 MS. DIXON: The staff suggests
18 that the appellant go first since it's
19 their request for the appeal.

20 MR. STANFORD: I think that is
21 sensible since he is rooting to
22 overturn your actions.

23 Mr. Williams.

24 MR. WILLIAMS: Mr. Chairman.

25 MR. STANFORD: We normally have a

1 20-minute period of time. If you need
2 to extend beyond that, please do so as
3 succinctly as possible.

4 MR. WILLIAMS: We'll do our best.
5 For the record Chester Williams. I'm a
6 local attorney on Hilton Head Island.
7 I'm here today as counsel for Beachwalk
8 Hotel & Condominium Association, Inc.
9 and Beachwalk Hilton Head, LLC. Here
10 today also with me is my co-counsel,
11 Tom Taylor. What I like to do with
12 you, Mr. Chairman, is go through some
13 background information. We subpoenaed
14 a few witnesses, so we have some
15 questions for the witness and some
16 questions for Nicole Dixon, and I'll go
17 through the substance of our arguments.
18 Acceptable?

19 MR. STANFORD: That's fine.

20 MR. WILLIAMS: I have had the
21 opportunity to review the application
22 and the narrative in it. I tried to
23 set out in sufficient detail what is
24 going on here. The history of the
25 property. This particular tract and

1 let me show you a couple things real
2 quick. In Nicole's determination
3 letter that is being appealed, she
4 refers to this particular property,
5 which is an undeveloped tract on
6 Waterside Drive and Pope Avenue. She
7 referred to it often as Tract B. In
8 our application, we refer to it as
9 Parcel E, but they are the same
10 property. We have two copies. You may
11 want to pass this down. I'm handing
12 you a copy of the 1984 -- I'm sorry --
13 this is the '84 master plan. Nobody
14 knows where the '87 plan is. I think
15 that's it.

16 MS. DIXON: This is '84.

17 MR. WILLIAMS: November 5, '84.

18 This is the master plan that was --

19 MR. STANFORD: That is the one on
20 the screen?

21 MR. WILLIAMS: Yes, this is the
22 one that was approved by the joint
23 planning ordinance that was the
24 ordinance prior to the original
25 adoption of the land management

1 ordinance. And you referred to, Mr.
2 Stanford, the 1987 master plan. There
3 is part of the problem. This master
4 plan was amended by action of the
5 town's planning commission in May of
6 1987. The boundaries of the PUD were
7 changed and back then it was known as
8 the town center PUD. The boundaries
9 were changed to facilitate the
10 development, which is the Beachwalk
11 Hotel property and the densities and
12 the uses of the property. But Nicole
13 refers to -- when Nicole refers to
14 Parcel B in her determination letter,
15 it is generally this area here where
16 you can see it says Tract B.

17 MR. STANFORD: Is Tract B also
18 known as Tract E?

19 MR. WILLIAMS: We refer to it as
20 Parcel E and here's why --

21 Nicole, do you know where this is
22 in the materials? Can you put this up
23 on the screen?

24 You'll see this is the
25 right-of-way of Pope Avenue, the

1 right-of-way of Waterside Drive and the
2 parcel you can see on this screen here.
3 We refer to it as Parcel E.

4 MR. CUTRER: Is that currently in
5 development?

6 MR. WILLIAMS: Yes, sir, it does.
7 One of the witnesses we have available
8 is Curtis Coltrane and he will testify
9 to some of these issues in a minute.
10 But in 1995 pursuant to the process
11 that was put in place by the town, the
12 Waterside PUD was the subject of the
13 categorical exemption of March 3, 1995,
14 and that's one of the main issues of
15 the appeal. What is the effect of the
16 categorical exemption and the
17 expiration of the categorical exemption
18 in 2000 on the ability to develop
19 Parcel E.

20 MR. STANFORD: Can you give us a
21 description of what a categorical
22 exemption is?

23 MR. WILLIAMS: Curtis can do this.
24 Well, if you like, we can go ahead and
25 put --

1 MR. STANFORD: I don't want to
2 interrupt your presentation.

3 MR. WILLIAMS: There was a number
4 of outstanding permits for developing
5 the property that allowed for the
6 development in a manner that would not
7 then comply with the current code
8 requirements and some of these permits
9 had no expiration dates on them, and
10 property owners found that they had
11 right to develop their property in a
12 manner provided for by the old permits.
13 The 1987 amendment to the PUD was one
14 of those issues. Robert Grays on
15 behalf of Pope Avenue Associates
16 applied for the categorical exemption.
17 It was granted. The town recognized
18 the ability to develop the entire 15.1
19 acre tract as provided for in the 1987
20 master plan.

21 At that point, actually the hotel
22 was already built and that was subject
23 to the categorical exemption. The
24 categorical exemption letter on its
25 face says it expired after five years.

1 The point there was to beat all the
2 bushes and shake all the trees and get
3 everybody who had a claim to develop
4 properties in a manner that did not
5 comply with the code and come out and
6 make their case and if the town agreed
7 with them, the categorical exemption
8 was issued. But there was a time limit
9 on it. After the time limit, the
10 categorical exemption letter on its
11 face and Nicole says in her
12 determination letter that any
13 subsequent development of properties
14 after the expiration date on March 3 of
15 2000 had to comply with current LMO
16 requirements.

17 MR. STANFORD: Thank you.

18 MR. WILLIAMS: The LMO as we have
19 it now, our position is that's what
20 controls the development of the
21 property. The e-mails that were
22 included in your package I think
23 clearly show that when the development
24 permit for the Spinnaker Welcome Center
25 was filed and when it was approved --

1 actually, not when it was approved,
2 when it was filed, that apparently
3 neither the town or the applicant were
4 aware that the property was in a in a
5 PD-2 overlay district. When Nicole
6 reviewed that application, she did not
7 take into account the provision of the
8 PD-2 overlay. Most people are familiar
9 with PD-1 districts of the town. The
10 major master plans area; Sea Pines,
11 Shipyard, Hilton Head Plantation,
12 Wexford and so forth.

13 The town code for a PD-2 planned
14 development overlay district, it is for
15 tracts that are smaller than the major
16 PD-1 zones. Parcels between 5 and 249
17 acres are eligible for the PD-2 overlay
18 district. 250 acres and up, you have
19 to go with the PD-1 district. The most
20 recent PD-2 overlay was approved
21 several years ago and it requires a
22 rezoning to go through it. Several
23 years some property owned by the
24 Barnwell family near the section of
25 Squire Pope road and Gumtree Road.

1 The question is why jump through
2 all those hoops? What are the benefits
3 of it? What are the detriments of it?
4 If you read the LMO, Section 16-3-106,
5 Sub G deals with the PD-2 overlays. It
6 is "to encourage creativity in design
7 and planning in the development of
8 parcels between five and 249 acres by
9 allowing greater design flexibility
10 than the underlying base zoning
11 district so that natural features may
12 be protected and development
13 concentrated in more suitable or less
14 environmentally sensitive areas." The
15 underlying based district is the RD
16 district. I suspect that when Nicole
17 reviewed the application, she reviewed
18 it with the RD district regulation
19 zoning.

20 When you are in a PD-2 district,
21 any use that is permitted in the
22 underlying base district is permitted
23 in that PD-2 district. Subsection 4
24 under PD-2, the density and development
25 standards. The primary reason to go to

1 the PD overlay, it allows you to shift
2 densities and the open spaces around,
3 so that you can develop part of the
4 property at a density higher that would
5 otherwise be allowed under the basis of
6 the district provided you offset that
7 with a corresponding open space --
8 excuse me -- specifically common open
9 space, so that the net effect is that
10 the average density over the entire
11 PD-2 doesn't exceed what is provided
12 for in the underlying based zoning
13 district.

14 So those are the issues that apply
15 here. The categorical exemption and
16 expiration of it and whether or not the
17 town applied the PD-2 overlay
18 requirements for the -- for the
19 Spinnaker Welcome Center.

20 With that, I ask Tom to come up
21 and Curtis will be our first witness to
22 come up.

23 MR. CUTRER: Did I understand that
24 the RD district is the base zoning
25 district?

1 MR. WILLIAMS: Correct.

2 MR. CUTRER: Absent the PD-2
3 elections, the RD would have governed?

4 MR. WILLIAMS: Correct. RD still
5 governs, but so does the PD-2. It is
6 not permitted in the RD district.

7 MR. CUTRER: Thank you.

8 MR. WILLIAMS: But because of the
9 PD-2, you can develop some of the areas
10 of PD-2 at a higher density than the RD
11 allows provided you offset that with or
12 common open space area, so the average
13 density doesn't exceed the RD district.

14 MR. TAYLOR: It is not an
15 election. It is what it is. The
16 overlay district either covers it or
17 not according to the town plan.

18 Mr. Chairman, I have a copy for
19 each of you of Ordinance 92 -- excuse
20 me -- 93-33, which I'm going to be
21 asking Mr. Coltrane about. And for the
22 record, Mr. Chairman, I'm providing a
23 copy as well, which I will be marking
24 as Exhibit 1, to the court reporter.

25 Curtis, would you come up, please.

1 (Whereupon, Exhibit
2 Number 1 was marked for
3 identification.)

4 MR. TAYLOR: Mr. Chairman, Tom
5 Taylor. I thank you for allowing as to
6 pair today so we can move things along
7 as quickly as we can. We are calling
8 for the testimony of Curtis Coltrane.
9 I ask that you swear him in.

10 MR. STANFORD: Would you state
11 your name.

12 THE WITNESS: Curtis Coltrane.

13 CURTIS COLTRANE,
14 a witness herein, having been duly sworn,
15 testified upon his oath as follows:

16 THE WITNESS: Yes.

17 MR. STANFORD: Thank you.

18 EXAMINATION

19 BY MR. TAYLOR:

20 Q Curtis, good afternoon. Thank you for
21 being here. Curtis, could you give the BZA for
22 some of those you may have recent movers to
23 Hilton Head, a little bit about your background
24 and tell them how you've been employed over the
25 course of the years as it relates to the town.

1 A I can. Well, I served as the town
2 attorney from June of 1989 to May of 2013.
3 Prior to that time from 1985 to 1989, I was the
4 town attorney and was with Jim Herring, who I
5 was employed by and a law partner in connection
6 with that. Did a fair amount of work for the
7 town. Following May of 2013, I became the
8 Master in Equity in Beaufort County. In March
9 2007, I returned -- I didn't return to the
10 private firm. I left the bench and became the
11 assistant town manager community development
12 with the town. And in September of 2010, I
13 returned to private practice of law first with
14 an organization involving the current town
15 attorney, Mr. Alford, and I continue to do work
16 for the town. Following in 2013 that law firm
17 split. I've been on my own with John Wilkins
18 since then. In 2013 and '14 and I assisted with
19 the drafting of the current editions of the land
20 management ordinance.

21 Q Curtis, thank you. Can you tell the
22 BZA a little bit about the history of how the
23 town came to adopt what is known as the
24 categorical exemption ordinance, what gave rise
25 to it and what was the intention of it to the

1 best of your knowledge, and I believe you have
2 pretty good knowledge about it.

3 A In the early 1990s, the town was still
4 focused. On very much focused on growth
5 management efforts throughout the town and issue
6 had arisen with respect to the permits that had
7 been issued by both Beaufort County and the town
8 under previous editions of the land management
9 ordinance and the previous ordinance, which was
10 the development standards ordinance and the
11 concern was that you had frankly an unquantified
12 number of permits and it was difficult for the
13 town staff and the town council to get its head
14 around what was out there that might come along
15 and how that would blend in with what the town
16 was trying to do.

17 In the earlier 1990s, there was a
18 committee of the town council members called the
19 growth management task force that was involved
20 in trying wrestle with the various development
21 management issues. A law firm out of Kansas
22 City, Missouri, known as Freilich, Leitner &
23 Carlisle lie and through work with the Freilich
24 firm, the town council, the growth management
25 task force and me, the ordinance, which is 92-35

1 or rather 93-33, the adopted number, was adopted
2 with the goal to providing two things. One, to
3 allow who possessed development rights under
4 existing permits to have them verified, if you
5 will. And two, to put a time limit on the
6 execution of those permits so that the town
7 would then know that within a given span of
8 years either something would be built here or
9 would not, and that was the goal to provide some
10 certainty to the ongoing development within the
11 town so that the town could then gauge its
12 owning planning efforts by having a better idea
13 of what would or perhaps would not ever come to
14 pass.

15 The ordinance 93-33 was adopted. It
16 had attached to it a series of procedures that
17 allowed for the holder of the given permit to
18 seek one or two separate determinations. One,
19 just to the specific vested rights and the
20 other, the categorical exemption which deals
21 with on the whole this application -- this
22 permit that I hold is exempt from current
23 restrictions placed by the land management
24 ordinance, and you had a deadline, I want to
25 say, of December 31, 1994, to file. My

1 recollection is that the only applications that
2 were ever received related to categorical
3 exemptions, there were probably 15 to 20 of them
4 filed. I believe, they were all granted and
5 each of them was documented by correspondence
6 similar to the letter from Mr. Brechko, that you
7 may have before you or certainly before this
8 hearing is over.

9 MR. TAYLOR: It is Exhibit D.

10 THE WITNESS: That states what the
11 town recognizes and also puts a
12 deadline on it and the deadline stated
13 that if you do not execute your permit
14 by the given date, which was five years
15 from the date of the letter, that any
16 development following that date would
17 have to be in compliance with the
18 requirements of the zoning and planning
19 ordinance that existed at the moment
20 you filed your application. I think
21 that was understandable, but that was
22 what the town attempted to do in '93.
23 That's what the ordinance, I think, on
24 its face says it does. And then with
25 respect to -- that is what the town was

1 trying to accomplish in 1993.

2 BY MR. TAYLOR:

3 Q And Curtis in a nutshell, is it
4 accurate to say that basically it was either a
5 matter to all these permit holders who had given
6 permits before the restrictive LMO or the
7 predecessor came to be, either build or lose
8 your rights?

9 A Well, either build within a given time
10 frame or therefore build in conformance with
11 whatever the LMO said to build to it.

12 Q Curtis, I got what is marked earlier as
13 Exhibit D to this. This is a letter that was
14 written by Mr. Brechko. Did you have an
15 opportunity before this hearing to take a look
16 at it?

17 A Yes.

18 Q Can you identify it, that is, the date
19 it appears it has been written and if that is
20 the categorical exemption letter?

21 A It was. It is dated March 3rd, 1995.
22 It is a letter responding to an application
23 filed on behalf of Pope Avenue Associates by Mr.
24 Robert L. Graves, and it does, in fact,
25 recognize as being categorically exempt the town

1 center PUD as it was permitted on the date
2 stated here.

3 Q And Curtis, to the best of your
4 knowledge, to the property you're talking about
5 in Exhibit D, does it contain Parcel E that we
6 are discussing today?

7 A I believe that it does, yes.

8 Q All right. And Curtis, that letter was
9 issued March 3rd, 1995, and expired March 3rd
10 2000, correct?

11 A Yes.

12 Q All right.

13 A Well, the categorical exemption expired
14 March 3rd, 2000.

15 Q Curtis, may I have that back, please.
16 Thank you.

17 Curtis, would you please answer any
18 questions Nicole or the board may have for you.

19 MR. STANFORD: Any questions from
20 the town?

21 MS. DIXON: I have none.

22 MR. STANFORD: Any questions from
23 the board?

24 EXAMINATION

25 BY MR. CUTRER:

1 Q In 1995, how much of this development
2 existed?

3 A I don't know.

4 MR. WILLIAMS: Chester Williams.
5 I can answer that for you. The part of
6 the property that is labeled on the
7 survey that is up on screen right now
8 is Parcel A and C is the site of the
9 Beachwalk Hotel. That property hadn't
10 been developed at the time of the
11 categorical exemption. That tract was
12 commenced almost immediately after the
13 1987 amendment of the master plan, so
14 that was the only tract that was
15 developed at that time.

16 THE WITNESS: Typically, it would
17 only apply to where there was no
18 development otherwise the permit would
19 be received and there would have been
20 nothing to seek.

21 MR. CUTRER: Right.

22 MR. STANFORD: Other questions?

23 Thank you, Mr. Coltrane.

24 Another question?

25 MR. TAYLOR: None for me, Mr.

1 Chairman. I just wanted to ask,
2 please, think hard because I hope to
3 let Mr. Coltrane and I don't want to
4 reach the end of this hearing and have
5 somebody say "Oh, I wish I found out a
6 little more about that."

7 MR. STANFORD: Curtis, you are
8 excused.

9 MR. TAYLOR: May we call Todd
10 Theodore, please?

11 MR. STANFORD: Please.

12 Well, Mr. Theodore, will you
13 please state your name.

14 THE WITNESS: Todd Theodore.

15 TODD THEODORE,
16 a witness herein, having been duly sworn,
17 testified upon his oath as follows:

18 THE WITNESS: Yes.

19 MR. STANFORD: Thank you.

20 EXAMINATION

21 BY MR. WILLIAMS:

22 Q Good afternoon, Mr. Theodore. Would
23 you please tell the board what your current
24 position is?

25 A I'm a principal at Wood & Partners.

1 Q Do you sit on any town boards?

2 A I sit on the planning commission.

3 Q Is it accurate to state that your job
4 is basically to help landowners to get permits
5 -- apply for and obtain permits for the town?

6 A Yes.

7 Q And in that process, I assume, you're
8 familiar with the provisions in the LMO. Is
9 that important for your job?

10 A Yes.

11 Q When you submitted the development
12 review plan for the Spinnaker Welcome Center,
13 did you note that their property was subject to
14 the March 3rd, 1995, categorical exemption
15 letter?

16 A No, I did not.

17 Q Have you had a chance to review that
18 categorical exemption letter since then?

19 A I did somewhat. I got the notice to
20 subpoena on Saturday, so I had a short time to
21 prepare for this.

22 Q Would you agree that it expires on
23 March 3rd, 2000?

24 A That is what I read, yes.

25 Q When you submitted the development

1 review application for the Spinnaker Welcome
2 Center, did you know it was part of the
3 Waterside PD-2 overlay district?

4 A No, I did not know that.

5 Q Is there any question in your mind now
6 that Parcel E is part of the Waterside PUD
7 district and subject to the PUD overlay
8 regulations?

9 A What threw us off and maybe threw the
10 town off as well is the PUD 2 zoning map that is
11 available on the website that we use for the
12 land zoning and the PD-2 had that parcel
13 excluded from PD-2. It was highlighted as not
14 being part of a PD-2, so we indicated as the
15 underlying district, which was RD.

16 Q All right. Again, I like to do sort of
17 theoretical plan exercise with you and what I
18 like you to -- let's assume you have a client
19 that owns an undeveloped tract of land on Hilton
20 Head Island located in the RD, the resort
21 development. And he takes 15.1 acres and also
22 let's assume it is in the PD overlay district.
23 The RD district, and correct me if I'm wrong.
24 You probably know this stuff better than I do.
25 The RD district allows development at 16 units

1 per acre for residential, 35 rooms per acre for
2 hotel use and 8,000 square feet for
3 nonresidential development. To your
4 recollection, is that correct?

5 A I think so. I primarily focus on the
6 land use of that parcel in particular Parcel E,
7 which was, like, 1.0688, but I normally work on
8 commercial-type uses.

9 Q So in our theoretical land planning,
10 what we can assume is the sight plan of 10.375
11 acre portion of the property for residential or
12 timeshare use with 198 units and 5,262 square
13 feet that is residential use. That is a
14 residential density of a little over 18 units
15 per acre, but as I understand the PD-2, overlay
16 density requirements, you can have that higher
17 residential density on that particular part of
18 the PD-2 provided you offset it with common open
19 space in another area; is that correct?

20 A Yes, correct.

21 Q Now, the 198 units on the RD district,
22 if you use 16 units per acre requires 12.375
23 acres to support the density. I have a
24 calculator and pad if you want to check these
25 figures, so just let me know if you do. The

1 5,262 square feet of commercial space requires
2 .659 acre if you apply 8,000 square feet per
3 acre which totals 13.034 acres. With me so far?

4 A You're kind of losing me a little bit.

5 Q Tell me what you don't understand.

6 A You're just throwing out numbers. I
7 mean, we look things at the PD-2 -- the whole
8 point of having a PD-2 is to be flexible. I
9 look at it as through the year it has evolved,
10 the PD-2, and the hotel was built. The
11 residential was built over time and where there
12 was commercial, there is no longer commercial,
13 it is residential and where it was indicated
14 commercial along the front, there is actually
15 some residential units. That was the first unit
16 that was built up towards 278.

17 Q And all that was done under the master
18 plan that was in effect at the time?

19 A Correct, but the purpose of the PD-2 is
20 to allow the flexibility to be responsive to the
21 market as time goes on.

22 Q And you heard my description of why
23 someone goes through a PD-2, so --

24 A Correct.

25 Q Was that an accurate description of

1 what the primary use of the PD-2 is?

2 A As far as I can follow you, yes.

3 Q I want to make sure you are clear.

4 A All the different numbers you're
5 throwing out there. All I know is once you
6 highlighted your concern and you submitted an
7 appeal, we looked at the open space on the
8 overall property. Albeit, it was crude and
9 quick, we use the CAT file and an aerial images.
10 All the open space is still well within the
11 original calculations in the original PD-2.

12 Q Did you look at the density?

13 A We did.

14 Q What sort of conclusions did you come
15 to?

16 A It is the flexibility of the PUDs it
17 migrated towards closer to 278 and the
18 commercial units in the back is no longer there.
19 There really is no commercial until you account
20 for the hotel and Parcel E and what is being
21 proposed on that.

22 Q Did you look at the overall density
23 what was developed on the existing parcels and
24 what the average density is available under the
25 RD district is?

1 A You said it was 16 units per acre.

2 Q For residential. 35 for hotels and
3 8,000 for commercial.

4 A Repeat your numbers back to me.

5 Q You want a pad and paper?

6 A I can write it down right here.

7 Q And I've got a copy of the LMO here,
8 but the RD district is 16 units per acre for
9 residential. It allows 35 rooms per acre for
10 hotels, and it allows 8,000 square feet per acre
11 for a nonresidential development.

12 A Okay.

13 Q So to go back to the theoretical sight
14 plan, you take a 10.375 acre portion of the 15.1
15 portion and you developed 198 timeshare units
16 along with 5,262 square feet of commercial use,
17 and I represent to you I got those figures from
18 the town's building permits for the Waterside by
19 Spinnaker project.

20 A 5,000?

21 Q 5,262.

22 A And where was that used?

23 Q There is a building permit for a
24 commercial building for part of that
25 development, so again, I got a calculator here

1 if it will help if you want to use it.

2 MR. STANFORD: Where are we going
3 with this mathematics exercise?

4 MR. WILLIAMS: What I want to try
5 to figure out is whether or not what is
6 currently developed there complies with
7 the current LMO requirements.

8 MR. STANFORD: Okay.

9 MR. WILLIAMS: Let me rephrase it.
10 What is currently developed plus what's
11 proposed. Whether that in aggregate
12 complies with the current LMO.

13 THE WITNESS: If I may speak?

14 BY MR. WILLIAMS:

15 Q Yes.

16 A I'm kind of not following you. I feel
17 like we are in warp zone. We are half in the
18 PUD and half not and it is expired --

19 Q I don't mean to cut you off. Nicole
20 acknowledged in her determination letter that
21 the expiration of the categorical exemption
22 didn't kill the PUD. The PUD is still there.
23 The town code recognizes the Waterside PUD is
24 now a PD-2 overlay district. And because of
25 that, would you not assume that you have to

1 comply with the PD-2 overlay district
2 requirements?

3 A I mean, I'm not a lawyer or expert.

4 Q Like I say, theoretical land planning
5 exercise. We got a 15.1 acre tract. It is in
6 the base RD district also with a PD-2 overlay
7 district.

8 A Okay.

9 Q And there is no question that this
10 property is in a PD-2 overlay, is there, the
11 property that we are dealing with that is
12 subject of the appeal?

13 A Right.

14 Q So to go back where we were, if you
15 need to comply with the PD-2 regulations. You
16 developed a 10.75 --735 with a 198 residential
17 timeshare and 5,262 square feet of commercial
18 space.

19 A Right. And are you saying the 10.735
20 is Parcel F.

21 Q Let's assume it is Parcel F because
22 that one happens to be 10.735 acres.

23 A Got it.

24 Q That is the density on Parcel F. If
25 you were to develop that under the current LMO

1 requirements, could you do that if it wasn't in
2 a PD-2 overlay district?

3 A No.

4 Q Okay. But because it is in a PD-2
5 overlay district --

6 A But what you are not taking into
7 account is the PUD, it is a blanket district.
8 So you take the whole piece of land, which is
9 the 15 acre, which is not the 10.735.

10 Q That is not part of my question. You
11 could not develop under the current code
12 requirements absent the PD-2 overlay, but with
13 the PD-2 overlay, you can do that because it
14 allows you to the build on the density higher
15 but you have to offset with common open space,
16 so that the average density over 15.1 acres
17 doesn't it exceed the RD district. Is that
18 accurate?

19 A Yes.

20 Q Okay. So we use 10.735 acres and I
21 think if you do the math and I'll be happy to
22 give you some time to go through it. If you
23 take the 198 units and the 5,262 square feet of
24 commercial space, without the PD-2, you need
25 13.043 acres to develop that amount of density.

1 MR. STANFORD: Is that the
2 question?

3 BY MR. WILLIAMS:

4 Q Well, I didn't phrase that as a
5 question.

6 Is that correct?

7 A I mean, that is referencing back to --
8 again, I haven't had a chance to go back through
9 all that background on the changes in the PD-2
10 and the changes that went along with the
11 process, so...

12 Q I'm not so sure any sort of the changes
13 are germane.

14 A It was changed when the hotel was built
15 and there was a re-shifting from the allocation
16 dollars.

17 Q Actually, that was before the hotel was
18 built. That facilitated the development of the
19 hotel, so --

20 A So that was a change.

21 Q We are working from the 1987 master
22 plan which was the one referred to the
23 categorical exemption.

24 A Okay.

25 Q So the way I come to these figures that

1 198 units on 10.735 is 18.44 units per acre. A
2 198 units, 16 units per acre, which is a
3 permitted in your base district would require
4 12.375. If you divide 198 by 16, you get
5 12.375. The 5,262 square feet is 8,000 square
6 feet per acre requires 2659, so if you add up
7 what is required under the base, that is the
8 12.375 and the 2659, you get the 13.04 acres.

9 A Okay.

10 Q So that's what you would need to
11 develop those densities under the current code
12 absent the PD-2 overlay. Does that seem
13 correct?

14 A Yes.

15 Q Okay.

16 A As far as I know.

17 Q Okay.

18 A I don't have an ordinance book in front
19 of me.

20 Q So if you actually used 10.735 acres
21 and under the base zoning district, you would
22 have been required to use 13.034 acres, the
23 difference between those is 2.299 acres. So you
24 have to have 2.299 acres of the common open
25 space in the remainder of the PUD in order to do

1 that development. Is that an accurate statement
2 assuming my figures are correct?

3 A I guess what is throwing me off is this
4 has already been developed under a PUD and it
5 was being built by the flexibility and that is
6 how the densities were distributed, and you
7 wouldn't necessarily call that "open space." I
8 guess it would be land.

9 Q Well, the code under the PD-2
10 requirement refers to common open space. You
11 can build the densities higher than what is
12 allowed in underlying base district provided.

13 A Well, the calculations already meets
14 the open space, so I don't know if you are using
15 the right term.

16 Q Right now -- in our theoretical
17 exercises, we are doing this outside of the
18 PD-2. So in our theoretical exercise, the
19 10.735 you would have to have allocated 13.034
20 acres --

21 A Theoretically, you couldn't do that
22 density because you couldn't shift that. You
23 can only shift that in a PD-2.

24 Q Oh, I understand that. We start with a
25 15.1 acre tract and in order to do the

1 development that we're talking about, you would
2 have had to subdivide the property differently,
3 so that you have 13.034 acres tract to the 198
4 units and commercial space.

5 Is that an accurate statement?

6 A Yes.

7 Q At this point, out of the 15.1, we used
8 up 13.034?

9 A Right.

10 Q So your client is happy with that
11 development and it's time to move on to Phase 2
12 of this additional land. I want to build a 91
13 room hotel. The code currently allows 35 rooms
14 per acre for a hotel. 35 rooms, 19 units that
15 is 2.6 acres. 2.6 acres plus the 13.034 acres
16 that you already used up out of 15.1 gives you
17 15.634 acres. So under the current code
18 requirements absent the PD-2 overlay, could you
19 do that development?

20 A No.

21 Q Okay.

22 A As far as I can tell without having the
23 LMO right in front of me, but the intent of the
24 PUD is to allow flexibility, but you're trying
25 to apply the RD to the whole property when it

1 was partially developed under the PUD and now we
2 are asking it for this remaining piece and we
3 applied the RD land use to it and --

4 Q And there is part of the problem. You
5 applied the RD requirement, but you didn't apply
6 the PD-2 requirements. Had you known when you
7 filed the development permit application that
8 the property was in a PD-2 overlay district,
9 would you have gone and taken a look at the
10 requirements of the PD-2 and determine whether
11 or not you could do that not only in compliance
12 with the RD district requirements, but also in
13 compliance with the PD-2 district requirements?

14 A I could do it.

15 Q Well --

16 A When you go back and look at the
17 allocations --

18 Q My question --

19 A -- it's intended to go on this
20 property.

21 Q My question was if you had known about
22 the PD-2 at the time that you filed for the
23 application, would you have gone back and
24 checked the PD-2 requirements?

25 A Yes.

1 Q And I'm reading Section 16-3-106, Sub
2 G, Sub 4, Sub A. "A section or phase of the
3 planned development may be built at a density
4 which is greater than the site-specific density
5 allowed by the underlying base zoning district,
6 provided that any such concentration of density
7 is offset by an area of lower density in another
8 section or phase of the planned development or
9 by an appropriate reservation of common open
10 space elsewhere in the planned development. The
11 average density for the PD-2 Overlay District
12 shall not exceed the maximum density permitted
13 in the base zoning district."

14 I submit to you that when you apply the
15 RD requirements for the density, the base zoning
16 district, to the 15.1 acres that's there and you
17 apply the existing 198 residential, the 5,262
18 square feet of commercial space, 91 hotel rooms,
19 that you are already in excess of what is
20 allowed under the RD district?

21 A I don't see it that way.

22 Q Tell me how you see it.

23 A Because you're penalizing something
24 that has built in the past and applying it to
25 the future.

1 Q Isn't that part and parcel to the PD-2
2 overlay?

3 A Well, the PD-2 have occasions of
4 commercial, residential --

5 Q You're not talking about the PD-2;
6 you're talking about the 1987 master plan?

7 A Right.

8 Q So let's talk about that for a minute.
9 The 1987 master plan was the subject of the 1995
10 categorical exemption?

11 A Correct.

12 Q It expired on March 3rd, 2000?

13 A Then there you go. Then it is an RD
14 piece of property.

15 Q No, because it still sets the
16 boundaries of the property. What the expiration
17 --

18 A I know.

19 Q -- let me finish. With the expiration
20 of the categorical exemption says you can no
21 longer rely on the development as set forth of
22 the densities and uses of the master plan,
23 instead you have to comply with the current code
24 requirements for any parcel that is developed
25 after the expiration of the categorical

1 exemption.

2 A Right.

3 Q So --

4 A And you and I are in agreement with
5 that. Which means that piece is undeveloped
6 thus the underlying district is RD so we treated
7 it and based on RD commercial density and that's
8 the way we looked at that parcel.

9 Q But you did not look at or apply the
10 PD-2 requirements or restrictions for the
11 development of that property?

12 A But that's where I think we were in a
13 warp zone. We are stuck in a PD-2 and we are
14 stuck in the current code.

15 MR. STANFORD: What applies? Is
16 it RD or PD-2 or both in your opinion?

17 THE WITNESS: I believe it is the
18 RD. It is the underlying district.
19 The PD-2 allows flexibility as time
20 goes on which is what this property has
21 done. The PD-2 allows room for
22 flexibility when you are outside the
23 gate and share buffers and open space
24 and things like that. This one even
25 meets its open space criteria on sight,

1 so it can almost stand independently on
2 its property boundaries rather than
3 even relying on the rest of the
4 property to count for open space and
5 impervious permits and calculations as
6 well, so it was intended to stand on
7 its own.

8 MR. STANFORD: Does that take into
9 account the concept master plan that
10 was applied to the overall tract in
11 1987?

12 MR. WILLIAMS: 1987 is when it was
13 last applied and it expired in 2000.

14 THE WITNESS: It has not been
15 found, but we did have a copy of the
16 architect that drew a site plan that
17 wasn't called a PUD plan, but it was a
18 site plan that showed commercial up on
19 that front parcel when that categorical
20 exemption was all established.

21 MR. STANFORD: Understood. I
22 think I understand. But my question to
23 you is doesn't the overall concept
24 master plan that was final and approved
25 in 1987 apply to the development of

1 this smaller tract within that?

2 THE WITNESS: Yes.

3 MR. STANFORD: All right. How can
4 we determine what the applicable use of
5 that property is if we don't have that
6 concept master plan?

7 THE WITNESS: I don't know.

8 MR. STANFORD: Thank you.

9 BY MR. WILLIAMS:

10 Q So is it your testimony that not
11 withstanding the fact that Nicole's
12 determination letter says the property is
13 located in the PD-2 overlay district that the
14 development of part of that property does not
15 have to comply with the PD-2 overlay district
16 requirements?

17 A Based on zoning, not the map. The map
18 is incorrect that's -- that's available on the
19 website, but based on, you know, after you
20 highlighted the question, apparently this parcel
21 is in the PD-2 Waterside district.

22 Q And does that mean that any development
23 of the parcel must not only comply with the base
24 zoning district and also require to comply to
25 the PD-2 overlay district?

1 A Yes, I believe so.

2 MR. STANFORD: The answer was yes?

3 THE WITNESS: Yes.

4 BY MR. WILLIAMS:

5 Q And I think it was contrary when you
6 asked the question, Mr. Stanford.

7 And I think you are right about that.
8 If you have a parcel in the overlay district,
9 regardless -- well, your application says you're
10 in the corridor district, that means you have to
11 comply with the requirements of the corridor
12 overlay district, correct?

13 A Yes.

14 Q If your application had mentioned that
15 it is in the PD-2 overlay district, then it
16 would have been required to comply with the PD-2
17 overlay requirement, correct?

18 A Yes.

19 Q I think that's all the questions I
20 have.

21 MR. STANFORD: Any questions for
22 Mr. Theodore from the board?

23 MR. CUTRER: We've heard about
24 5,262 square feet of nonresidential
25 development.

1 MR. WILLIAMS: Yes.

2 MR. CUTRER: Is that what's
3 proposed for this welcome center.

4 MR. WILLIAMS: No.

5 MR. CUTRER: Or is that already
6 existing?

7 MR. WILLIAMS: That is already
8 existing as part of the Waterside
9 Spinnaker project.

10 MR. CUTRER: What is that
11 nonresidential property?

12 MR. WILLIAMS: I don't know the
13 answer. I'm not familiar with the
14 property. It is a timeshare.

15 MR. CUTRER: So the property
16 currently developed -- let me finish,
17 please -- the property that is
18 currently developed consists of 198
19 residential units, 91 hotel units and
20 5,265 square feet of some kind of
21 nonresidential units?

22 MR. WILLIAMS: Correct, if by the
23 term "the property," you refer to as
24 Parcel F, Parcel D and Parcel A and C
25 on the survey that is on the screen,

1 yes.

2 MR. CUTRER: I don't know what I'm
3 referring to. Can I ask one basic
4 question?

5 MR. WILLIAMS: Yes.

6 MR. CUTRER: What is the -- I
7 understand -- I've read all of this
8 material, some of it highly technical,
9 some of it not. What I don't get is
10 what is the objection here? Why are
11 your clients opposing this development
12 and what is the objection to it.

13 MR. WILLIAMS: Our clients are --
14 own property in this PUD and we want to
15 make sure that it complies with all the
16 town requirements. As Mr. Stanford
17 asked earlier, how can we tell with the
18 1987 master plan if the town doesn't
19 have it. It may show Parcel E as open
20 space. I don't know that. But what I
21 do know is that when I apply the
22 current code requirements of the RD
23 district to what is developed on this
24 15.1 acre, there is no density left for
25 any development or very little density

1 left for any development on Parcel e
2 and certainly not enough to develop a
3 7500 square foot commercial facility.
4 It doesn't comply with the town code.

5 MR. WILSON: There appears there
6 is some murky water here.

7 MR. WILLIAMS: Absolutely not.
8 Tell me what --

9 MR. WILSON: No, no. I'm
10 suggesting -- I like to know what the
11 motivation of your client is other than
12 seeing that the town code is enforced,
13 is there some other motivation?

14 MR. WILLIAMS: I'm not sure that
15 that's germane to the appeal even if
16 the decision that was made is correct
17 or not, but my client owns -- if my
18 client is entitled as the property
19 owner in this PUD to maintain that area
20 as open space, then it has the right to
21 do so and this the process to do that.

22 MR. WILSON: I'd like to know the
23 motivation.

24 MR. STANFORD: We may hear more
25 about that as the hearing proceeds.

1 Any other questions for Mr.
2 Theodore?

3 MR. CUTRER: I have one.

4 MR. STANFORD: Yes.

5 EXAMINATION

6 BY MR. CUTRER:

7 Q To use Mr. Williams's calculations,
8 which I assume the math is correct, there are
9 198 residential units at 16 per acre permitted
10 under the LMO that requires 12.375 acres to
11 develop. Did the 198 units actually take 12.375
12 acres to develop?

13 A No. I mean, there is parcel
14 boundaries, but Parcel F is all contained in
15 that boundary.

16 Q If the LMO allows a maximum density per
17 acre and I develop a property with less than
18 that density, does that unused density or unused
19 acreage get credited some other way like open
20 space?

21 A If it's entitled to look an RD and you
22 don't use all of it.

23 Q Looking at the math that Mr. Williams
24 presented --

25 A Yeah.

1 Q -- 198 units of residential and 16 per
2 acre and 12.375 acres required, nonresidential
3 5,262 square feet permitted 8,000 square feet
4 per acre that gets you .658 acres --

5 A Right.

6 Q And the hotel is 91 rooms, 35 units per
7 acre, 2.6 acres all that added up to 15.633
8 acres on a 15.1 acre site. That's taking the
9 maximum allowable density for each of these
10 three categories of use and applying them
11 mathematically. I guess my question is was the
12 property actually developed at less density than
13 what this calculation would show? In other
14 words, how many acres were really used in the
15 residential property? How many acres were
16 really used in the hotel? And how many acres
17 were really used in the nonresidential? You may
18 not know the answer to that.

19 MR. WILLIAMS: I can answer that
20 question for you Mr. Cutrer. The 5,262
21 commercial and the 198 units are
22 developed on what is shown here as
23 Parcel F, 10.735 acres. The 91 hotel
24 rooms are developed on what is s here
25 at Parcel A and C, 2.6 acres, and you

1 then have the roadway right-of-way of
2 Waterside Drive, which is Parcel D,
3 which is .697 acres and then you have
4 the undeveloped tract of Parcel E.

5 When you apply -- and one of the
6 beauties of the PD-2 overlay district
7 is it allows you to do that. It allows
8 you to develop the 10.375 acres at a
9 density greater than what the RD
10 allows, but at the same time you need
11 to offset that for reserving more
12 common space than you would be
13 otherwise required to do in the RD
14 district so that the end result is that
15 the average density over the entire
16 15.1 acre doesn't exceed the aggregate
17 density to each of the individual
18 parcels that are available in the RD
19 district.

20 Does that make sense?

21 THE WITNESS: If we're going to
22 get technical with that, wouldn't you
23 say that hotel has been vacated for a
24 whole number of years. It has been
25 basically moth balls. The stairs have

1 been taken off. It has been boarded
2 up. It has been trying to avoid
3 condemnation because it is unsafe. I'm
4 surprised --

5 MR. WILLIAMS: It is not unsafe.
6 That is documented in the town. Excuse
7 me. I need that on the record.

8 THE WITNESS: It is a vacant. It
9 is an eyesore. I'm surprised it never
10 went to the design review board to
11 approve the boarding up of that
12 building. I'm sure Spinnaker folks
13 love driving by there all the time and
14 having the tape around it and the
15 barricades and the painted plywood
16 boards and all that stuff. But my
17 question is I think there is duration
18 of time that is more than 18 months
19 that this building hasn't been utilized
20 as it's intended and it's not being
21 maintained.

22 MR. STANFORD: That is not our
23 jurisdiction.

24 THE WITNESS: Well, what I'm
25 saying is, you know, would that be

1 considered a vacant use of land where
2 it is right now counting that as a
3 hotel?

4 MR. STANFORD: It is developed.
5 There are structures there.

6 THE WITNESS: Okay.

7 MR. STANFORD: And that's all I
8 can say about that.

9 Now, other questions for Mr.
10 Theodore? I would like to take a break
11 here in a moment.

12 MR. JOHNSON: I have a question.

13 MR. STANFORD: Yes.

14 EXAMINATION

15 BY MR. JOHNSON:

16 Q When they developed this 198
17 residential, would they have not required at
18 that time to incorporate the open space into
19 that design, or did they say oh, we will get to
20 that someday with these other parcels?

21 A The intent of the PD-2 is to spread
22 that out. And that becomes part of the lagoons,
23 there is marshes, there is recreation area, all
24 that counts as open space criteria. I was
25 looking at the 1987 approved modified PD-2 plan

1 said there was office was 21,913 square feet,
2 1.4 acres, retail was 3 acres at 36,279 square
3 feet, hotel was 94 rooms, open space was 1.3
4 acres and residential was 200 DUs on 7.6 acres
5 as what I can recall in here. So as part of the
6 PD-2 when this was being developed, it was
7 really under density. They really didn't do any
8 of the commercial or --

9 MR. TAYLOR: Mr. Chairman, I
10 object to that because we don't have
11 the document that he is testifying to
12 us in front of us.

13 MR. WILLIAMS: Right. And again I
14 think it is a factually inaccurate
15 statement. Those densities are far in
16 excess of what the code allowed at that
17 time, but they are approved and there
18 again is the reason for the categorical
19 exemption. Categorical exemption
20 letter in 1995 said property owners --
21 yeah -- we will let you develop what
22 that master plan says, notwithstanding
23 the fact that it is far in excess what
24 our current code requires or allows,
25 but you have to do so in five years.

1 That is 16 years after the permit was
2 issued. Do it or don't.

3 MR. STANFORD: MR. Johnson, did
4 that answer your question?

5 MR. JOHNSON: Somewhat.

6 MR. WILLIAMS: Well, please tell
7 me what you still have unclear in your
8 mind.

9 MR. JOHNSON: I just question
10 whether there is open space on this 198
11 residential area?

12 MR. WILLIAMS: There is clearly
13 some of the open space there. But the
14 PD-2 requirements under the current
15 code requires to common open space and
16 the open space that is back there in
17 Spinnaker that is not common. That is
18 Spinnaker's open space.

19 THE WITNESS: But that is part of
20 the PUD.

21 MR. WILLIAMS: Absolutely. No
22 question about that. And it was
23 developed under that code. The current
24 code requirements though refer to
25 common open space.

1 MR. STANFORD: Mr. Fingerhut had a
2 question.

3 EXAMINATION

4 BY MR. FINGERHUT:

5 Q When you made the application, I think
6 you did, pertaining to Tract D, that you were
7 not aware this was a PD-2 overlay district; is
8 that correct?

9 A That is correct.

10 Q Does that fact materially with that
11 fact materially change your application with the
12 town?

13 A We would have looked at the open spaces
14 and the buffers because it then looks at the
15 property as a whole, but we also rely on the
16 town to provide us with the historical
17 background on the PD-2 information and, you
18 know, apparently that '87 plan or whatever is
19 missing.

20 Q So one follow up. So without that
21 analysis, can your application be viewed as
22 valid if that material fact was not presented?

23 A I don't know. That is the town.

24 Q You're right.

25 MR. STANFORD: Did you have

1 another brief question?

2 MR. CUTRER: No.

3 MR. WILLIAMS: If I may, I have a
4 couple questions. First, Mr. Theodore,
5 this refers to open space. The issue
6 with the PD-2 also involves an
7 investigation of the average density
8 over the entire 15.1 acres and that is
9 the main crux of the issue there. If
10 the categorical exemption expired and
11 they have to comply with current code
12 requirements, it is simple math. What
13 is there already exceeds the permitted
14 density for the average of the 15.1
15 acres under the RD district.

16 MR. STANFORD: We can move on.
17 Anything else for Mr. Theodore? He
18 probably would like to get back to his
19 office. You're welcome to stay with
20 us. You're excused, Mr. Theodore.

21 That being said, we are going to
22 reconvene at 4:30 and try to keep it a
23 little brief.

24 (Whereupon, a short break was
25 taken at 4:30 p.m..)

1 MR. STANFORD: Mr. Williams, Mr.
2 Taylor, are you ready to proceed?
3 Succinctly I hope.

4 MR. WILLIAMS: If I may before we
5 move on, does anybody have -- any
6 member of the board have any question
7 about what has been presented so far,
8 please let us know. We rather make
9 sure that each step going forward,
10 you're clear of what your understanding
11 is of this situation. So does anyone
12 have any questions? Let's get them out
13 of the way now. That was a lengthy
14 conversation with Mr. Theodore.

15 MR. CUTRER: I've got one. You
16 stated, Mr. Williams, that any common
17 area related to the Spinnaker resort
18 wouldn't apply across the board because
19 it was not common open space.

20 MR. WILLIAMS: I think that is
21 accurate quote.

22 MR. CUTRER: I have two questions.
23 One, is there actually in the code a
24 legal definition of common open space
25 and it seems to me that we're applying

1 this word "common" one way when it
2 suits us and one when it doesn't. You
3 would argue -- you're arguing that any
4 open space associated with Spinnaker
5 doesn't apply to the whole parcel
6 because it is not common open space and
7 yet we're throwing in the hotel to come
8 up with the common parcel when trying
9 to compute the density.

10 MR. WILLIAMS: I know Mr. Theodore
11 was focusing on open space
12 substantially. That's really not what
13 we see as the determining factor. It
14 is the density issue, but the code does
15 have a common open space and maybe I
16 need to correct myself. Let me just
17 read it to your. "Any part of a
18 development site that is not utilized
19 for single family lots, right-of-way
20 streets, commercial structures,
21 multi-family structures and parking and
22 loading areas, the following are
23 included in the definition of common
24 open space; golf courses, tennis
25 courses, swimming pools, pedestrian

1 bicycle paths, equestrian trails,
2 playgrounds, picnic areas, horse
3 stables, places for people to gather
4 and passive recreation areas."

5 MR. CUTRER: So it seems like the
6 last few items are for places for
7 people to gather and passive recreation
8 areas would have some applicability
9 here.

10 MR. WILLIAMS: Possibly. When I
11 did make my initial inquiries to the
12 town about whether or not this complied
13 with the codes, I did ask about the
14 open space, but the further I looked at
15 it, the clearer it became to me that
16 the real determining issue is whether
17 or not there is sufficient density on
18 the 15.1 acres to support the further
19 development of that property and still
20 comply with the average density under
21 the underlying base zoning district,
22 which is the RD district.

23 MR. STANFORD: Mr. Taylor, please
24 proceed.

25 MR. TAYLOR: I call Charlie

1 Halterman, Your Honor, for a brief --

2 Mr. Chairman, for a brief question.

3 MR. STANFORD: Okay.

4 State your name, please, sir.

5 THE WITNESS: Charlie Halterman.

6 CHARLIE HALTERMAN,
7 a witness herein, having been duly sworn,
8 testified upon his oath as follows:

9 THE WITNESS: I do.

10 EXAMINATION

11 BY MR. TAYLOR:

12 Q Mr. Halterman, where are do live, sir?

13 A Hilton Head Island, Sea Pines Golf
14 Course.

15 Q What do you do for a living?

16 A I'm the construction manager for
17 Spinnaker and owner representative.

18 Q How long have you been employed with
19 Spinnaker Resorts?

20 A Fourteen years, June of 2004.

21 Q Mr. Halterman, what specific level of
22 administrative capacity do you hold? Are you
23 like a vice president of Spinnaker or anything
24 like that?

25 A No. Just construction manager and

1 handle all his application permits.

2 Q We talk about Spinnaker. Let me ask
3 you this: What is SDC Properties, Inc.?

4 A It's SCD Properties. That is the
5 parent company for it.

6 Q All right. Are you familiar with the
7 property that we have been discussing today that
8 we are calling the Beachwalk area or Parcel E?

9 A Yes, sir.

10 Q The 15 acres that we are talking about
11 here?

12 A Yes, sir.

13 Q Mr. Halterman, when Mr. Williams
14 earlier identified the building permits, 5,262
15 square feet of commercial space that is use in
16 the Spinnaker Resort, what is that being used
17 for?

18 A It is an ancillary support building.
19 It is pool equipment. It is used for
20 activities. It is used -- there is a fitness
21 center and it is a check-in facility for the
22 resort.

23 Q Okay.

24 A There's also sales and where they run
25 tours for people.

1 Q All right. Mr. Halterman, the
2 gentleman sitting in the back row, the good
3 looking one without any hair on top of his head,
4 that is Barry Johnson, correct?

5 A Yes, sir.

6 Q That is the attorney for Spinnaker or
7 SCD Properties?

8 A He is the attorney for this. I'm not
9 sure if he handles everything. That would be a
10 question for management. I'm not part of
11 management.

12 Q Have you ever worked for him before
13 today on this appeal?

14 A No, I haven't.

15 Q Okay. Have you seen in preparation for
16 this hearing or any other time, the exhibit that
17 has been termed the "categorical exemption
18 letter" that was dated March 3rd, 1995?

19 A Yes, sir, I was given a copy after the
20 appeal.

21 Q Have you reviewed it?

22 A Yes, sir.

23 Q You see -- did you notice that Mr.
24 Johnson was indicated as the distributee on that
25 letter or someone that was copied at that point

1 in time?

2 A Yes, sir, I did.

3 (Whereupon, Exhibit
4 Letter B was marked for
5 identification.)

6 BY MR. TAYLOR:

7 Q Let me hand you what I identified as
8 Exhibit B. This is purports to be the deed of
9 the property that we are discussing here and ask
10 you to look over it and tell me whether or not
11 it appears to you that this was the purchase of
12 SCD Properties of the piece of property for the
13 15 acres that we're here talking about. Parcel
14 E?

15 A This would not be the 15 --

16 Q This is just Parcel E. I misspoke.
17 That is that correct.

18 A Yes, sir.

19 Q And it is the parcel that SCD or
20 Spinnaker is now asking the town to okay the
21 additional construction of commercial space on,
22 correct?

23 A Yes, sir.

24 Q This deed is dated according to your
25 reading of it July 14th, 1999; is that correct?

1 A Yes, sir.

2 Q All right. And the letter that we
3 spoke of earlier marked as Exhibit D, which is
4 the categorical exemption letter, has a date of
5 expiration of March 3rd, 2000, correct?

6 A Yes, sir.

7 Q Therefore, it is right to say and to
8 acknowledge that SCD Properties took ownership
9 property during the time that the categorical
10 exemption letter was in effect and open for
11 business, correct?

12 A Yes, sir.

13 Q Did to your knowledge Spinnaker or SDC
14 take any action whatsoever to move forward with
15 getting a development permit or otherwise
16 develop Parcel E during the categorical
17 exemption period that expired March 2000?

18 A I was not employed by the company.

19 Q Okay. To your knowledge as you know
20 now as your job, did they take any action to
21 move forward with the development permit or
22 otherwise develop land during the categorical
23 exemption period?

24 A Not that I know of.

25 Q That's all I have.

EXAMINATION

BY MR. STANFORD:

Q It was not your responsibility to manage the development of that property; is that correct?

A No, sir.

Q All right. You wouldn't have knowledge of whether it is was true or not?

A It was purchased after he purchased the other piece.

MR. STANFORD: Any questions from the town?

Any questions from the board?

Thank you. You're excused.

MR. WILLIAMS: We call Nicole Dixon.

MR. CUTRER: I had a question.

EXAMINATION

BY MR. CUTRER:

Q You stated that the 5,262 square foot building is used for a storage facility, check-in, fitness, sales center and some other things.

A It supports basically recreation and our big outdoor pool.

1 Q The building that's being proposed to
2 be built, what would the use of the new building
3 be?

4 A It would be a welcome center and an
5 also a sales floor and tour building. Our
6 building is not big enough. We want to expand
7 our health center and activities.

8 Q If the new building was built in, would
9 this 5200 square foot building stay?

10 A Yes, sir.

11 Q Okay. Thank you.

12 MR. STANFORD: I believe they are
13 calling you as a witness to be sworn
14 in.

15 Could you state your name.

16 THE WITNESS: Nicole Dixon.

17 NICOLE DIXON,
18 a witness herein, having been duly sworn,
19 testified upon his oath as follows:

20 THE WITNESS: Yes, sir.

21 MR. STANFORD: Thank you.

22 EXAMINATION

23 BY MR. WILLIAMS:

24 Q Good afternoon, Nicole. I appreciate
25 you handing in with us. State your name and

1 your occupation, please.

2 A Nicole Dixon, development review
3 administrator.

4 Q In that capacity, you typically review
5 development permit applications for the town
6 under its LMO authority and Teri Lewis who is
7 the LMO official?

8 A Yes.

9 Q And you had the opportunity to review
10 the development permit application submitted by
11 SCD Properties for designated Parcel E on the
12 subdivision plat; is that correct?

13 A Yes.

14 Q When you reviewed the development plan
15 and the application, did you know that the
16 property was subject to the 1995 categorical
17 exemption letter from Tom Brechko and Robert
18 Graves?

19 A When I first received the application,
20 I did not and you brought it to my attention.

21 Q My first question is the categorical
22 exemption letter. Were you familiar with that
23 as you reviewed the development permit
24 application?

25 A Not until you brought it to my

1 attention. I didn't approve the DPR until I
2 researched all that.

3 Q Were you aware at the time that you
4 reviewed and processed the application that it
5 was in the PD-2 overlay district?

6 A After you brought it to my attention.

7 Q Even after you were aware it was a PD-2
8 district and after you were aware of the
9 categorical exemption letter on its face said it
10 expired in 2000?

11 A I did all of my research and determined
12 as you see in my staff determination that the
13 purposed DPR was not in conflict with the PD-2.

14 Q And when you reviewed that, did you
15 look at the overall density of the 15.1 acres on
16 the entire PD-2 overlay district and determined
17 whether or not that exceeded the maximum density
18 in the RD district?

19 A I looked at everything that pertained
20 to the PD-2; density, open space. The PD-2
21 developed under a different LMO. So looking at
22 what is developed out there now and looking at
23 the density, no, I did not see it was in
24 conformance with that. The RD district -- I
25 checked the conformance of the subject property

1 against the RD and it does meet that.

2 Q When you say that, you're talking about
3 just Parcel E; is that correct?

4 A Correct.

5 Q So you did not check the overall
6 density on the 15.1 acres to see if the
7 additional development of the Parcel E caused
8 the overall average density to exceed what is
9 permitted in the underlying RD district; is that
10 correct?

11 A That is correct because staff does not
12 thing that is the intent of how you are
13 interpreting the LMO.

14 Q Okay.

15 A When the PD-2 was -- when the
16 conceptual plan was approved --

17 Q When you say "conceptual," can you give
18 us the date?

19 A 1984 and then reviewed 1987.

20 Q The one that we can't find?

21 A We have May 6th of 1987.

22 Q Isn't it dated February?

23 A The second page of that shows this
24 plan. There is a revised date of May 4th. Let
25 me think. May 4th, 1987 is the most recent.

1 Q Which was prior to the planning
2 commission's review and approval of the
3 amendment of the master plan, correct?

4 A Two days prior.

5 Q Correct. So --

6 A There was nothing in the planning
7 revision that indicates that the layout was
8 changed.

9 Q But you don't have access to -- you
10 didn't have an opportunity to review the
11 approved 1987 master plan?

12 A I did not.

13 Q Okay. You heard our discussion with
14 Mr. Theodore about our theoretical plan process.

15 A You're not going to ask me to do all of
16 that.

17 Q On Pages 13 and 14 of our narrative of
18 the application, we basically go through that
19 entire process. Did you have an opportunity to
20 review those figures?

21 A I did.

22 Q Are they accurate?

23 A If you're looking at as you're
24 interpreting it, yes. The way I see it is that
25 when the PD-2 was originally approved, it was

1 based on a different LMO and right now when the
2 DPR was submitted for the welcome center, I
3 don't think that the PD-2 should have to comply.
4 We are not changing the PD-2, so the density has
5 to comply with the current resort development
6 density standards. Most of the PD-2 Waterside
7 exists today, what they're proposing does comply
8 with that. That is what the LMO requires, any
9 future development has to comply with the
10 current LMO.

11 Q Okay. Let me ask you this: Going
12 through the process that we went through with
13 Todd, if you had 15.1 acre tract and you have
14 198 residential units by Spinnaker and you had
15 the 52 whatever the figure is commercial and the
16 91 hotel units, could you approve that
17 development under a PD-2 under the current code
18 requirements?

19 A If you're coming in starting from
20 scratch today then that would be brought to the
21 planning commission and that flexibility would
22 be look at that time.

23 Q I'm not sure. Why would the planning
24 commission be involved?

25 A Well, the PD-2 has to go for rezoning.

1 Q You're talking about --

2 A You're starting from scratch, yeah I
3 would apply the LMO density standards.

4 Q Okay. Let me be more clear. The
5 process that we went through with Mr. Theodore
6 assumed that there was an existing PD-2 overlay
7 on the 15.1 acres and it was undeveloped.

8 A Okay.

9 Q So no need for a rezoning and change in
10 the PD-2. Could you develop that property with
11 the densities that are already there plus the
12 density for Parcel E under the current code
13 requirements?

14 A I think so because they were not
15 exceeded what was original intended and what is
16 in the LMO.

17 Q I'm not being very clear.

18 A We obviously disagree. That's what we
19 here for today.

20 Q A new PD-2 -- okay -- a new PD-2
21 overlay, not the 1987 not the 1984, a new PD-2
22 overlay under current code requirements, could
23 you develop those?

24 A But we're not talking about that.

25 Q This is a theoretical. You're a

1 planner. You would be the one to review this
2 application. I've got a 15.1 acre tract. It's
3 in a RD base zoning district. I developed 198
4 residential units. I developed the commercial
5 space. I developed a hotel -- I guess the
6 question is could I develop the hotel and come
7 in for Parcel E, could you do that starting
8 fresh under the current code requirements?

9 A Under the current code requirements,
10 yes.

11 MR. STANFORD: Let's move it
12 along, Mr. Williams.

13 BY MR. WILLIAMS:

14 Q In your determination letter, you
15 acknowledge the categorical exemption expired in
16 -- on March 3rd of 2000, correct?

17 A (Nods head.)

18 Q Okay.

19 MR. STANFORD: Answer is yes?

20 THE WITNESS: Yes, sir.

21 BY MR. WILLIAMS:

22 Q I'm reading from the second page of
23 your letter. "The categorical exemption
24 certificate was valid for five years and expired
25 March 3, 2000. After the expiration of the

1 certificate, any future developments of the
2 property shall be subject to the provisions of
3 the LMO in effect at that time."

4 A Correct.

5 Q "They must conform to the standards of
6 the current LMO."

7 A Any future developments. It doesn't
8 mean go back and look at everything that is
9 there.

10 Q But isn't that what the PD-2
11 requirements call for? That you can't exceed --

12 A Staff doesn't agree with that. That's
13 why we're here.

14 Q Let me put it this way? They had their
15 cake with the PD-2 before and now they want to
16 eat it. They already developed more than what's
17 allowed in the current code requirements and not
18 withstanding the expiration of the categorical
19 exemption letter, it is still your position that
20 they can rely on the densities and uses of the
21 1987 master plan?

22 A They didn't develop the property to the
23 capacity that was allowed under the PD-2. They
24 didn't exceed what was allowed at that time.
25 They didn't fully develop it.

1 Q Okay. Let me ask you this: Does the
2 PD-2 overlay provide any densities at all or any
3 sort of uses for other than what's in the base
4 zoning district?

5 A Are you talking about this PD-2?

6 Q The PD-2 requirements in the code now,
7 does it provide any sort of densities other than
8 what's in the based underlying zoning district?

9 A I'm not aware of that. I would have to
10 go back and look. It's just to be flexible with
11 buffers and --

12 Q Just now when you refer to the PD-2 and
13 correct me if I'm wrong, is the 1987 master
14 plan; is that correct?

15 A I'm not sure what you're asking.

16 Q When you said that you developed under
17 the old PD-2 and the current code requirements,
18 did you mean --

19 A The old master plan.

20 Q Okay. So what you're saying is town
21 staff's position notwithstanding the
22 categorical exemption, the property owner still
23 has a right to rely on the densities and uses
24 provided for the 1987 master plan not
25 withstanding the fact that they do not comply

1 with current code requirements?

2 A I'm saying that regardless of the fact
3 that the developer did not develop fully to
4 their potential at that time, yes, the
5 categorical exemption did expire, that's what I
6 reviewed it under the current RD district for
7 that property and it does not exceed the open
8 space. It meet all LMO requirements. I do not
9 believe that just because the categorical
10 exemption expired, the vacant areas of that
11 property are no longer to be built on. I don't
12 agree with that.

13 Q Have you worked on any other
14 applications that involve the categorical
15 exemption?

16 A No, I have not.

17 Q And you weren't here at the time?

18 A I was not.

19 Q And you hear Curtis Coltrane's
20 testimony earlier about the process that led up
21 to the categorical exemption --

22 A I do.

23 Q -- and reason it was implemented?

24 A Mm-hmm.

25 Q Do you have any reason to doubt that

1 Curtis accurately described what the process
2 was, what the intent was and how the categorical
3 exemption process came about?

4 A No.

5 MR. STANFORD: You are going to
6 have to cut this off. This facility
7 closes in 60 minutes, so I want to be
8 done well before that time.

9 BY MR. WILLIAMS:

10 Q Just to be clear when you reviewed the
11 development review application, you did not take
12 into account whether or not the development of
13 Parcel E would call the overall density to PD-2
14 to exceed what is allowed currently under the RD
15 regulations?

16 A I do not interpret the LMO that way.

17 Q Yes or no? Yes, I did or no, I didn't?
18 If you would just answer.

19 MR. STANFORD: I think she said
20 no.

21 BY MR. WILLIAMS:

22 Q The answer is no?

23 A I did not look at the density as far as
24 all the uses that exist out there now and
25 calculate as a whole.

1 MR. WILLIAMS: That's all we have.

2 EXAMINATION

3 BY MR. STANFORD:

4 Q Nicole, what troubles me in this whole
5 case is the reliance on the concept master plan
6 from 1987, which is missing. How can you make a
7 determination of the applicable uses under this
8 application if you don't have the concept master
9 plan? It's not your fault that it's not there.

10 A I understand.

11 Q I don't understand how you can make the
12 decision to grant the application.

13 A I spent weeks reading through all the
14 documentation that went along with the
15 categorical exemption, the conditional use
16 permit, the special exception, the original
17 master plan documentation. I spent way too many
18 hours in trying to understand it and there was
19 nothing in that documentation that indicated
20 that that parcel was going to be dedicated to
21 open space. There was a revision in 1987. I
22 have this plan that you see up on the screen
23 that was dated May 4th before the planning
24 commission approved it. What they did is they
25 changed the boundary to allow for a better

1 design of the hotel property and reconfigure
2 some of the parking areas and then they
3 permitted an increase in the hotel rooms from 50
4 to 94 and a reduction -- a corresponding
5 reduction of residential to retail space. That
6 is all it says. There was nothing in the
7 documentation that indicated that lot should be
8 designated as open space. All along it said it
9 was commercial retail. The only notation about
10 the open space says that there had to be 1.3
11 acres of open space, but it could be spread out
12 the PD-2.

13 Q I understand.

14 A I got documentation from Mr. Theodore
15 that the open space for the entire PD-2 was well
16 over 1.3 acres. I think it averaged nine acres,
17 so reading through all of that, and yeah, I
18 don't have the conceptual plan referred to in
19 the letter dated May 7th, 1987. I do have the
20 one dated May 4th and it looks very close to the
21 original one from 1984. I did not find any
22 reason to deny the application.

23 Q I acknowledge that you've made a very
24 strong, thorough investigation of the records,
25 and we appreciate that and I believe that this

1 concept master plan probably could not be found
2 for whatever reason. It troubles me greatly
3 that we are asked to approve an application
4 based upon the original concept master plan
5 modified in 1987, that master plan, and we don't
6 have the core document. We have to assume what
7 was there and you've done everything you could
8 to make that assumption and I'm not criticizing
9 you.

10 But it just troubles me that we are
11 asked to -- to essentially support an
12 application here when the core document is
13 missing. So I'll get off my speech horse about
14 that. To me that is the thing that is most
15 troubling in this application.

16 EXAMINATION

17 BY MR. FINGERHUT:

18 Q Nicole, when you were doing your
19 analysis, did you apply the LMO in effect at the
20 time of the master plan or the current LMO?

21 A When I was reviewing the DPR?

22 Q Yes.

23 A I reviewed what was in the PD-2
24 documents and then I also made sure it met the
25 current LMO. In that letter it stated any

1 future development has to comply with the
2 current LMO, and this was considered future
3 development but I also didn't exceed what was on
4 the original concept plan.

5 Q Did you do the analysis of units and
6 square footage and units and acreage that we've
7 been talking about here, did you do a separate
8 analysis to make sure --

9 A No. What I did was I looked at the
10 table that was in the master plan that allowed
11 for -- it was 23,360 square feet of retail --

12 Q Table in which master plan?

13 A I was looking at the table that was
14 approved by the planning commission with the May
15 6, 1987 date.

16 Q So not this one?

17 A The table was in the documentation. It
18 was just the actual plan was not in there. So
19 the table indicates how much square footage for
20 commercial, retail and residential and open
21 space. So when I did my review, there was no
22 retail out there currently, so because the
23 proposal does not exceed that or well below that
24 amount, I felt it was compliant with that and
25 because it meets the current LMO requirements, I

1 did not see a reason to deny the application.

2 Q Okay. But just to -- I hate to repeat
3 the question, but did you do the analysis that
4 was discussed earlier, in other words, to see if
5 there was enough acreage not only what was there
6 and proposed to be there?

7 A You mean the math that Chet was talking
8 about?

9 Q Yes.

10 A Adding what was out there and --

11 Q Sure.

12 A No, I did not. I looked up what was on
13 the original master plan and what was allowed in
14 the current LMO and it meets both of those, so
15 that's what I based my approval on.

16 MR. STANFORD: Other questions?

17 EXAMINATION

18 BY MR. CUTRER:

19 Q If I understand what you're saying, in
20 the minutes of the planning commission was a
21 table --

22 A Yes.

23 Q -- that addressed the development of
24 this property on a square footage basis --

25 A Yes, it does.

1 Q -- rather than a per units basis like
2 the other calculations we're doing?

3 A I'm not sure what attachment it is. It
4 was in your packet.

5 Q Honey, there was a thousand pages in
6 there. I looked at every one of them, but I
7 don't remember many of them. Let me ask my
8 question again.

9 A Okay.

10 Q In the minutes of the planning
11 commission, May whatever, it was 1987, that
12 approved the master plan that we can't find the
13 drawing of, but in the minutes of the planning
14 commission is this table --

15 A Yes, sir.

16 Q -- which limits development or
17 specifies what can be developed on a per square
18 footage basis?

19 A Correct.

20 Q Using that and the current LMO, you've
21 made the determination that this development is
22 permitted?

23 A Correct.

24 Q Thank you.

25 EXAMINATION

1 BY MR. STANFORD:

2 Q Do we have in this voluminous record,
3 the approval action taken by the planning
4 commission relating to the 1987 master concept
5 plan? Do we have those minutes?

6 A Whatever I found is in your packet, so
7 everything that I found is in there and this
8 document is in there and it lists the town PUD,
9 what was approved and what was proposed with
10 that revision and it lists the acreage of the
11 different uses, the square footage and it does
12 for the same proposed and the reduction of the
13 commercial office, a reduction of the commercial
14 retail, the increase of the hotel rooms, the
15 addition of the common open space requirement
16 and the reduction of the residential.

17 And there's a note below that says that
18 the total area for the proposed 94 hotel rooms
19 has the special exception within the P -- or RD
20 zoning district is 3.9 acres and the hotel was
21 not to be developed on the 3.9 acre site like it
22 was on the table. The acreage not utilized in
23 the hotel would be set off as common open space
24 not to be used for any other developments. And
25 there was documentation that I found there was a

1 letter from, I believe, it was Tom Brechko or
2 somewhere in that documentation that said that
3 open space could be spread out throughout the
4 PD-2.

5 And I asked Todd to come up with some
6 calculation of how much open space exists out
7 there. There was well over nine acres which is
8 well over the 1.3 acres minimum required. And
9 again, I didn't find any documentation or
10 anything that could lead me to deny the
11 application, which is why I came up with my
12 determination and that's why we're here.

13 MR. STANFORD: Other questions?

14 BY MR. STANFORD:

15 Q The table you are referring to is not a
16 concept master plan, is it?

17 A No, it is a table -- I don't know
18 because I don't have a copy of the concept plan
19 if it was actually on there, but that table was
20 on the original 1984 plan. They have that
21 paperwork on there and this revised those
22 numbers, but I don't know if it was actually on
23 there, but it makes reference to this table.

24 EXAMINATION

25 BY MR. CUTRER:

1 Q And the minutes of the '87 meeting do
2 also?

3 A Yes, this is where I found this and it
4 is in your packet. What page, I have no idea.

5 MR. JOHNSON: 1732.

6 THE WITNESS: 1732.

7 Is that where the page is in that
8 documentation is?

9 MR. STANFORD: Other questions?

10 EXAMINATION

11 BY MS. LAUDERMILCH:

12 Q I have a question and it's kind of this
13 whole process again. But if we had that master
14 plan document, however the categorical exemption
15 has expired, now as you look at a new
16 application, most of -- well, I guess all, but
17 the existing improvements on the various parcels
18 within the PUD were built under different LMO
19 requirements. So now that there is an
20 application submitted for a specific undeveloped
21 parcel, do you need to take into account the
22 entire PUD under the current LMO or do you just
23 look at that parcel?

24 A Staff believes that you look at that
25 parcel. The original concept plan was based

1 under a different LMO, and so to go back now
2 this PD-2 doesn't meet the LMO, well, obviously
3 it doesn't. It is a PD-2. The LMO says any
4 further development has to meet the current LMO
5 standards and that is what the applicant did.
6 It meets all current LMO standards. I could not
7 find a reason to deny the application.

8 MR. STANFORD: Thank you very
9 much.

10 MR. WILLIAMS: If I could, I like
11 to clarify one thing, Mr. Stanford.

12 EXAMINATION

13 BY MR. WILLIAMS:

14 Q Nicole, the document that is the
15 concept master plan that is up there, it doesn't
16 have density or use charts like the 1984 plan,
17 does it?

18 A No, it does not.

19 Q So it is not sufficient for determining
20 what the permitted or even what the purposed
21 density use is for the 15.1 acres at the time it
22 was done as it was presented. Is that an
23 accurate statement?

24 A Correct, and this plan, I believe, I
25 actually found in the DPR documents. It wasn't

1 even in the PD-2 documents.

2 Q One other question. Are the
3 LMO Section 16-3-106, Sub G, which is the
4 provisions for the plan development overlay PD-2
5 district, is that part of the current LMO
6 requirements?

7 A Yes.

8 Q Thank you.

9 MR. STANFORD: Thank you. Are you
10 finished?

11 MR. WILLIAMS: That's all.

12 MR. STANFORD: Nicole, you're
13 excused.

14 Is there any further presentation
15 from the town?

16 MS. DIXON: I think I addressed
17 everything I was going to say. No, I
18 can't think of anything I would like to
19 add.

20 MR. STANFORD: I know that we have
21 Mr. Johnson, who is the attorney for
22 the owner of this property. Mr.
23 Williams, Mr. Taylor represent the
24 condominium association that is
25 affiliated with the property.

1 Mr. Johnson, do you have anything
2 to present in conjunction with this?

3 MR. JOHNSON: Just a little bit
4 briefly, sir.

5 MR. STANFORD: Thank you.

6 MR. JOHNSON: For the record, I'm
7 Barry Johnson, local attorney. I
8 didn't come prepared to make a
9 presentation today because of the rules
10 of the board, which I respect.

11 MR. STANFORD: Thank you, sir.

12 MR. JOHNSON: But I thank you for
13 the opportunity to say just a couple
14 things. The planning commission
15 minutes that were alluded to a few
16 minutes ago and because these do not
17 have Bates stamps, I don't know how to
18 identify them to you, but in your
19 materials we have the Town of Hilton
20 Head Island Planning Commission May 6,
21 1987, meeting that's either one or two
22 days after the date of the drawing that
23 is on the screen and in these minutes
24 there is approval of the plan that was
25 discussed with modifications and those

1 modifications appear in some tables
2 that are attached to those minutes in
3 these plans, and I believe that they
4 significantly re-enforce what Ms. Dixon
5 has said.

6 I think what Mr. Theodore has
7 calculated and everybody has talked
8 about -- I don't know if it's
9 specifically in evidence, but I think
10 it is part of the submission Ms. Dixon
11 made to you, but there is approximately
12 nine or nine and a half acres of open
13 space on this property according to Mr.
14 Theodore's calculations out of the 15.1
15 acres overall. That clearly
16 demonstrates that the 1.3 acres
17 required by the planning commission in
18 this 1987 document have been met, and
19 you have to recall that at that time
20 nothing had been built.

21 Now, if you -- I think we all
22 understand what the appellant is trying
23 to argue. I would submit to you a
24 couple things in that regard. One is
25 that the people that fought to get

1 their vested rights validated or
2 verified, I think was the word that
3 Curtis used, intended to fully develop
4 their property under their
5 constitutional rights. That's why they
6 went to significant expense and trouble
7 to get those rights validated. They
8 disagreed with the time limits on a
9 very narrow point, the court said five
10 years is good enough for the
11 continuation of those rights.

12 But if you just look not only at
13 that cluster of dozen or so of them and
14 I represented at least half of those
15 people that got those exemptions at
16 that time, none of them will ever
17 comply with the current LMO, so the
18 theory that my friend Chet and my
19 friend, Tom are arguing to you is that
20 none of these undeveloped properties
21 anywhere on the island in PD-2 overlays
22 are ever going to get developed. That
23 is the practical effect.

24 And the zoning law requires that
25 if you give people the opportunity to

1 have a reasonable use of their property
2 and a reasonable use of this property
3 is certainly to comply with the
4 applicable site standards for RD for
5 those 1.086 or 68, whatever it is acres
6 and it does comply. Otherwise, what
7 you have effectively done is condemn
8 the property as a town action and that
9 becomes a different conversation. But
10 it may have effect on any other
11 properties out there that are so far
12 undeveloped residuals from PUDs that
13 met the categorical exemption standards
14 that expired all of them in or about
15 March of 2000 because they issued the
16 letter about the same date if not the
17 same date and are now sitting here
18 saying "is the property worth zero
19 because you can't do anything with it
20 or does it have a reasonable and fair
21 zoning which the municipality has
22 obligation to provide to it. Staff has
23 been a determination of how to
24 interpret the LMO that is reasonable
25 and fair and it consistent with the

1 obligations of the municipality
2 regarding zoning and resulting uses and
3 densities.

4 I would also like to say one more
5 thing and then I'll sit down. Some of
6 you and I don't know -- I understand
7 Mr. Stanford has legal background. I
8 apologize -- Mr. Fingerhut does too. I
9 don't know unfortunately all you people
10 and I apologize for that. The law in
11 South Carolina where there is ambiguity
12 regarding restrictions and I think it's
13 generally the law in the country. It
14 is derivative of constitutional rights
15 for property ownership. Where there is
16 ambiguity, the law favors the
17 unrestricted use of the property rather
18 than the restricted use of the
19 property.

20 If you heard earlier, Mr. Coltrane
21 his association and law partnership
22 with Jim Herring back in the mid-80s.
23 Mr. Herring had a case that went to the
24 South Carolina Supreme Court called
25 Hamilton versus CCM. It is Hilton Head

1 based case. It has to do with the
2 plats around Harbour Town and the
3 documents related to the cemetery and
4 some other land over there and the
5 question was whether or not the absence
6 of designation of use on the plats made
7 it open space. And the court very
8 convincingly ruled that it doesn't say
9 therefore it is not expressly
10 restricted to open space and you can't
11 have that by implication because the
12 law favors the free and unrestricted
13 use of the property where this is
14 ambiguity.

15 So if you find some ambiguity
16 about the 1987 July master plan, which
17 merely implemented like Nicole said,
18 the May 1987 plan and the adjustments
19 to that made by the planning commission
20 at their meeting on May 6th, then I
21 would suggest to you that is an
22 ambiguity that supports the conclusion
23 the staff has come to and I would
24 encourage you to that decision.

25 I will answer any questions I can.

1 MR. STANFORD: I continue to have
2 trouble moving forward from the 1987
3 concept master plan, which is the core
4 zoning document for this parcel as well
5 as the balance of the 15 acres. That
6 would have been the core zoning
7 document there and then we're moving
8 forward based on that, but we don't
9 have that document.

10 MR. JOHNSON: Right.

11 MR. STANFORD: And we have to make
12 an assumption on that. I'm very
13 uncomfortable making an assumption.

14 MR. JOHNSON: I'm suggesting that
15 you don't have to make that assumption.
16 You can say the absence of that
17 document creates an ambiguity, and
18 there is enough documentation -- I
19 realize Mr. Cutrer?

20 MR. CUTRER: Cutrer. Close
21 enough.

22 MR. JOHNSON: Cutrer. Sorry.
23 That it was opine or said a while ago,
24 you got thousands of pages of
25 documents, and I appreciate you-all

1 haven't had time to study all that, but
2 if you did you would find in the
3 minutes of May 6, 1987, all the comfort
4 you need and you would see that the
5 July, three month later document, is
6 the implication of what was commanded
7 by the town planning commission.

8 MR. STANFORD: Thank you for that
9 able presentation, prepared or not.

10 Any other questions?

11 MR. CUTRER: If I might.

12 MR. JOHNSON: Yes, sir.

13 MR. CUTRER: I think I heard
14 Nicole say that under the current LMO
15 this property could be developed. All
16 of this discussion of the 1987 master
17 plan was part of the conditional
18 exemption.

19 MR. JOHNSON: Categorical
20 exemption.

21 MR. CUTRER: Categorical
22 exemption.

23 MR. JOHNSON: Yes, sir.

24 MR. CUTRER: Which expired in
25 2000.

1 MR. JOHNSON: Yes, sir.

2 MR. CUTRER: Am I correct or am I
3 wrong that all that 1987 stuff is kind
4 of irrelevant at this point?

5 MR. JOHNSON: I believe it became
6 irrelevant on March 3rd, 2000.

7 MR. CUTRER: So if all this
8 discussion of 1987 action by the town
9 is irrelevant because that exemption
10 expired, then today we're bound or
11 governed by the current LMO?

12 MR. JOHNSON: Correct.

13 MR. CUTRER: And I believe I heard
14 Ms. Dixon say that her interpretation
15 was that under the current LMO this
16 property could be developed as being
17 proposed?

18 MR. JOHNSON: That's correct.

19 MR. STANFORD: But the application
20 was not made based upon the current LMO
21 rather it was based on the 1987 master
22 concept plan as I understand it.

23 MS. DIXON: No, it was not.

24 MR. JOHNSON: I don't have all the
25 details about think, but I think that

1 is entirely accurate. I think that was
2 just a component of the history.

3 MR. STANFORD: Nicole, can you
4 straighten me out?

5 MS. DIXON: When the application
6 was submitted it was initially reviewed
7 under the current LMO. It wasn't until
8 Chet brought to my attention the PD-2
9 that applied to this property, that I
10 started doing all that determination to
11 Chet. But all along I was reviewing
12 the application under the current LMO
13 and after reviewing the PD-2 documents
14 still did not find a reason to deny the
15 application, and the application met
16 current LMO requirements and approved
17 it, so that's what the application
18 approval is based on is the current
19 LMO.

20 MR. STANFORD: I like to hear from
21 the appellant on that narrow point, how
22 is the application made and how should
23 have the application been considered?

24 MR. WILLIAMS: The application
25 form, itself, does not refer to a PD-2

1 overlay. If you look at the e-mails,
2 clearly, they were not currently aware,
3 Todd Theodore and Nicole Dixon, during
4 the application process until the issue
5 was raised by us that there was a PD-2
6 overlay. I think you're exactly right.
7 The March 3, 2000, the legal ability to
8 rely on the categorical exemption
9 expired. I think Mr. Johnson just
10 suggested that. Mr. Johnson also said
11 the court upheld that five-year
12 limitation as a valid limitation. So
13 the first part of our argument --

14 MR. STANFORD: Tom, excuse me.

15 MR. WILLIAMS: The first part of
16 our argument is that the 1987 master
17 plan isn't irrelevant because it still
18 is the plan that defines the boundaries
19 of the PD-2 overlay district. I think
20 we're all fairly comfortable that the
21 15.1 acres, there is boundaries of the
22 PD-2 overlay district, but after the
23 expiration of the categorical
24 exemption, any property owners can no
25 longer rely on the uses and densities

1 that are provided for in the 1987
2 master plan. And with the categorical
3 exemption letter says that after that
4 point, you have to comply with all
5 current code requirements.

6 MR. CUTRER: Current at that
7 moment or current today?

8 MR. WILLIAMS: Current at the
9 development permit application was
10 filed.

11 MR. CUTRER: 2016?

12 MR. WILLIAMS: Correct.

13 Nicole has at admitted that the
14 PD-2 overlays are part of the LMO
15 requirements and she's also testified
16 that she did not review the application
17 from the standpoint of the PD-2
18 requirements for average density over
19 the PD-2. She looked at it as a
20 standalone parcel without taking into
21 account the requirement of the PD-2
22 overlay. You can't have it both ways.
23 If you're in a PD-2 zone, you are
24 required to comply with the PD-2
25 requirements. Because there is certain

1 benefits that accompanied from being in
2 there, but there is certain burdens
3 that go along with it. The benefits
4 were increased density of the certain
5 areas. The burden is where is that
6 offsetting open space. We don't know
7 standing here if the 1987 master plan
8 says open space on Parcel E neither
9 does Nicole neither does Mr. Theodore,
10 yet they proceeded to approve the plan
11 on the assumption that it did not.

12 MR. STANFORD: We need to move on.

13 MR. WILLIAMS: So it is a two-step
14 inquiry. Is there is right to rely on
15 the 1987 master plan? Our position is
16 no, there is not. So that kicks you
17 into the current code requirements.
18 And with Mr. Johnson said earlier about
19 if you follow our arguments than no
20 further development is allowed PD-2
21 district. That is not correct. No
22 further development is allowed in the
23 PD-2 where it would exceed the average
24 density of the underlying zoning
25 district. If there was only a 50 50

1 room hotel instead of 91, there might
2 be some more density.

3 Somebody got the benefit of that
4 PD-2 approval, the master plan approval
5 way back then. The current properties,
6 the SDC Properties bought it during the
7 time where they had the right.

8 MR. STANFORD: Okay. You made
9 that point. Let's move on again,
10 please.

11 And this is a case that is brought
12 to us on appeal. There is no provision
13 for public comment in this particular
14 type of case, so I think you have made
15 your argument abundantly and I would
16 ask you to please show us the courtesy
17 of letting us move forward and unless
18 you feel there is something that we
19 have totally missed.

20 MR. WILLIAMS: It is difficult for
21 me to know whether or not there is
22 something you totally missed. If you
23 have any questions, please ask. But on
24 the assumption that you don't think you
25 missed anything, then we would ask that

1 you hold that the development of the
2 Waterside PD-2 -- any development in
3 the Waterside PD-2 district including
4 without limitation the proposed
5 Spinnaker Welcome Center, Parcel E,
6 must comply with the current LMO
7 requirements, that the average density
8 of provisions of LMO Section
9 16-3-106.G.4.A, which is the PD-2
10 requirements, is the applicable PUD
11 that the average density of the RD has
12 already been exceeded by the existing
13 development with the PD-2 overlay and
14 you reverse Ms. Dixon's determination.

15 MR. STANFORD: Thank you.

16 MR. TAYLOR: Mr. Chairman, I'm
17 sorry. Before Mr. Johnson sat down, I
18 wanted to ask him less than 30 seconds
19 of questions for the record. May I ask
20 Mr. Johnson a couple questions?

21 MR. STANFORD: Very, very quick.

22 MR. TAYLOR: He is an officer of
23 the court. He does not need to be
24 sworn in.

25 MR. STANFORD: He does not need to

1 be sworn in.

2 MR. JOHNSON: I do not understand
3 that I am appearing as a witness, but
4 as counsel for my client and I am not
5 subject to questions by opposing
6 counsel.

7 MR. STANFORD: And I so rule.
8 Thank you.

9 Now it is time for us to discuss
10 this and make a decision or it occurs
11 to me, we may want to consider in this
12 case a remand back to the town to make
13 the determination, to make its
14 determination on this application in
15 light of the factors that we have here,
16 which are the missing master concept
17 plan and then how that relates to the
18 applications of law for this particular
19 application. That is a month down the
20 road. I acknowledge that. And I'm
21 interest of the comments of the board
22 on that.

23 MR. WILLIAMS: If it may help you
24 out, we would be willing to stipulate
25 the 1987 master plan shows the

1 boundaries of the PD-2 district as 15.1
2 acres.

3 MR. FINGERHUT: I think that is
4 excellent idea maybe for a slightly
5 different reason. Looking at what the
6 appellant is asking for holding the
7 development of the Waterside district
8 including the limitation of the
9 purposed Spinnaker Welcome Center must
10 comply with the current LMO. I would
11 certainly move we still hold that.
12 Number 2, that the average density
13 provision in the LMO section -- I'm not
14 going to read the whole thing now --
15 would apply. I would move that and I
16 would actually move to reverse and
17 remand.

18 MR. STANFORD: Reverse or remand?

19 MR. FINGERHUT: Reverse and remand
20 for analysis of the average density
21 because I don't believe that was done.
22 I think that's what I'm hearing here.
23 I don't know that we heard enough here
24 to rule whether on the average
25 densities that counsel is making, but I

1 think we did hear enough that it was
2 not done by applicant or by the town
3 and I didn't view --

4 MR. STANFORD: We don't have the
5 motion on the table at the moment.
6 This is just a discussion.

7 MR. FINGERHUT: Yeah.

8 MR. STANFORD: And I'm interested
9 in the points of view of the other
10 members of the board.

11 MS. LAUDERMILCH: I heard two
12 different interpretations now of this
13 latest parcel how the density issue is
14 analyzed. Is it based on the parcel
15 solely or is it based on the entire
16 PUD?

17 MR. STANFORD: Yes.

18 MS. LAUDERMILCH: And I've heard
19 two different opinions which creates
20 confusion and I don't feel prepared to
21 make a decision.

22 MR. WILSON: Mr. Chairman, I have
23 another thought. I like to know
24 whether or not these discussions about
25 this part of your suggesting that

1 should be remanded back to the staff
2 for further consideration has already
3 been discussed at length and between
4 Mr. Williams and between Ms. Dixon. In
5 that case, I would really moving
6 forward with this process to remand it
7 back to their continued conversation.

8 MR. STANFORD: Understood. And
9 that is a good point. I'm not trying
10 to just push it down the road, but we
11 have two competing interpretations of
12 the applications of the rules here and
13 I'm just trying to see if there is
14 some way we can get more clarity on
15 that.

16 MS. DIXON: I was going to say,
17 obviously, Chet and I disagree on how
18 it is interpreted, but to remand it
19 back to us, the staff feels that the
20 density should be based on that
21 particular piece of property. If
22 you're saying that you-all need to make
23 a decision whether density should be
24 based on the average of the entire
25 PD-2, if that's the case, Chet's done

1 the math and if that's how you
2 interpret the LMO and/or direct us to
3 interpret the LMO, then they are over
4 their density and remanded it back to
5 us, I think that is going to hold up
6 the process.

7 MR. FINGERHUT: You would
8 stipulate to that the math -- I'm
9 sorry. I didn't hear that. You're
10 saying the theory is incorrect, but the
11 math is correct is what you're saying.

12 MS. DIXON: If you're going to
13 look at the entire PD-2 and based on
14 their density on the current LMO, but
15 use what is existing out there now,
16 then Chet has demonstrated in his math
17 they would not be allowed to do what
18 they are proposing. Staff does not
19 interpret the LMO that way.

20 MR. STANFORD: And that's because
21 we have a new LMO that is being applied
22 to this particular smaller parcel.

23 MS. DIXON: Correct. I believe on
24 this particular piece, they are meeting
25 the current LMO.

1 MR. FINGERHUT: Not as part of the
2 new development, just as a new piece of
3 land.

4 MS. DIXON: I'm not denying it is
5 part of the 15 acre PD-2. I'm not
6 denying that it is not part of that
7 anymore. It is still part of that
8 PD-2, but as you know -- as you said
9 that categorical exemption expired.
10 They're really not tied to the original
11 density allowed, so as long as they
12 meet the current density that is
13 allowed on that tract, then it should
14 be approved and that is what I based my
15 decision on.

16 So you can either agree with my
17 determination or not agree with it and
18 I would have to resend my notice of
19 action.

20 MR. WILSON: I think that is part
21 of the responsibility of the board
22 because there is this dispute including
23 with Mr. William's client and between
24 our town.

25 MR. FINGERHUT: So you're

1 concurring that his math is correct?

2 MS. DIXON: I concur his math is
3 correct, but I don't interpret the LMO
4 that way.

5 MR. FINGERHUT: That is fine.
6 Just speaking for myself that is a
7 correct finding because I wasn't
8 following all the math.

9 MS. DIXON: I just interpret the
10 LMO differently and that is not what I
11 based my approval on. But the math
12 that he had Mr. Theodore come up with
13 earlier, that is correct.

14 MR. STANFORD: I think the motion
15 of remand probably is not a good motion
16 at this point, so we are looking for a
17 motion either to grant the appeal,
18 which means to reverse the action of
19 the town or affirm the action of the
20 town and denying the appeal.

21 MR. CUTRER: Can I ask Ms. Dixon
22 one more question?

23 MR. STANFORD: Sure.

24 MR. CUTRER: If I'm interpreting
25 what you are saying correctly that the

1 PD-2 overlay no longer applies or it
2 does apply?

3 MS. DIXON: I think the pd-2
4 overlay is always going to be. It was
5 approved in that PD-2 boundary exists.
6 That property is part of that PD-2.

7 MR. CUTRER: To create a total
8 picture?

9 MS. DIXON: Correct.

10 MR. CUTRER: Okay.

11 MS. DIXON: I do not think we have
12 to go back and make sure all the
13 densities in that development complies
14 to the current LMO. I don't think that
15 was the intent of the language in the
16 LMO and I don't think that should be an
17 unbuildable lot.

18 MR. CUTRER: So we take the parcel
19 today, how does this applicant comply
20 with the current LMO and how does it
21 comply with the PD-2 overlay?

22 MS. DIXON: The PD-2 is always
23 going to be there. Now, as far as them
24 being tied to the density that was
25 shown on the original conceptual plan,

1 they don't have to be tied to that.

2 They have to be tied to the current LMO
3 density standards.

4 MR. CUTRER: So how does that
5 proposed development comply with the
6 current LMO?

7 MS. DIXON: How does it?

8 MR. CUTRER: How does it?

9 MS. DIXON: They demonstrated that
10 their density meets the current density
11 standards and current open space.

12 MR. CUTRER: That's what I needed
13 to hear.

14 MR. JOHNSON: Can I ask a quick
15 question? This master plan if it were
16 to appear, does it have any bearing on
17 what we're talking about?

18 MS. DIXON: It does not.

19 MR. STANFORD: We talked 45
20 minutes about that.

21 MS. DIXON: It is just a diagram
22 what was approved by the planning
23 commission and I just looked back when
24 you were talking earlier and that table
25 is listed in Attachment H in the

1 documents I gave you and that is
2 planning commission minutes from the
3 May 6th meeting.

4 MR. STANFORD: Thank you.

5 Mr. Williams, please.

6 MR. WILLIAMS: I'll be very quick.

7 To buy into the town staff's
8 interpretation, you necessarily need to
9 find Parcel E is the only piece of
10 property in the Town of Hilton Head
11 Island that is PD-2 zoning district
12 that doesn't have to comply with PD-2
13 requirements. To comply with the
14 current code requirements is exactly
15 that. Do not pick and choose which
16 one. She said she reviewed it only
17 under the RD requirement and not the
18 PD-2 requirements. And she admitted
19 that if you reviewed it under the RD
20 requirements and the PD-2 requirements,
21 there is not sufficient density there.

22 MR. STANFORD: Thank you.

23 Does anyone care to make a motion
24 this?

25 MR. FINGERHUT: Yeah. I'll make a

1 motion. I would move that we grant the
2 appeal and as requested hold that any
3 development to the PD-2 overlay
4 district including without limitation
5 the purposed Spinnaker Welcome Center
6 on Parcel E must comply with current
7 LMO. I'm reading the submission to be
8 clear for the record. The average
9 density provision in the LMO Section
10 16-3-106.G.4 is applicable to the
11 Waterside PD-2 overlay district.
12 Number 3, the average density to the RD
13 district has already been exceeded by
14 the existing development on the parcels
15 within the Waterside PD-2 overlay
16 district, which we just stipulated to
17 and by granting the appeal, we reverse
18 Ms. Dixon's determination.

19 MR. STANFORD: Is there a second?

20 MS. LAUDERMILCH: I would second.

21 MR. STANFORD: All right. So the
22 effect of this would be that the
23 property can not be developed in
24 accordance with the current
25 application.

1 MR. FINGERHUT: Correct. As long
2 as it is part of the PD-2 district, it
3 has to be -- any development
4 application has to be in light of the
5 entire district, not that single
6 property.

7 MR. WILSON: It is vote to
8 overturn the ruling.

9 MR. STANFORD: I was just trying
10 to make it clear so everybody
11 understood what was happening.

12 MR. WILSON: That is what we are
13 voting for.

14 MR. STANFORD: I was just
15 clarifying.

16 Any other discussion on the
17 motion?

18 Call the role, please.

19 MS. HALEY: Mr. Wilson.

20 MR. WILSON: No.

21 MS. HALEY: Mr. Fingerhut.

22 MR. FINGERHUT: For the motion.

23 MS. HALEY: Mr. Stanford.

24 MR. STANFORD: Against the motion.

25 MS. HALEY: Mr. Cutrer.

1 MR. CUTRER: Against the motion.

2 MS. HALEY: Ms. Laudermilch.

3 MS. LAUDERMILCH: For the motion.

4 MS. HALEY: Mr. Johnson.

5 MR. JOHNSON: Against the motion.

6 MR. STANFORD: Motion fails. So

7 we are ready to proceed forward. Thank

8 you, gentlemen.

9 MR. TAYLOR: Mr. Chairman.

10 MR. STANFORD: We need another

11 motion. Somebody who feels otherwise.

12 The motion failed. I'm spinning

13 right now.

14 MR. FINGERHUT: It's late.

15 MR. STANFORD: Does someone care

16 to make a motion? The other two

17 motions available to us are either

18 remand or to deny or overrule the

19 appeal.

20 MR. CUTRER: I move to deny the

21 appeal. I believe I've heard Ms. Dixon

22 say that those requirements that were

23 in that PD-2 density don't apply. The

24 property meets the current LMO

25 standard. The results of the

1 determination letter way back in 1987
2 said all that expired in 2000. It is
3 expired. I heard testimony from the
4 staff that says this property would
5 comply with current LMO, so I move to
6 deny the appeal.

7 MR. STANFORD: Is there a second?

8 MR. WILSON: Second.

9 MR. STANFORD: Discussion on the
10 motion, please?

11 Call the role.

12 MS. HALEY: Mr. Wilson.

13 MR. WILSON: Yes, for the motion.

14 MS. HALEY: Mr. Fingerhut.

15 MR. FINGERHUT: Against the
16 motion.

17 MS. HALEY: Mr. Stanford.

18 MR. STANFORD: For the motion.

19 MS. HALEY: Mr. Cutrer.

20 MR. CUTRER: For the motion.

21 MS. HALEY: Ms. Laudermilch.

22 MS. LAUDERMILCH: Against the
23 motion.

24 MS. HALEY: Mr. Johnson.

25 MR. JOHNSON: For the motion.

1 MR. STANFORD: Motion carries.
2 Thank you. Now in conjunction with the
3 motion for reconsideration --

4 MR. TAYLOR: Mr. Chairman, excuse
5 me. Before you move on -- before you
6 move off of this, you know as a lawyer,
7 I have an obligation to protect my
8 client, I need because of your ruling
9 earlier, I need to make a 30 second
10 proffer on the record of what I
11 intended to ask Mr. Johnson. Would you
12 please allow me to do that?

13 MR. STANFORD: Can't you just
14 submit it into the record? Don't you
15 have them written down there?

16 MR. TAYLOR: No, sir. These are
17 my notes, sir. You couldn't read that.
18 I would be happy to --

19 MR. STANFORD: We need to be out
20 of here in 20 minutes and we haven't
21 heard the ArborNature reconsideration
22 still and I don't think we can postpone
23 it.

24 MR. TAYLOR: I can address that in
25 a moment. I wanted to put my offer --

1 I'm sorry -- proffer on the record. I
2 hear you to say no.

3 MR. STANFORD: Thank you.

4 (Whereupon, the appeal hearing was
5 concluded at approximately
6 5:38 p.m.)

C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Amanda Bowen, Court Reporter and Notary
Public in and for the above county and state, do
hereby certify that the foregoing testimony was
taken before me at the time and place
herein-before set forth; that the witness was by
me first duly sworn to testify to the truth, the
whole truth, and nothing but the truth, that
thereupon the foregoing testimony was later
reduced by computer transcription; and I certify
that this is a true and correct transcript of my
stenographic notes so taken.

I further certify that I am not of counsel to
either party, nor interested in the event of
this cause.

Amanda Bowen

Court Reporter

Notary Public

Beaufort, South Carolina

1	State of South Carolina	)	Court of Common Pleas
		)	14th Judicial Circuit
2	County of Beaufort	)	No. 2016-CP-07-02712
3			
4	Beachwalk Hotel &	)	
	Condominiums Association,	)	
5	Inc. and Beachwalk Hilton	)	
	Head, LLC,	)	
		)	
6	Plaintiffs,	)	
		)	HEARING
7	vs.	)	
		)	November 16, 2017
8	The Town of Hilton Head	)	
	Island and/or The Town of	)	
9	Hilton Head Island Board	)	
	of Zoning Appeals, and SDC	)	
10	Properties, Inc.,	)	
		)	
11	Defendants.	)	
12	_____	)	

13 Hearing reported by Deborah S. Thomas,
14 Certified Verbatim Reporter and Notary Public in and
15 for the State of South Carolina; said hearing held
16 before Honorable Marvin H. Dukes, III, Beaufort
17 County Master in Equity and Special Circuit Court
18 Judge in accordance with the South Carolina Rules of
19 Civil Procedure, at the Beaufort County Courthouse,
20 102 Ribaut Road, Room 212, Beaufort, South Carolina
21 on November 16, 2017, at the hour of 2:13 p.m.

22 _____

DEBORAH S. THOMAS, CVRM

2017-11-16 Transcript.txt
80 Plymouth Lane
Bluffton, South Carolina 29909
(803) 206-7390

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Appearances

Representing the Plaintiffs:

Thomas C. Taylor, Esquire
Law Offices of Thomas C. Taylor, LLC
Post Office Box 5550
22 Bow Circle, Suite A (29928)
Hilton Head Island, South Carolina 29938-5550
tom@thomastaylorlaw.com

Chester C. Williams, Esquire
Law Offices of Chester C. Williams, LLC
Post Office Box 6028
Hilton Head Island, South Carolina 29938-6028
firm@ccwlaw.net

Representing the Defendants SDC Properties, Inc.:

Barry L. Johnson, Esquire
Johnson & Davis, PA
10 Pinckney Colony Road
Okatie, South Carolina 29909
barry@jd-pa.com

Representing the Defendant Town of Hilton Head
Island and/or The Town of Hilton Head Island Board
of Zoning Appeals:

Gregory M. Alford, Esquire
Alford Law Firm, LLC
Post Office Box 8008
Hilton Head Island, South Carolina 29938
gregg@alfordlawsc.com

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Exhibits:

Marked at Page

11

(Exhibits retained by Clerk of Court.)

12

Respondent SDC's Exhibit 1
(Affidavit)

26

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14

Appellant's Exhibit 1
(Transcript of 11/28/16 BZA Hearing)

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1 This hearing is conducted in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 JUDGE DUKES: Good afternoon. We're
5 here in 2016-CP-07-02712. This is Beachwalk versus
6 The Town of Hilton Head. And this is an appeal from
7 a Zoning Board decision. And, Mr. Taylor, it's your
8 appeal I think.

9 MR. TAYLOR: It is, Your Honor.

10 JUDGE DUKES: Happy to hear from you,
11 sir.

12 MR. TAYLOR: Your Honor, thank you

13 very much. Judge, this very evolved transcript and
14 over a thousand pages of documentation that was
15 submitted at the BZA level is a inflated file that
16 all boils down to one specific issue. And that is
17 that by mistake, by admitted error, the Town staff
18 member who was charged with the responsibility of
19 evaluating the proposed development of a -- what is
20 known as a visitor center for Spinnaker on the
21 property did not realize when she -- when she
22 evaluated it and when she made the recommendation to
23 authorize it that it was subject to what is known as
24 a PD-2 Overlay in the Town of Hilton Head.

25 That PD-2 Overlay requires that the

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1 density of the entire parcel be evaluated under the
2 terms of the current LMO before authorization is
3 given for the permit -- permitted building.

4 At the hearing on the appeal to the BZA
5 and prior to that when Chet Williams, my co-counsel,
6 talked with Nicole Dixon who made the initial, she
7 admitted that she was unaware that the PD-2 Overlay
8 District was in place on the property and admitted

9 to the BZA that had she taken that into account that
10 it would have affected her decision and that she
11 would not have given the permission for the
12 building.

13 In addition, the staff member from the
14 professional planners that submitted the
15 application, a man named Ted Theodore also testified
16 at the BZA hearing, and this is all well briefed,
17 Your Honor, that he did not know that the PD-2
18 Overlay District also apply to this one-acre parcel.
19 And that he did not take it into the calculations
20 when he submitted the application for the
21 development of parcel.

22 Your Honor, it is simply undisputed that
23 the PD-2 Overlay District requirements, if they are
24 considered, would bar the permitted use of this new
25 visitor center, of building it, because taking into

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1 account the density requirements that it -- that the
2 PD-2 Overlay, or the density that it requires, be
3 evaluated on an average basis. The parcel exceeds
4 it as it is now. And therefore, any new additional

5 square footage of building on it would be improper.

6 And, Your Honor, in order to really get
7 the wide view of this, what you have to understand
8 is initially this 15-acre tract, which is made up of
9 five different parcels, was by the original
10 developer taken -- the PD-2 Overlay District was
11 taken advantage of because it allows a developer to
12 move density around onto other areas, to make
13 environmental choices and to leave certain areas
14 more open space and to put higher density on these
15 other areas.

16 So the original developer took advantage
17 of that, put heavy density on several of the parcels
18 that make up the 15-acre parcel and now want the
19 Town to look at a one-acre defined parcel within it
20 and say, well, we want to forget about the rest of
21 that. We want to build with the density on this
22 one-acre parcel when they acknowledge once again,
23 Your Honor, that if you take the PD-2 Overlay
24 requirements into account, they would absolutely
25 prohibit it.

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1 And I know you have to be seating there
2 going, Tom, if that is such a simple thing, why are
3 we here? The answer is no one can figure out how
4 Nicole Dixon is taking the position that she is.
5 And you'll see from the transcript, Your Honor, that
6 she simply says, it's my opinion that the LMO PD-2
7 Overlay should not count anymore, that this was
8 originally done in a prior LMO. And therefore, I do
9 not find that the PD-2 Overlay is now applicable.

10 But if it is, I admit that this would not
11 be allowed.

12 JUDGE DUKES: Question real quick?

13 MR. TAYLOR: Yes, sir.

14 JUDGE DUKES: Assume for the moment,
15 she didn't come in and her position was it's
16 absolutely not allowed. You can't do it. Sorry.
17 Staff says you can't do it. And the Board said,
18 yeah, we think you can. We're going to do it.
19 Aren't they permitted to do that? Can't they reject
20 staff and move ahead with an approval anyway?

21 MR. TAYLOR: The Board can in
22 conformity with the LMO find that an opinion
23 rendered by a staff member was wrong. Yes. But
24 that still has to be based on the LMO. The BZA is

25 not free just as the Town staff is not free to

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1 interpret the LMO in a way that it wants to
2 interpret it.

3 The LMO is quite clear on this point, Your
4 Honor. That PD-2 Overlay District requires that
5 analysis to be made of the density on all of the
6 parcels that it covered.

7 Once again, I'll point out, Judge, as
8 unbelievable as it is, neither the Town staff nor
9 the Town -- nor -- excuse me -- the planning
10 official -- the planning -- the land planner who
11 submitted the application was aware that this PD-2
12 Overlay District was over this Parcel E which is
13 what we're here about today.

14 They both admitted at the BZA hearing.
15 And they both admit that if you take the
16 requirements of that PD-2 Overlay District and apply
17 it to the parcel as we certainly suggest the LMO
18 requires then this development is not authorized
19 under the terms of the density analysis that is
20 being made.

21 So it seems, Judge, what you're asking is
22 doesn't the BZA have some authority to make a
23 finding? They have a finding -- they have the
24 ability to make a finding that the Town staff member
25 was right or was wrong, but that still has to be

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1 based upon the LMO. And when there's an
2 interpretation as this arguably, it can't be made.
3 And, Your Honor, we brought the case. And
4 I know that you're aware of it. The McCrowey -- let
5 me see how to say it. McCrowey case versus The
6 Zoning Board of Adjustment, City of Rock Hill, 360
7 SC 301 where the Court of Appeals in 2004
8 specifically held that the code does not grant power
9 to the administrator to alter, modify or waive
10 provisions contained in the zoning code.

11 The zoning administrator's actions in
12 approving, in this case, a parking plan were in
13 error. And the trial court was right in
14 overturning.

15 MR. WILLIAMS: Your Honor, if I may,
16 Chester Williams. There's a section -- I use the

17 term the LMOS, the Town's land management ordinance.

18 There's a section there on conflicts with other LMO

19 standards. It says when any LMO provision is

20 inconsistent with another LMO provision, the more

21 restrictive provision shall govern unless the terms

22 of the more restricted provision specify otherwise.

23 There's a section also that says when

24 there's a conflict between an overlay zoning

25 district and an underlying base zoning district, the

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1 provision of the overlay district shall control.

2 There's a section that says land within

3 base zoning district may also be classified into one

4 or more overlay zoning districts. In which case,

5 regulations governing development in the overlay

6 district shall apply in addition to the regulations

7 governing development -- the underlying base

8 district.

9 And then there's two other sections of the

10 code that say when you're in an overlay district,

11 the regulations of the overlay district always

12 control over the regulations of the base district.

13 Ms. Dixon admitted that -- well, what she
14 said she interpreted the code as the PD-2 Overlay
15 District regulations not being applicable to Parcel
16 E. Notwithstanding the fact that everybody
17 acknowledges that Parcel E is in the PD-2 Overlay
18 District.

19 And the Board is -- on appeal said, we've
20 heard Ms. Dixon say that the PD-2 doesn't apply, so
21 we're okay with that. I think that's a classic
22 error of law in this case. It's in the PD-2
23 district. You've got to take into account the PD-2
24 regulations.

25 And one of the PD-2 regulations is that

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1 the average density for the PD-2 Overlay District
2 shall not exceed the maximum density permitted in
3 the base of it's district. You basically have a
4 15-acre tract. And this is like one acre out of
5 that. When you apply the densities that are already
6 there relative to the base zoning district, you're
7 already over that cap. And so there's no way that
8 you can develop Parcel E in any manner where the

9 average -- the average density doesn't exceed what's
10 allowed for in the R&D District. That's just what
11 the code says.

12 For some reason or another Ms. Dixon said,
13 well, I don't think it applies in this case.

14 JUDGE DUKES: She didn't think the
15 PD-2 applied or that the cap of --

16 MR. WILLIAMS: She didn't think the
17 PD-2 regulations apply in this case.

18 JUDGE DUKES: Okay. So the PD-2 is
19 an overlay district that can be found on a map --

20 MR. WILLIAMS: Yes.

21 JUDGE DUKES: -- is that right?
22 Okay. And --

23 MR. WILLIAMS: Well, and let me say
24 you'll see in the record part of the problem was is
25 that the maps that are available on line through the

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1 Town system didn't show this as being in PD-2
2 district. The code though clearly says it's in the
3 PD-2 district. And there should be a PD-2 Overlay
4 District with a hard copy. Well, that's part of the

5 official zoning map that shows this as being in the
6 PD-2 Overlay District.

7 For some reason or another neither the
8 Town Planner, Nicole Dixon nor the landowner
9 Theodore realized when they were going through the
10 process that it was in a PD-2 Overlay. And Nicole
11 and Todd both -- let me rephrase that. Nicole
12 admitted that if the PD-2 Overlay District
13 requirements applied that she could not have
14 approved this application.

15 JUDGE DUKES: Anything else from --

16 MR. TAYLOR: Yes, sir. Your Honor,
17 there are several -- that really boils down the
18 basic argument of law. This is one of those few BZA
19 cases that, Judge, I would contend is a very easy
20 one because this is not Vulcan Materials. This is
21 not an opinion made about whether or not someone who
22 was cutting down a lot of trees a grinding them was
23 doing something about waste management. There's no
24 interpretation necessary here.

25 We have an admission by both the Town's

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1 representative and the land planner that they did
2 not realize the PD-2 Overlay District applied. And
3 that under oath, when asked, when we said if the PD
4 -- if you believe the PD-2 Overlay District applies,
5 would this have been granted? Would the letter have
6 granted allowing this to go forward? And she said,
7 no, it would not have.

8 But for whatever reason she is thinking
9 that it's okay for her to say the current LMO does
10 not apply to this particular parcel. And there's
11 simply no basis for that whatsoever. Greg may tutor
12 me now, and I may learn something. But there was
13 nothing said at the BZA hearing about it.

14 It was all a lot of discussion about what
15 happened 15 years ago until everybody finally
16 admitted that that really didn't matter. And the
17 fact that they've lost the part -- the plat that was
18 the okay originally back in the 1980s and they
19 can't find that that everybody now agrees that
20 really doesn't matter either because there's no
21 question that this application for development is
22 subject to the current LMO that went into effect in
23 October of 2014. And if use the PD-2 Overlay
24 District requirements, it is not authorized. Flat,
25 plain and simple that is the answer to that.

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1 Your Honor, there are two other issues
2 though that were raised by the appellant at the
3 board level which we wish to put on the record and
4 wish to argue for you.

5 First is that the notice of action that
6 was given lacks any findings of fact or conclusions
7 of law. We have raised this issue. And it was
8 funny because even at the motion for reconsideration
9 where they were aware of this, the Board still did
10 not issue us findings of facts and conclusions of
11 law. We believe that the law clearly requires that.
12 And we are entitled to a determination of the facts
13 and of the laws, supposedly, that form the basis of
14 the BZA's decision to uphold the determination
15 letter. We believe that at a minimum it should be
16 sent back down for the issuance of that.

17 And then as a final matter, Your Honor,
18 there is a very distinct legal point and that is
19 this. The developer who has made the application
20 for the permit does not own the property. And by
21 that I mean that the original deed of conveyance to

22 the developer which is SDC Properties, Inc., the
23 deed into them on this property was made to SCD
24 Properties, Inc. It is not the same corporation.
25 It was raised at the BZA level. And the

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1 chairman at that point in time was tired of the
2 argument and did not allow me to question
3 Mr. Johnson about it at that point time. But as
4 you'll see, there was a proffer of evidence made and
5 it is appropriately attached to the appeal where the
6 deed was submitted. And the deed clearly shows that
7 the property is owned by an entity known as SCD
8 Properties, Inc. And the developer who was making
9 the application here is SDC Properties, Inc. and
10 does not own that.

11 Now, I will grant, and Barry I'm sure will
12 tell you, that after this was raised there was a
13 filed what I believe is a deed that says there was a
14 scribner's error and that somehow that now avoids
15 this. There was nothing about that in the record.
16 The BZA did not consider it. While whatever is on
17 file today -- may be on file today.

18 At the time the BZA argument was made,
19 there's really also not any contention that the
20 entity that made the application for the permit is
21 not the entity that owned the property because the
22 deed specifically was clear that it was into SCD
23 Properties, Inc.

24 Your Honor, that's the appellant's case.

25 JUDGE DUKES: Okay. Thank you so

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1 much. Mr. Johnson, happy to hear from you, sir.

2 MR. JOHNSON: If it were as simple as
3 all that, Your Honor, they would never have had to
4 file an appeal. I suspect Your Honor is wondering
5 why all that. So, let me address a couple of these
6 issues in the reverse order.

7 JUDGE DUKES: Can I ask two questions
8 before you begin just so I know what to listen for?

9 MR. JOHNSON: Certainly.

10 JUDGE DUKES: Is there a dispute as
11 to whether or not this property is in PD-2.

12 MR. JOHNSON: There is not a dispute
13 that the property is within what the Town now says

14 is PD-2. That's correct.

15 JUDGE DUKES: But now you've
16 qualified it with what the Town now says is PD-2.
17 So it sounds like there is a dispute as to whether
18 or not it was in the PD-2 Overlay, existed for this
19 property at the time of this hearing or not?

20 MR. JOHNSON: Or at times that are
21 relevant to the acquisition of rights in this
22 property. This property has something close to a
23 30-year history with the Town. And that's important
24 when you get into the issue of interpreting what you
25 can do with the property. Whether it's PD-2,

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1 current LMO, how do you square the various
2 provisions of the LMO, what's left with the property
3 if you have one interpretation or another.

4 JUDGE DUKES: So this is like a
5 grandfather issue?

6 MR. JOHNSON: In some degree. And
7 there are reasons why that's on some levels
8 questionable. But it depends, in terms of how you
9 get there to a degree, on how you understand how

10 open space has been treated on the 15-acre parcel,
11 historically. And that hasn't been really laid out
12 for the court. Although, it is laid out in the
13 transcript of the BZA hearing which is a hundred and
14 something page transcript.

15 JUDGE DUKES: Great. I guess what I
16 was trying to get at is I had written down two
17 things that I thought might be important for me to
18 start with, sort of threshold issues, and maybe not.
19 But at least what I had here, one was is there a
20 factual dispute as to whether or not the property at
21 all times relevant was in PD-2?

22 MR. JOHNSON: At all times relevant,
23 yes.

24 JUDGE DUKES: Okay. So it was in
25 PD-2. So then Question Number 2 I've got is if the

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1 PD-2 Regulations apply --

2 MR. JOHNSON: Counsel's not sure what
3 I meant, so maybe the courts not. I don't think we
4 agree that at all times relevant it was in a PD-2
5 District. At all times relevant, the PD-2 Overlay

6 didn't exist in the code.

7 JUDGE DUKES: Okay. All right.

8 MR. WILLIAMS: Well, if I may, Your
9 Honor. In the original code as adopted in 1987, the
10 original LMO, it didn't say PD-2. But there was a
11 similar zoning district. That's been in effect
12 every since the Town --

13 JUDGE DUKES: Similar. Okay.

14 MR. WILLIAMS: Yeah, that -- and as
15 the code has been changed over the years, that is
16 now what is referred to as the PD-2 Overlay.

17 JUDGE DUKES: Well, I mean, this
18 hearing was when? I mean, I'm sorry. The original
19 granting of the permission to build this.

20 MR. TAYLOR: August 2016.

21 MR. WILLIAMS: Yes.

22 JUDGE DUKES: August 2016. When did
23 PD-2 come into being? Is there -- is there --

24 MR. WILLIAMS: I would -- if I had to
25 make a wild guess, I would say the LMO has had the

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1 PD-2 Overlay since some time in the mid to early

2 1990s.

3 MR. TAYLOR: Everybody can agree that
4 when this application was made, the PD-2 Overlay
5 District was in the LMO.

6 MR. ALFORD: And I don't disagree,
7 Your Honor, but there's a ton of history with this
8 property. And there are issues of vested rights.
9 You know, whenever you see the name Robert Graves on
10 a 1995 letter from the Town, this is your Exhibit D.

11 JUDGE DUKES: His name comes up --

12 MR. ALFORD: Yes, sir. I mean,
13 there's a lot of history. And so --

14 JUDGE DUKES: All right. But I'm
15 trying to take the really simple stuff and work my
16 way out to the more complicated things.

17 MR. WILLIAMS: Well, let me see if
18 this helps you. The current version -- in
19 October 2014, the Town repealed and reenacted the
20 land management ordinance. And Waterside PD-2 is in
21 there as of October 2014. That is the PD-2 Overlay
22 District that we're talking about. So, at all times
23 relevant for purposes of the development permit
24 application that we're talking about, yes. It has
25 been and it still is in that PD-2 Overlay District.



1 JUDGE DUKES: Okay. So the -- but
2 the questions then become the grandfathering issue,
3 the way it was treated and some other things.

4 MR. JOHNSON: And some other things.

5 JUDGE DUKES: PD-2.

6 MR. JOHNSON: Yes, sir.

7 JUDGE DUKES: Okay. All right.

8 That's just what I was trying to figure out. So,
9 I'm sorry. Mr. Johnson, go ahead.

10 MR. WILLIAMS: But you said you had
11 two questions. That was one.

12 JUDGE DUKES: Well, the second
13 question was sort of answered. The second question
14 was does -- if it's in PD-2, does the PD -- do you
15 -- do you all agree or disagree that the PD-2
16 Overlay would have prevented this development?

17 And I think Mr. Johnson sort of answered
18 that as he was talking which was that, no, it was
19 the way the property was treated or something like
20 that. I don't if that's --

21 MR. JOHNSON: And I would take that

22 position, too, that the Town -- I mean, you know, it
23 was the position that was taken by the Town
24 representative of the staff folks as that. I mean,
25 I think she's quoted on Page 112 of the record being

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1 questioned -- I'm sorry -- 111 and 112. The PD-2
2 was always -- Question by Mr. Cutrer -- I don't know
3 if I'm pronouncing that right.

4 MR. WILLIAMS: Cutrer.

5 MR. ALFORD: Cutrer. So we take the
6 parcel today. How does this applicant comply with
7 the current LMO? And how does it comply with the
8 PD-2 Overlay?

9 Ms. Dixon, Line 22, the PD-2 is always
10 going to be there. Now, as far as them being tied
11 to the density, that was shown on the original
12 conceptional plan. They don't have to be tied to
13 that. They have to be tied to the current LMO
14 density standards.

15 Mr. Cutrer, so how does that proposed
16 development comply with the LMO?

17 How does it?

18 Yes, how does it?

19 They demonstrated that their density meets
20 the correct density standards and current open
21 space. That's here to here.

22 Mr. Johnson asked the question.

23 MR. JOHNSON: Not this Mr. Johnson.

24 MR. ALFORD: A different --

25 MR. JOHNSON: The Mr. Johnson --

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1 MR. ALFORD: That's right.

2 MR. JOHNSON: He's on the BZA.

3 MR. ALFORD: And she goes on to say,
4 Your Honor, that -- let me find it. That
5 essentially the way that piece of land was treated
6 within this, it's almost a -- I don't want to call
7 it a master plan. Is that an accurate term?

8 MR. TAYLOR: It's a master plan.

9 MR. ALFORD: The master plan. But
10 that it's a lot. And it was never the intention of
11 the LMO to have that be an unbuildable lot provided
12 within the entire master plan the other density
13 requirements weren't exceeded and the, you know,

14 open space requirements, all those kinds of things
15 aren't exceeded.

16 And it was her opinion that -- I mean,
17 they're asking her in the back part of this
18 transcript, tell me about the interplay between the
19 PD-2 and whether or not they can do anything with
20 this lot. She says, well, it's PD-2 but because
21 it's this master plan concept, they meet the density
22 requirements. And that was her finding despite the
23 fact that it was PD-2. And they went -- I mean, the
24 BZA said, okay.

25 MR. WILLIAMS: No question that the

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1 proposed development of Parcel E meets the density
2 requirements as a standalone parcel under the Base
3 Zoning System which is a hard E zoning district.

4 MR. TAYLOR: Resort District.

5 MR. WILLIAMS: No question about
6 that. We don't dispute that. The issue is whether
7 or not because it's in a PD-2 District, does the
8 entire PD-2 District average density have to comply
9 with the overall density in the RD District? Our

10 position is, yes. The code says clearly that the
11 overlay district regulation always control over the
12 base district regulations.

13 When you look at the aggregate density on
14 the other developed parcels that are in the PD-2
15 Overlay District, the density exceeds what would be
16 permitted under the RD District. But 15 acres as a
17 whole which means that there's no way you can
18 develop Parcel E and meet the average density for
19 the underlying zoning district.

20 JUDGE DUKES: Let me do this. Mr.
21 Johnson had the floor and I stoled it away from him
22 with a question and then we got off of this.

23 MR. ALFORD: Sorry. I take some
24 blame for that.

25 JUDGE DUKES: No. It was my fault.

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1 So go ahead, sir, please. Thanks.

2 MR. JOHNSON: Well, I'd like first of
3 all to address the issue of title. I'd ask the
4 court to take judicial notice, and I can hand up a
5 certified copy to attach to the record.

6 JUDGE DUKES: I mean, it sounds like
7 a scribner's error.

8 MR. JOHNSON: I've got an affidavit
9 of correction of name of guarantee that was filed
10 December 21, 2016, by Maria Parker who is the
11 corporate lawyer for Spinnaker and its related
12 companies. But I'd like just have that in the
13 record if Your Honor will allow it.

14 JUDGE DUKES: Okay. Respondent's 1.

15 MR. JOHNSON: SDC Properties Exhibit
16 1.

17 MR. TAYLOR: Your Honor, just for the
18 record, I object to that because, specifically,
19 under the statutes, the court is not to take new
20 evidence at this -- at this hearing.

21 JUDGE DUKES: Well, that's true.

22 MR. JOHNSON: The court can always
23 take notice of what's of record in the courthouse.

24 MR. WILLIAMS: But it wasn't of
25 record at the time of the hearings.

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1 MR. JOHNSON: Well, it was at the

2017-11-16 Transcript.txt
2 time of the second hearing.

3 JUDGE DUKES: Let me ask this. The
4 Appellant doesn't think there were two different
5 companies, right? I mean, you all are -- it's a
6 technical argument. I understand, but, I mean,
7 there's not prejudice to some unknown company. It
8 was the same -- it just sounds like a transposed
9 clerical letter -- clerical error.

10 MR. TAYLOR: Your Honor, there does
11 not appear to be a entity in the State of South
12 Carolina known as SCD Properties, Inc. I cannot
13 vouch for whether there is one anywhere else. But
14 in all candor and good faith, I have no reason to
15 believe that it is anything other than a mistake
16 that was made.

17 But I do note again that it has not -- it
18 was not addressed at the time that this hearing was
19 held and was inappropriate. And actually, the
20 developer did not own the property at that point in
21 time. And the issue was raised.

22 JUDGE DUKES: Okay. I think they're
23 probably right on introducing new evidence. But, I
24 mean, it seems to me it's a clerical error that's --
25 which no party would be prejudiced by considering it

1 fixed, doing that which should have been done. So
2 anyway what was --

3 MR. JOHNSON: Could we just mark it
4 for identification for those purposes? SDC's Number
5 for identification.

6 (MARKED RESPONDENT'S EXHIBIT NO. 1.)

7 MR. JOHNSON: For the record, but
8 reluctantly, on the same issue, there is in the
9 record of this case SDC Properties, Inc.'s notice of
10 application and motion to intervene and be added as
11 a party defendant. And it states that it is the
12 owner of the property. And it does so -- excuse me.

13 And then subsequent to that there is a
14 consent order bearing Mr. Taylor's consent signed by
15 Your Honor on March 28, 2017, granting that motion
16 of SDC Properties, Inc. to intervene on a caption in
17 which the appearing party is SDC Properties, Inc.,
18 not SCD Property, Inc. I think it's a red harried
19 issue at most.

20 Now, Greg can speak to this probably with
21 more experience than me. But it's obvious when you
22 read the transcript of the BZA hearing on

23 November 28, 2016, and the subsequent transcript
24 January 23rd, 2017, at the petition for
25 reconsideration, that there's not a formal layout of

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1 a section of an order or a motion that says findings
2 of fact and conclusions of law. Nor is there a
3 separate document in either cases that so says.
4 However, I believe the case law is that if the
5 decision incorporates enough facts and law, its
6 stands under the appellate law. Part of that may be
7 under Vulcan Materials.

8 MR. ALFORD: Your Honor, there is --
9 I'll have to find -- I'm kind of trying to look for
10 now. There's a case out there that says when the
11 law -- the findings of facts and conclusions of law
12 aren't set forth that the court can rely on the
13 actual record. And I'll get it for the court and
14 submit it because I've run into it before.

15 MR. JOHNSON: The only way to travel
16 through this and get the correct nuance of what was
17 before the commission -- excuse me -- the BZA,
18 rather than the summaries that counsel has provided,

19 is respectfully, Your Honor, for you to read the
20 transcript of the BZA matter.

21 I can point out things to you as
22 Mr. Alford has done. I'll refer to the transcript
23 of the November 28th, 2016, hearing, beginning at
24 Page 68.

25 JUDGE DUKES: You all have another

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1 copy of that transcript because it's not --

2 MR. ALFORD: It was the very bottom
3 part of the --

4 MR. JOHNSON: It was the last part of
5 the record on appeal.

6 MR. ALFORD: Very bottom.

7 MR. JOHNSON: Last section.

8 MR. ALFORD: But I'll be happy to
9 leave mine.

10 JUDGE DUKES: Yeah, I mean, I don't
11 have -- I have the pleadings here the way this
12 system works. But I don't have that. Do you all
13 have like a mini transcript of it or anything?

14 MR. JOHNSON: I don't have that, Your

15 Honor. I don't think we got one from the court
16 reporter.

17 JUDGE DUKES: All right. I'll come
18 up with it at some point.

19 MR. TAYLOR: Your Honor, I have one
20 and I will get it to you if you'd like.

21 JUDGE DUKES: Oh, that would be
22 great. At some point you could get someone to scan
23 that and PDF it over to me.

24 MR. TAYLOR: Yes, sir. And this is
25 of the original hearing in front of the BZA that

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1 took place on the 28th of November. That's what
2 we're talking about, correct?

3 MR. JOHNSON: 2016, yeah.

4 MR. WILLIAMS: Yes.

5 MR. TAYLOR: I'll get it over to Your
6 Honor.

7 JUDGE DUKES: Thank you. Thank you.

8 MR. TAYLOR: I'll highlight the
9 portions that are important.

10 JUDGE DUKES: I think he's joking.

11 Go ahead, please, Mr. Johnson.

12 MR. JOHNSON: I take that as an
13 aside.

14 MR. TAYLOR: It is.

15 MR. JOHNSON: And maybe before we get
16 into this, just a very big picture; although, it's
17 explained in all this stuff. A company called Pope
18 Avenue Associates owned a fair amount of land on the
19 shipyard side of Pope Avenue between Coligny Circle
20 and Cordillo Parkway, which they acquired eons ago
21 from the original Hilton Head company.

22 Subsequently, there were discussions on
23 that property and with a number of other properties
24 in the Town about vested rights. I represented half
25 a dozen or more of the ten or 12 companies that had

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1 lands that were caught up into that milieu.

2 The upshot was on all of them and on this
3 one there was the issue of what the Town decided to
4 call a categorical exception, which was the result
5 of some litigation, which was essentially a vested
6 rights determination or an opportunity for that.

7 And a few minutes ago, Mr. Alford had in
8 his hand a letter from the '90s addressed to Robert
9 Graves who was one of several principles of Pope
10 Avenue Associates that, over the course of five or
11 six pages, goes into detail about the history of the
12 property and about what may or may not be done with
13 the property and in what time period.

14 By that time, most of the property in Pope
15 Avenue Associates' control had been sold and
16 developed. In 1999, Spinnaker's company, SDCs
17 Properties acquired this site which was a little
18 over an acre, I think. Consensus is it's about
19 1.3 acres which fronts on Pope Avenue. At the
20 corner where Cordillo goes towards the shipyard from
21 Pope Avenue. I know you're generally familiar with
22 that area. Spinnaker did not choose to do anything
23 with the property until it filed through SDC the
24 application that resulted in the notice of action in
25 August of 2016.

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1 Under the zoning district that it is
2 listed in, the RD District, they could build a

3 commercial building -- and Chet can correct me if
4 I'm wrong, but my concept I know is right -- of
5 10,000 square feet. And the building that they
6 proposed to build as a welcome center is something
7 on the order of 7,500 square feet. It's under that
8 number.

9 Nobody has any problem with it but Chet's
10 client and Tom's client. And the record contains a
11 description of their clients' property which is an
12 old hotel that somebody converted into some kind of
13 units. I don't know if they're condominiums or
14 time-shares or both.

15 MR. ALFORD: It was -- it was, for
16 the record, arguably, one of the scammiest things
17 ever when they began to sell something called
18 condo-tels. Where, they would take a hotel and
19 condominiumize it and sell you a room. And then you
20 would enter their lease program.

21 MR. TAYLOR: Your Honor, I object.

22 MR. WILLIAMS: Like the Mariner's in.
23 That sort of scammy development.

24 JUDGE DUKES: Well, I mean, we did a
25 foreclosure --

1 MR. TAYLOR: I object to that as --

2 JUDGE DUKES: I'm familiar with the
3 concept. We had a good bit of litigation over it.

4 MR. ALFORD: No, and I don't his
5 client -- I'm not saying his clients did it.

6 JUDGE DUKES: Yeah.

7 MR. ALFORD: I mean, they're --

8 JUDGE DUKES: We're just talking
9 about the history --

10 MR. ALFORD: -- cleaning it up.

11 JUDGE DUKES: -- of the site.

12 MR. ALFORD: Yeah. I'm not accusing
13 his clients of anything negative. I'm saying it
14 failed.

15 JUDGE DUKES: Yeah. No --

16 MR. WILLIAMS: It was originally
17 developed as, I think, a Super 8 Motel.

18 MR. ALFORD: Yeah.

19 MR. WILLIAMS: Developed --

20 MR. ALFORD: Holiday Express or
21 something. It was a hotel, and then they the
22 condo-ized it. And it, of course, failed. And then

23 his clients, Mr. Williams and Mr. Taylor's clients
24 are buying up those interests and trying to get it
25 unified again to do something.

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1 MR. JOHNSON: Meanwhile, it's boarded
2 up with plywood over everything. Not in operation.
3 Nothing going on. And that's been it's state for
4 number of years. It's amazing to me it hasn't been
5 torn down. And this is a description of how it
6 looks now. Appears in the colloquy that's in this
7 transcript of November. And could pull that out if
8 need be.

9 Fast-forward, we filed this application.
10 If you look in the transcript, the examination of
11 Ms. Dixon, the planner for Hilton Head, it begins on
12 Page 66 at Line 15.

13 JUDGE DUKES: I don't have one, so
14 what are we --

15 MR. TAYLOR: I think I can help
16 remedy that. Your Honor, I have an original
17 transcript that I would have normally before we got
18 to electronically submitted to the court. May the

19 court reporter mark it and I hand it to you and you
20 can open it and use it.

21 JUDGE DUKES: That sounds like a
22 great idea because otherwise I'll have a hard time
23 following you all.

24 MR. JOHNSON: I'm all in favor of
25 that.

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1 JUDGE DUKES: Let's give Deborah just
2 a second.

3 (MARKED APPELLANT'S EXHIBIT NO. 1.)

4 (OFF RECORD DISCUSSION)

5 JUDGE DUKES: I now have what's been
6 marked as Appellant's 1 which is the transcript of
7 the hearing in front of the Hilton Head Island Board
8 of Zoning Appeals from the 28th, November 2016 of
9 which the sealed transcript was opened in my
10 presence. So Page 66 I think you were on.

11 MR. JOHNSON: Yes, sir. Line 15.

12 JUDGE DUKES: Yes, sir. Go ahead,
13 please.

14 MR. JOHNSON: There's some

15 preliminaries there that are important, but, I mean,
16 all of her testimony and all the testimony of Todd
17 Theodore is important. And I would ask that Your
18 Honor read that testimony because me just reading it
19 out loud is not the same as you reading it. But
20 technically I would have a right to read it all out
21 loud. And if we had a jury I might need to do that.

22 On page 68, Line 3, question by
23 Mr. Williams, were you aware at the time that you
24 reviewed and processed the application that it was
25 at the PD-2 Overlay District?

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1 Answer, Line 6, after you brought it to my
2 attention.

3 Line 7, question, even after you were
4 aware it was a PD-2 District and after you were
5 aware of the categorical exemption letter on its
6 face said it expired in 2000?

7 Line 11, answer, I did all of my research
8 and determined as you see in my staff determination
9 that the proposed DPR -- somebody tell me what
10 that's --

11 MR. ALFORD: It's development
12 planning review.

13 MR. WILLIAMS: It's a development
14 plan review application.

15 MR. JOHNSON: DPR review. All right.
16 Application with development permit was not in
17 conflict with the PD-2.

18 Line 14, question, and when you review
19 that, did you look at the overall density of the
20 15.1 acres on the entire PD-2 Overlay District and
21 determine whether or not that exceeded the maximum
22 density in the RD District?

23 Line 19, answer, I looked at everything
24 that pertain to the PD-2. Density open space. The
25 PD-2 developed under a different LMO. So looking at

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36

1 what is developed out there now and looking at the
2 density, no, I did not see it was in conformance
3 with that. The RD District. I checked the
4 conformance of the subject property against the RD,
5 Resort District, and it does meet that.

6 Page 69, Line 2, question, when you say

7 that, you're talking about just Parcel E; is that
8 correct?

9 Line 4, answer, correct.

10 Line 5, so you did not check the overall
11 density on the 15.1 acres to see if the additional
12 development of Parcel E caused the overall average
13 density to exceed what is permitted in the
14 underlying RD District; is that correct?

15 Answer, Line 11, that is correct because
16 staff does not think that that is the intent, the
17 value or interpreting the LMO.

18 Then there's a discussion about the fact
19 that nobody can find the original master plan that
20 was approved, but there were some subsequent copies
21 found.

22 Page 17, Line 22. Excuse me. Line 17,
23 question by Mr. Williams. On pages 13 and 14 of our
24 narrative of the application -- that's contained in
25 this pile that's about a thousand pages, Judge, it's

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37

1 part of the record on appeal. It went in initially
2 on the record to the BZA.

3 Continuing at Line 18, Page 70. We
4 basically go through that entire process. Did you
5 have an opportunity to review those figures?

6 Line 21, answer, I did.

7 Line 22, accurate -- question, are they
8 accurate?

9 Line 23, answer, if you're looking at as
10 you're interpreting it, yes. The way I see it is
11 that when the PD-2 was originally approved, it was
12 based on a different LMO. And right now when the
13 DPR was submitted for the welcome center I don't
14 think that the PD-2 should have to comply.

15 We're not changing the PD-2, so the
16 density has to comply with the current resort
17 development density standards. That's the
18 underlying district. The current underlying
19 district. Most of the PD-2 waterside exists today.
20 This is the only parcel left of the original
21 15-point something acres that hasn't been built on,
22 yet.

23 I'm saying that. That's not part of her
24 answer.

25 JUDGE DUKES: Right.

1 MR. JOHNSON: What they're proposing
2 does comply with that. Continuing with her answer
3 at Line 7 on Page 71. That is what the LMO
4 requires. Any future development has to comply with
5 the current LMO.

6 Then carrying on Page 72, Line 9. Excuse
7 me. Line 4, okay, question, let me be more clear.
8 The process that we went through with Mr. Theodore
9 assumed that there was an existing PD-2 Overlay on
10 the 15.1 acres and it was undeveloped. That is the
11 whole 15.1 acres.

12 Line 8, answer, okay. Line 9, so no need
13 for a rezoning and change in the PD-2.

14 Question, could you develop that property
15 with the densities that are already there plus the
16 density for Parcel E and the current code
17 requirements?

18 Line 14, answer, I think so because they
19 were not exceeded what was originally intended and
20 what's in the LMO.

21 Line 18. Excuse me. Line 17, I'm not
22 being clear, was Mr. Williams' comment.

23 Line 18, answer, we obviously disagree.

24 That's what we're here for today.

25 Then Line -- Page 72, Line 25, this is a

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1 theoretical, Mr. Williams says. Your planner -- you
2 would be the one to review this application. I've
3 got a 15.1-acre tract. It's in a RD base zoning
4 district to develop the 198 residential units. I
5 developed the commercial space. I developed a
6 hotel. I guess the question is could I develop the
7 hotel and come in for Parcel E. Could you do that
8 starting fresh under the current code requirements?

9 Answer, under the current code
10 requirements, yes.

11 Comment by Mr. Stanford, Chairman of the
12 BZA, let's move it along, Mr. Williams.

13 All right. Then they go into discussion
14 about that categorical exemption letter. Page 74 --
15 excuse me. I better start at the bottom of Page 73.
16 Line 23, question, Mr. Williams, I'm reading from
17 the second page of your letter. And I'm thinking
18 that is the categorical -- is that -- I can't tell
19 what he's referring to. But anyway, the quote is

20 correct.

21 The categorical exemption certificate was
22 valid for five years and expired March 3, 2000.
23 After the expiration of the certificate, any future
24 developments of the property shall be subject to the
25 provisions of the LMO in effect at that time. End

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1 of quote.

2 Page 74, Line 4, answer, correct.

3 Line 5, question, quote, they must conform
4 to the standards of current LMO, end of quote.

5 Line 7, answer, any future developments.

6 It doesn't mean go back and look at everything that
7 is there.

8 Page 74, Line 10, question, but isn't that
9 what the PD-2 requirements call for that you can't
10 exceed.

11 Line 12, answer, staff does not agree with
12 that. That's why we're here.

13 Line 14, let me put it this way.

14 Question, they had their cake with the PD-2 before
15 and now they want to eat it. They already developed

16 more than what's allowed in the current code
17 requirements. And notwithstanding the expiration of
18 the categorical exemption letter, it's still your
19 position that they can rely on the densities and
20 uses of the 1987 master plan.

21 Line 22, answer, they didn't develop the
22 property to the capacity that was allowed under
23 PD-2. They didn't exceed what was allowed at that
24 time. They didn't fully develop it.

25 Page 75, Line 20, question, okay, so what

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1 you're saying is Town staff's position
2 notwithstanding the categorical exception, the
3 property owner still has a reliant to rely on the
4 uses and densities -- I said that backwards -- the
5 densities and uses provided for the 1987 master plan
6 notwithstanding the fact that they do not comply
7 with current code and requirements.

8 Page 76, Line 2, I'm saying that
9 regardless of the fact that the developer did not
10 develop fully to their potential at the time, yes,
11 the categorical exemption did expire. That's what

12 -- I reviewed it under the current Resort
13 District -- RD District for that property. And it
14 does not exceed the open space. It meets all LMO
15 requirements.

16 I do not believe that just because the
17 categorical exhibition expired the vacant area of
18 that property -- she's referring to the 15.1 acres
19 -- are no longer to be built on. I don't agree with
20 that.

21 Okay. Page 77, Line 10, question by
22 Mr. Williams, just to be clear, when you reviewed
23 the development of the new the application -- that's
24 the DPR application -- you did not take into account
25 whether or not the development of Parcel E would

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1 call the overall density to PD-2 to exceed what is
2 allowed under the current RD regulations.

3 Answer, I do not interpret the LMO that
4 way.

5 Question. Line 17 of Page 77. Yes or no.
6 Yes, I did or no I didn't. If you would just
7 answered.

8 Line 19, Mr. Stanford, the Chairman. I
9 think she just said -- she said no.

10 All right. Then there's a discussion on
11 Page 78 at Line 4 led by Mr. Stanford, Chairman of
12 the BZA.

13 MR. WILLIAMS: Your Honor, I always
14 hate to interrupt someone, but I think this has now
15 gotten almost like reading a deposition into the
16 record. And I think it's important that the rest of
17 her answer be read on there. Barry did not -- did
18 not put in.

19 And the only thing -- I'm not offering any
20 argument. But, Barry, when you were on Page 77 a
21 moment ago, and I'm now looking at Line 19, you
22 quoted that Mr. Stanford said, I think she said no.
23 Mr. Williams then said, the answer is no. And
24 Mr. Dixon said, I did not look at the density as far
25 as all the uses that exist out there and calculate

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1 it as a whole.

2 That's all I wanted to make sure.

3 MR. JOHNSON: That's fine. I have no

4 objection to that being in there.

5 JUDGE DUKES: All right.

6 MR. JOHNSON: Beginning at Page 78,
7 Line 4, Mr. Stanford goes into a discussion of one
8 think that troubles him is the concept master plan
9 from 1987 seems to be missing. There's much
10 discussion about everybody having tried to find it.
11 Nobody could find it.

12 Earlier, I believe, Mr. Alford read from
13 this transcript some of dialogue that Mr. Cutrer --
14 is that the right way to say it?

15 MR. ALFORD: Cutrer.

16 MR. WILLIAMS: Cutrer.

17 MR. JOHNSON: Cutrer.

18 MR. WILLIAMS: He's a member of the
19 Board.

20 MR. JOHNSON: Member of BZA, yeah.

21 Page 82, Line 19, question by Mr. Cutrer,
22 if I understand what you're saying, in the minutes
23 of the planning commission was a table.

24 Line 22, answer, yes.

25 Line 23, that addressed the development of

1 this property on a square footage basis?

2 Line 25, answer, yes, it does.

3 Page 83, Line 1, question, rather than a
4 per units basis like the other calculations we're
5 doing.

6 Line 3, answer, I'm not sure what
7 attachment it is, but it was in your packet.

8 Line 5, there was a thousand pages in
9 there. I looked at every one of them, but I don't
10 remember many of them. Let me ask my question
11 again.

12 Line 9, answer, okay.

13 Line 10, again on Page 83, question by
14 Mr. Cutrer, in the minutes of the planning
15 commission, May whatever it was, 1987, that Are
16 approved a master plan that we can't find the
17 drawing of, but in the minutes of the planning
18 commission's it's tabled?

19 Line 15, answer, yes, sir.

20 Line 16, which limits development or
21 specifies what can be developed on a per square
22 basis.

23 Line 19, answer, correct.

24 Line 20, question, using that -- referring
25 to that table -- and the current LMO, you've made

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1 the determination that this development is
2 permitted?

3 Line 23, answer, correct.

4 If you read the examination of
5 Mr. Theodore, I think you will see that some
6 theoretical questions were asked of him and they
7 were so confusing that he wound up describing the
8 questions that he received. I forget who asked the
9 questions. It was one of you all.

10 Yeah, Mr. Williams had asked some
11 questions. For example, Page 31, Line 16,
12 Mr. Theodore says I'm kind of not following you. I
13 feel like we're in a warp zone. The PD or not --
14 PUD -- original PUD and half not. It's expired, et
15 cetera.

16 Now, I want to take a couple of minutes
17 and point out to the court that I was invited by the
18 chair to make any comments I might have. Those
19 comments are laid out in this transcript on Page 89,

20 beginning at Line 1. And they only go on for about
21 five or six pages.

22 I would like every bit of that
23 specifically incorporated by reference in the record
24 of this hearing because it's argument that I would
25 make today just as I made to the BZA.

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1 JUDGE DUKES: I'll read it.

2 MR. JOHNSON: And I want to say one
3 thing about it. What I'm about to say does not
4 appear in the record, but I suspect everyone would
5 stipulate to it out of knowledge.

6 The Town of Hilton Head was promoted as a
7 -- to be incorporated as a town on the theory of
8 limited government and limiting growth. And over
9 the years, the LMOs got progressively more
10 restrictive in uses and densities; such that if you
11 have a property that was developed under a prior
12 LMO, particularly if it was a PUD and had this
13 ability to migrate uses and densities around within
14 the PUD and it was fully compliant when built and
15 you have a little piece leftover like we do about

16 roughly ten percent of the size of that 15-acre
17 parcel, maybe a little less than that, all over the
18 Island, what that does is render all of those
19 parcels today unbuildable under these concepts.

20 MR. WILLIAMS: Absolutely not. We're
21 certainly not willing to stipulate to that.
22 Mr. Johnson made those comments in -- when he was
23 speaking, and it's flat wrong. That's all there is
24 to it.

25 JUDGE DUKES: Okay. Well, if the

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1 request was for a stipulation, it sounds like it's
2 not there. So go ahead with your argument, though.

3 MR. JOHNSON: Even if it's not
4 something they can stipulate to on other properties,
5 it's clearly the effect on this property because
6 under their view of this property if you apply
7 current LMO densities to what has already been built
8 on the property under prior approvals then the rest
9 of the property that's left is throw-away property
10 of zero value.

11 The Town has an obligation to provide a

12 zoning for property that allows it to be reasonably,
13 economically developed. If they don't do that or if
14 they interpret their control documents like the LMO
15 such that that's their conclusion, then they have
16 condemned the property because the property owner
17 can make no beneficial economic use of the property.
18 It's a Lucas argument.

19 The position the Town came to with the
20 staff on further review after the staff
21 determination was appealed and reviewed by the staff
22 and then at the BZA and then in the hearing in which
23 the BZA considered Beachwalk's petition for
24 reconsideration and denied it, the interpretation,
25 all that was based on, was one which avoided the

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1 condemnation of this property, on the one hand, and,
2 on the other hand, interpreted the current LMO and
3 the entire history of this property so as to approve
4 this development at a number of square feet for a
5 commercial building that's less than what's
6 currently allowed there.

7 My comments in the record at the November

2017-11-16 Transcript.txt
8 hearing go up to Page 96, I think.

9 JUDGE DUKES: I think it's the bottom
10 of 94.

11 MR. JOHNSON: Ninety-four. All
12 right.

13 JUDGE DUKES: Now, you may have
14 answered some questions.

15 MR. JOHNSON: Then I answered some
16 questions.

17 MR. ALFORD: Mr. Taylor wanted to put
18 him under oath.

19 MR. WILLIAMS: He did.

20 MR. ALFORD: Harsh crowd.

21 MR. JOHNSON: By the way, just
22 because Mr. Taylor has submitted his proffer of what
23 he thinks I would testify to if asked does mean that
24 I think that's what I'd testify to if asked.

25 MR. ALFORD: We've got a

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1 non-stipulation non-proffered. Proffered testimony.

2 JUDGE DUKES: Thanks. All right.

3 Anything else? And I think, Mr. Alford, you wanted

4 to be heard on this?

5 MR. ALFORD: If I may, Your Honor.

6 I'll be -- I'll try to be brief because I'm just not
7 that smart. Density and calculations and all just
8 kind of go over my head. Respectfully, there was a
9 question about the sufficiency of the notice of
10 action from the Board of Zoning Appeals. That it
11 didn't contain sufficient findings of fact. I would
12 refer the court to the painful case of Carolyn
13 Songer Austin v. Board of Zoning Appeals and Town of
14 Hilton Head Island, decided November 24, 2004. I
15 do not have the SE 2nd citation, but I'd be happy to
16 get it for the court.

17 With respect to what's in the record or
18 not, there's also a discussion of that in Vulcan
19 Materials Company versus Greenville, 342 South
20 Carolina 480, 536 SE 2nd 892. Also, Massey v. City
21 of Greenville Board of Zoning Adjustments, another
22 case that stands for that proposition that the court
23 can look at the transcript if it is unable -- if the
24 entire record -- if it's unable to discern this from
25 the written order what the intent was.

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1 Okay. There's a lot of material here.
2 There's a lot of history here. I think if you dig
3 into this record, in the back, I read some of it to
4 the court earlier, and I think it really came down
5 to the staff interpreting the LMO and the PD-2 in
6 one way and Mr. Williams and his clients
7 interpreting it another. And I think they both had
8 ample opportunity to present those views to the
9 Board of Zoning Appeals in a fairly lengthy record.

10 And I think the finding was even with the
11 comment about the PD-2 and those kind of things, Ms.
12 Dixon was pretty clear throughout that she felt like
13 they complied with the LMO. The current LMO
14 including the PD-2 standards. And that the intent
15 of the LMO was not to leave that property as an
16 unbuildable lot as an open space forever.

17 And I think if you go through this record,
18 what you find is just a disagreement between
19 Mr. Williams and Ms. Dixon and then ultimately
20 Mr. Williams and the BZA and then ultimately
21 Mr. Williams and Mr. Johnson and Mr. Taylor on
22 Mr. Williams' side about how to interpret that
23 provision of the LMO as it related to the density
24 requirements.

25 And then I always will want to ask myself

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1 why? Why does Mr. Taylor and Mr. Williams care.
2 Why does their client care? And I think -- I could
3 be wrong. I think they care because they all have
4 to share whatever bit of density is left within that
5 master-planned parcel such that if Mr. Johnson's
6 client is able to utilize this density that there
7 might not be any left for Mr. Taylor/Mr. Williams'
8 client should they want to add something or increase
9 the density of their withholdings within that master
10 plan.

11 I don't know if that's true or not, but
12 that stands to reason that there's only a certain
13 amount of density allocated. And that if
14 Mr. Johnson's client is going to use some of it --
15 I'll let you -- go ahead.

16 MR. WILLIAMS: You mean a certain
17 amount of density allocated to the entire 15 acres?

18 MR. ALFORD: Yeah.

19 MR. WILLIAMS: Okay. All right.

20 MR. ALFORD: Yes.

21 MR. WILLIAMS: I just wanted to make
22 sure.

23 MR. ALFORD: Yes, sir. Yeah. So
24 anyway, I'll just -- I'll keep it simple, Judge,
25 because like I said, I'm not real -- I mean, I cite

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1 Vulcan Materials. There's a lot of material here.
2 There was a thorough discussion of it. There's a
3 lot of exhibits. There's a lot of conversations.
4 There's a lot of history with the property. I would
5 simply just, you know, cite the standard in Vulcan
6 Materials and tell you that there is some evidence.
7 I think there's more than some, but there is some
8 evidence to support the decision of the Board of
9 Zoning Appeals and I would ask that it be affirmed.

10 MR. JOHNSON: Might I follow up with
11 two minor points, Your Honor?

12 JUDGE DUKES: Go ahead, please.

13 MR. JOHNSON: One is that in the
14 record you will see that Mr. Theodore, the land
15 planner, did some calculations and calculated that
16 out of that 15-acres, some nine acres is open space

17 already.

18 Second thing is that since we have the
19 confusion with regard to whether or not a transcript
20 of the November 2016 BZA hearing was in the record
21 and you kindly provided one for the record, I want
22 to make sure that the record includes a copy of the
23 transcript of the January 2017 BZA hearing. I have
24 a copy --

25 MR. WILLIAMS: Both transcripts are

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1 in the record. Greg's office filed -- has the
2 record --

3 MR. JOHNSON: Okay. Well, I want to
4 make sure His Honor has both of them. I only have
5 one copy of the January one and one copy of the
6 November one. But if you've got another sealed copy
7 of the one that's in January, maybe we could put
8 that in. All right. If you've got an extra copy
9 and stipulate to that or either one of us can email
10 it to him. I don't care. But it needs to be before
11 his attention because there's a review of that same
12 stuff in January that's relevant at the

13 reconsideration hearing.

14 JUDGE DUKES: Well, I am happy to
15 receive it any way it can be sent.

16 MR. ALFORD: I do think there's -- I
17 mean, obviously, the rules provide for the BZA to be
18 asked to reconsider matters. And Mr. Williams and
19 Mr. Taylor availed themselves of that opportunity.
20 So you've got quite a bit of discussion,
21 consideration, and back and forth in front of the
22 BZA on this issue. And I think that that further
23 lends credibility to their decision.

24 MR. JOHNSON: You all look at this
25 and see if it's good enough for me to copy and send

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1 to him.

2 (OFF RECORD DISCUSSION)

3 JUDGE DUKES: And for the record, it
4 was hard to file the record electronically. It took
5 me a while to figure out how to do it.

6 MR. WILLIAMS: That's because it
7 wasn't in chronological order.

8 But, Your Honor, the reason why I asked

9 Mr. Alford if he was talking -- when he was talking
10 about only so much density go around when he was
11 talking about the entire 15 acres is because that's
12 -- he's making our argument for us there's.

13 And there's a good bit of math in the
14 transcript, but let me see if I could -- if I can
15 boil it down for you. One of the benefits of a PD-2
16 Overlay District is it allows you to be able to
17 shift densities around and build on a particular
18 tract at a density that is higher than the base
19 underlying zoning district would normal allow for
20 provided that that increase in density is offset by
21 a lower density on another tract.

22 For example, if you had a 10-acre tract
23 and you were in a zoning -- base zoning district
24 that allowed for 10,000 square feet per acre, then
25 on the entire tract you'd have 100,000 square feet

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1 available. If it was subject to a PD-2 Overlay
2 District and you subdivided it into four tracks,
3 then you could build all 100,000 square feet on one
4 of those four tracks.

5 But at the same time you had to give up
6 the density one the other three tracks because the
7 average on the entire 10-acres still can't exceed
8 10,000 square feet per acre.

9 That's exactly the situation that we have
10 here. There's a PD-2 Zoning District that consists
11 of some 15 acres. And when you take into account
12 the existing development on the four acres that are
13 -- the four parcels that are already developed and
14 you apply that to the base underlying RD Zoning
15 District, there's no more density under the average
16 density left for Parcel E. And it's not a taking --
17 and Mr. Johnson's very familiar with the categorical
18 exemption process that he went over.

19 The way that came about -- and there's
20 testimony from Curtis Coltrane, who we called as a
21 witness for the BZA hearing, because he was the town
22 attorney at that time who handled all the
23 categorical exemptions. In fact, he drafted that
24 letter to Mr. Graves.

25 When the Town enacted it's LMO in 1987 and

1 as development progressed after that, the Town found
2 these developers like Mr. Graves, and many of
3 this -- coming forward with development permits
4 issued by the County prior to the incorporation of
5 the Town, sometimes prior to the Town's enactment of
6 the land management ordinance that purported to
7 allow for development on parcels within the Town at
8 -- for uses and densities that were not then
9 permitted under the code -- under the LMO.

10 The Town said, you know, how do we deal
11 with this. They came up with this vested rights
12 determination process that resulted in the
13 categorical. Here there was a categorical exemption
14 letter that was issued for the waterside PUD, for
15 the entire master-planned area. And back then it
16 was referred to as the Town Center PUD. And it's
17 now referred -- it's now called the Waterside PUD.

18 And what that document said was the Town
19 recognized Pope Avenue Associates' rights to develop
20 the PUD at the densities and uses permitted in the
21 master plan that was then approved but only until
22 March 3rd of 2000. And after that, Mr. Johnson in
23 his statements at the BZA hearing said that the
24 issue of the five-year limitation was tried before

25 the courts and the courts upheld that as a valid

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1 limitation on vested rights.

2 So what the categorical exemption did was
3 it granted a vested right for a certain period of
4 time, five years. And what it said was, you can
5 develop under the old approvals notwithstanding the
6 fact that they would be nonconforming under the
7 current code revisions, but you've got to do it by,
8 in this case, March 3rd of -- March 3rd of 2000.

9 SCD Properties are SDC Properties,
10 whichever one, acquired the property -- acquired
11 Parcel E prior to the expiration of the categorical
12 exemption. So they had the right during a period of
13 their ownership of the property to develop Parcel E
14 as originally provided for under the Waterside PUD,
15 the Town Center PUD. They chose not to do that.

16 After the expiration of the categorical
17 exemption, they then required for any development to
18 comply with the then current LMO provisions. They
19 applied for the development permit for Parcel E.
20 And we don't dispute that it meets all the

21 requirements for the base underlying zoning
22 district.

23 But if you have to comply with all of the
24 provisions of the LMO that's currently in effect,
25 that includes the PD-2 requirements, the PD-2

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1 limitations, the PD-2 regulations. And the code
2 says if you're in a PD-2, then the PD-2 regulations
3 control.

4 And both Todd Theodore and Nicole, when we
5 went through the math, agreed that the density
6 that's there right now in that PD-2 District exceeds
7 what would otherwise be permitted under the current
8 code. The fact of the matter is there's no density
9 left available.

10 And Mr. Alford may have some validity to
11 his argument. Maybe there's only so much to go
12 around. Well, there is only so much to go around.
13 And that so much to go around has already been
14 exceeded. There's no taking here because -- and
15 that's a completely separate issue.

16 But assuming it was before us, SCD -- they

17 elected not to exercise the rights that they held
18 under the categorical exemption during the period of
19 time that they owned the property. And they've got
20 to comply with the current code requirements now.
21 If they want to file a takings action with the Town,
22 they're free to do that. But that's not before us
23 right now.

24 MR. TAYLOR: Your Honor, if I may,
25 just a couple other points. Kind of to wrap up from

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1 our position.

2 Fortunately -- to address Mr. Johnson's
3 assertions about the quality of our existing
4 development. Fortunately, how a plaintiff looks is
5 not indicative of its legal rights as I'm sure I
6 don't have to tell this court. But that type of
7 assertion, I want to point out to the court, is why
8 the BZA ultimately makes rulings like this.

9 And it is this, Your Honor, after two and
10 a half hours, a thousand pages and the kind of
11 arguments here where someone says, you know, you've
12 got nine acres that are open space, how can you even

13 think about doing it. The good thing and the reason
14 the legislature set up an appeal to this court is
15 because Your Honor can set that aside because you
16 don't you know and you have the background and
17 training as a judge to know that that argument
18 doesn't mean a thing.

19 To just pull out of the air and say he
20 said that not 15 -- there's nine acres in open
21 space. So, obviously, we ought to be able to
22 develop here. Well, no, because the LMO has always
23 been set up for people to be able to plan
24 accordingly. And when you have a PD-2 Overlay
25 District that allows you, as Chet described, to put

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1 significant density in one area, then, yes, you give
2 up that density rights in other areas.

3 And the only way you can come and make
4 this argument is to say E -- Parcel E, the one acre
5 that's vacant now must be treated as if it stood
6 alone under the LMO. And nobody here would argue
7 that if stood alone under the LMO that the base
8 density for RD would be met by this application.

9 But it doesn't stand alone, Your Honor. PD-2
10 applies to it. There isn't really any dispute here
11 that the PD-2 Overlay applies to it, that the
12 average density had to be calculated, and that it
13 exceeds what is permissible on that point.

14 What happened was the BZA got overwhelmed
15 with all of the discussion and all the emotional
16 talk about you're taking away our rights to develop.
17 No, they made a decision to develop density higher
18 in other aspects of the 15 acres and this is not
19 developable under the current LMO.

20 Your Honor, two other major points. The
21 reason I did not address the exemption letter that
22 was talked about is because I didn't think there was
23 any real need to. That is a complete -- it's
24 another thing that the BZA got hung up on. But,
25 ultimately, everybody agreed it was not applicable

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1 because the letter issued, as we said, to Mr. -- to
2 the forerunner in interest of Mr. Johnson's clients
3 on March 3rd, 1995, and for the record a copy of
4 that letter is Exhibit D to the appeal submitted to

5 the Town and is a part of this and was copied to
6 Mr. Johnson at the time, and all of the rights, and
7 it says so in the letter, after the expiration of
8 the certificate, any future development on the real
9 property, which is the subject of the application,
10 shall be subject to all relative provisions of the
11 then existing LMO and/or other such land-use
12 ordinances or regulations as may be enforced, which
13 is exactly what we're arguing today.

14 And in fact, a part of the transcript was
15 not earlier noted from the hearing of the 28th of
16 November. Mr. Cutrer asked Mr. Johnson on behalf of
17 SDC, am I correct or am I wrong that all of this
18 1987 stuff is kind of irrelevant at this point? And
19 Mr. Johnson said, I believe it became irrelevant on
20 March 3rd, 2000, which is the day the letter
21 expired.

22 So there's nothing about any of the
23 background and any of the talk about grandfathering
24 or any of that that is relevant to this court's
25 decision whatsoever because everybody agrees that

1 once this exception letter expired and they did not
2 develop under it and the rights that they were given
3 by the March 3rd, 2000, timeframe that became
4 irrelevant. And that any future development would
5 be subject to the existing terms and condition of
6 the LMO which as of October 14th, 2014, establishes
7 and continues the PD-2 Overlay with the requirements
8 of the density averaging. And there's no doubt this
9 exceeds that.

10 Your Honor, this is a clear error of law
11 on behalf of the staff and on the BZA. We ask that
12 you, at a minimum, send it back for further
13 consideration based upon the fact that it's a clear
14 error of law or overturn it completely.

15 MR. ALFORD: If I may be heard, Your
16 Honor, briefly. I promise I'll be quick. I think
17 it's -- I think as you go through these BZA hearings
18 you kind of -- they do. They go through all kind of
19 different things. And they sift through it. And I
20 think as get to sort the end of the transcript, the
21 members of the BZA and the staff, people have had a
22 chance to kind of distill things down. I think
23 that's helpful.

24 And there's been a lot of talk about the
25 density and PD-2 and those kind of things. And this

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1 is a question -- I'm on Page 108 of the transcript,
2 Mr. Fingerhut, a member of the BZA asks, you would
3 -- he's asking Ms. Dixon, you would stipulate to
4 that math.

5 I'm sorry. I didn't hear that.

6 You're saying the theory is incorrect, but
7 the math is that correct. Is that what you're
8 saying? He's asking Mr. Dixon.

9 Ms. Dixon says, if you're going to look at
10 the entire PD-2 and based on their density on the
11 current LMO but use what is existing out there now,
12 then Chet has demonstrated in his math they would be
13 allowed -- they would not be allowed to do what they
14 are proposing. Staff does not interpret the LMO
15 this way.

16 Mr. Stanford, and that's because we have a
17 new LMO that is being applied to this particular,
18 smaller parcel?

19 Ms. Dixon, Correct. I believe on this
20 particular piece they are meeting the correct LMO.

21 Let me -- next page. I'm sorry, Your

22 Honor. And so I guess -- and then he --

23 Mr. Fingerhut, not as part of the new development --

24 MR. JOHNSON: What page?

25 MR. ALFORD: I'm on the top of 109.

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1 Not as part of the new development, just as a new
2 piece of land.

3 Ms. Dixon, I am not denying it is part of
4 the 15-acre PD-2. I'm not denying that it is not
5 part of that anymore. It is still part of that
6 PD-2. But as you know, as you said, that
7 categorical exemption expired. They're not really
8 tied to the original density allowed. So as long as
9 they meet the current density that is allowed on
10 that tract, then it should be approved. And that is
11 what I base my decision on. So you can either agree
12 with my determination or not agree with it and I
13 would have to resend my notice of action.

14 I mean, they really went through
15 everything that these gentlemen are concerned about.
16 It really just comes down to a disagreement on the
17 interpretation. And I think that's important.

18 MR. WILLIAMS: And part of the issue
19 is -- from our standpoint is when the law is clear,
20 there's no interpretations. I mean, the PD-2 --

21 MR. ALFORD: Well, we wouldn't have
22 jobs if that was the case.

23 MR. WILLIAMS: The PD-2 requirements
24 are crystal clear and everybody agrees the property
25 is in a PD-2 overlay. Regulations have to be taken

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1 into account. And as Greg just read, Ms. Dixon said
2 that, you know, if you look at the PD-2
3 requirements, the entire 15 acres, then the math
4 that I did and presented at the hearing is
5 corrected. And she's got to resend her development
6 plan immediately.

7 MR. ALFORD: But I don't think she
8 agreed with your interpretation. And I think --

9 MR. WILLIAMS: Correct. She didn't.
10 But she said if --

11 MR. JOHNSON: What she said is that
12 the -- all that old stuff is gone and we're looking
13 at it just today.

14 MR. ALFORD: Under the current LMO.
15 And that's where I think you have the problem. Is
16 under the current standard today, they're allowed to
17 have that density. And I think that's what the BZA
18 distilled it down to. And I think that's the
19 answer. But we could --

20 MR. WILLIAMS: And I would agree that
21 --

22 MR. ALFORD: We could go on day after
23 day.

24 MR. WILLIAMS: I would agree that
25 under the RD they've got that density. But under

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1 the PD-2, the don't have that density.

2 MR. ALFORD: Well, Your Honor, unless
3 the court has any questions of me, I would rest.

4 JUDGE DUKES: I don't have any
5 questions. I guess you all are going to send me
6 that other transcript to read?

7 MR. JOHNSON: Yes, sir. I will be
8 responsible for doing that, and I will get that to
9 you tomorrow.

10 MR. WILLIAMS: So the position of the
11 Respondent is the PD-2 still exists and still covers
12 this property but that there's a new LMO and because
13 this piece of property is technically separate, I
14 assume, taxable parcel, it's one acre rather than
15 14, even though the PD-2 covers the whole 15 that
16 includes all these different parcels that are both
17 parties' properties. Because there's a new LMO,
18 this is no longer -- the PD-2 is no longer
19 applicable.

20 MR. ALFORD: No. The PD-2 is
21 applicable, but the density requirement changed.
22 And so that's what her quote was at the end. She
23 said, because of the change, the density
24 requirements have changed. And so they now have the
25 density. That was her quote. I'll go back to it if

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1 the court would like because I think it does a good
2 job of explaining what she --

3 JUDGE DUKES: What page is that on?

4 MR. JOHNSON: 108 and 109.

5 MR. ALFORD: Yes, sir, 108 and 109

6 because we're down at the end of the hearing and
7 they're kind of, you know, drilling down on it and
8 saying -- and so that's her explanation. And if you
9 follow the dialogue --

10 JUDGE DUKES: So the Appellant's --
11 just to sort of distill down the Appellant's
12 position is the most restrictive restraints. And
13 the PD-2 is the most restrictive and it's still
14 applicable. And it doesn't matter what the new LMO
15 did because the most restrictive restraints. Was
16 that kind of where you all are?

17 MR. WILLIAMS: Well, no. Under the
18 LMO that was adopted in 2014, if you look just at
19 it, then -- and apply those PD-2 requirements under
20 the existing LMO to the property, then there's no
21 density left. Meaning Nicole admitted that.

22 MR. ALFORD: Well, but again, I think
23 you're selectively pulling out her admissions. And
24 I don't --

25 MR. WILLIAMS: Well, what else --

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1 what am I -- what am I missing then?

2 JUDGE DUKES: So then there's a new
3 LMO, right? That's all that happened.

4 MR. ALFORD: Yeah, I'm on Page 109.

5 MR. WILLIAMS: No.

6 MR. ALFORD: And she -- well, here's
7 what she says because they're asking her kind of the
8 same question you're asking, Judge.

9 JUDGE DUKES: -- appears on page --

10 MR. ALFORD: 109.

11 JUDGE DUKES: -- 109 --

12 MR. ALFORD: Yes, sir. Yeah, 1
13 through -- Line 1 through 19, because they're asking
14 her, are they stuck with that? And she says, they
15 would be. But then she says, they're not tied to
16 the original density allowed so long as they meet
17 the current density that is allowed on the tract,
18 then it should be approved. And that's what I'm
19 basing my decision on.

20 And if you follow on in the conversation,
21 she just says, I concurred that his math is correct.
22 But I don't interpret the LMO that way. And what
23 she's saying is the current LMO, I don't interpret
24 as sticking them to the prior density requirements
25 that Mr. Williams wants them to be stuck with -- or



1 limitations, I guess, that he wants them to be stuck
2 with.

3 MR. WILLIAMS: But therein it lies
4 part of the problem because the density figures that
5 I've used aren't prior density figures. They're the
6 current density figures under the current LMO.

7 MR. ALFORD: Well, she disagrees with
8 you on that part of it.

9 MR. WILLIAMS: Well, she -- but she
10 went through the math and she agreed that my math
11 was correct and that math was all based on the
12 current LMO.

13 JUDGE DUKES: Well, it is --

14 MR. JOHNSON: By your assumption.

15 MR. ALFORD: Your Honor, if you go --
16 if you go to Page 111 at the bottom -- if you go to
17 Page 111 at the -- toward -- starting at Line 18,
18 Mr. Cutrer, which is for the court reporter's
19 benefit C-u-t-r-e-r, so we take the par for the day.
20 How does that comply with the current LMO? And how
21 does it comply with the PD-2 Overlay?

22 Ms. Dixon, the PD-2 is always going to be
23 there. Now, as far as them being tied to the
24 density that was shown on the original conceptual
25 plan, they don't have to be tied to that. The have

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1 to be tied to the current LMO standards.

2 Mr. Cutrer, so how does that proposed
3 development comply with the current LMO?

4 Ms. Dixon, how does it?

5 Mr. Cutrer, how does it?

6 Ms. Dixon, they demonstrated that their
7 density meets the current density standards and
8 current open space.

9 Mr. Cutrer, that's what needed to hear.

10 MR. WILLIAMS: And we will submit to
11 you that the math is contrary to that because while
12 it meets the development of Parcel E as proposed by
13 SCD meets the density standards of the RD District,
14 the underlying base, it does not meet the density
15 standards that are imposed on the property because
16 of the PD-2 Overlay.

17 You've got -- you've got to comply with

18 both and you have to get over the higher hurdle.
19 The higher hurdle, the more restrictive one is the
20 PD-2 density requirements for the average density
21 across the 15 acres.
22 MR. TAYLOR: Your Honor, as you know
23 from having seen a lot of witnesses over the years,
24 taking her testimony when being led by the BZA at
25 the end is not the really appropriate place.

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1 MR. ALFORD: Whoa.
2 MR. TAYLOR: The best place to look
3 at her testimony --
4 MR. JOHNSON: It's no different than
5 her being led by you all and she's not a lawyer.
6 JUDGE DUKES: Well, let -- you all
7 let me --
8 MR. JOHNSON: And that's what
9 happened in that hearing.
10 JUDGE DUKES: You all let me do this.
11 I'm going to read the transcript. I'll figure it
12 out.
13 MR. JOHNSON: No different.

14 MR. WILLIAMS: I trust you to figure
15 it out.

16 MR. JOHNSON: You lead a leading
17 question.

18 MR. ALFORD: Chet lead her to the
19 point where she said we just disagree.

20 JUDGE DUKES: Yeah. I'll read it.
21 I'll figure it out.

22 MR. TAYLOR: But, Your Honor, the key
23 is Ms. Dixon actually believes that PD-2 does not
24 apply anymore. And she so testified to that on
25 Page 70 and 71. She says, if you're looking at it

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1 as you're interpreting it, yes. Because Chet asked
2 her if his figures were accurate. And then she
3 said, the way I see it is that when the PD-2 was
4 originally approved, it was based on a different
5 LMO. And right now when the DPR was submitted for
6 the Welcome Center, I don't think that the PD-2
7 should have to comply. We are --

8 JUDGE DUKES: Let me ask you all a
9 question about the PD-2 and the LMO. Does the PD-2

10 reference the -- and I understand the LMO is totally
11 different now. It's all changed. But does the PD-2
12 reference the underlying, at the time it was
13 written, LMO? Is it some --

14 MR. WILLIAMS: No, but it does -- it
15 does incorporate -- it does -- there's a listing of
16 the PD-2 master plan areas to which all of the PD-2
17 requirements are applicable. And the Waterside Town
18 Center PUD is included in that list.

19 So the current LMO recognizes the
20 Waterside Town Center PUD as a -- that -- previously
21 existing and remaining PD-2 Overlay District. And
22 I'll be glad to -- if you want the section --

23 JUDGE DUKES: But I mean, because
24 there's somewhat of a true overlay that'll have no
25 connection with what's underneath. And, you know,

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1 you can have design standards and that sort of
2 things in it. And then you can have, I guess, an
3 overlay that ordinarily would allow additional
4 density on top of whatever the underlying --

5 MR. WILLIAMS: Correct. In that case

6 because the PD-2 requirements control, you have
7 greater density than the underlying base zone
8 district. I'll be glad to photocopy or excerpt out
9 all the requirements from the section from the LMO
10 and the PD-2 Overlay District.

11 JUDGE DUKES: Are those part of -- it
12 should be part of it somewhere? A.

13 MR. WILLIAMS: Well, there are the
14 excerpts that I went over earlier that are
15 Exhibit 3, I think, to the petition for -- or the
16 transcript at the petition for reconsideration. But
17 the actual code sections themselves I don't think
18 were included in the -- in the record at all. I
19 mean, it's -- take judicial notice of it because --

20 JUDGE DUKES: But let me ask and see
21 if the parties agree to this. So PD-2 was not
22 linked as sometimes these things would be linked.
23 And ordinarily they're link as far as you get an
24 additional certain number of units if you position
25 the property closer to the road or using

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1 (inaudible). I mean there's a linkage that has to

2 do with additional rights and then there's the flip
3 side, the additional restrictions. But either of
4 those would link it in such way to the LMO where if
5 the LMO changed, conceivably the overlay would
6 change.

7 MR. ALFORD: Correct.

8 JUDGE DUKES: And so I guess my
9 question is, maybe it's down to that. Maybe I need
10 to read the PD-2 and try to determine -- because I'm
11 trying to figure out her testimony that it just went
12 away. At the same time she's saying it will always
13 be there. And I can only --

14 MR. ALFORD: What she's saying is it
15 changed. That's what she's saying.

16 JUDGE DUKES: And if it's linked
17 together, then maybe it did go away or change.

18 MR. ALFORD: It changed.

19 MR. WILLIAMS: Well, if you read --
20 you read the categorical exemptions, certificate and
21 -- do have -- Tom, the categorical exemption?

22 JUDGE DUKES: It's probably --

23 MR. WILLIAMS: And it says -- it
24 says -- and what it says is you could rely on the
25 previous permits that allow you to develop the

1 property at densities exceeding what the code allows
2 but only until March 3, 2000. And after that, you
3 have to comply with all relevant provisions of the
4 then existing LMO.

5 This was the then existing LMO adopted in
6 October of 2014 at the time that the development
7 permit application was filed in 2016. All
8 applicable provisions -- it's a PD-2. You've got to
9 comply with the PD-2 requirements of the current
10 LMO.

11 It seems pretty clear to us. And Nicole
12 just didn't think -- Nicole interpreted the
13 ordinance in a manner that allows the development of
14 Parcel E as if it were a stand-alone parcel and not
15 part of the notwithstanding the fact that everybody
16 agrees it's in a PD-2 Overlay District. And that's
17 simply wrong.

18 MR. ALFORD: And I disagree.

19 JUDGE DUKES: Well, let me let
20 Mr. Johnson -- he's been very quiet.

21 MR. JOHNSON: I'd like to just say
22 one thing. I mentioned it in comments I made to the

23 BZA that are in that section of the transcript
24 beginning at Page 89. To the extent that all of
25 these learned people have a disagreement over what

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1 applies and what doesn't apply, it invokes to me the
2 dictates of Hamilton and CCM, the case Jim Herring
3 had that says the principal law that we all know,
4 that where there's ambiguity in regard to a
5 restriction on the use of real estate, the ambiguity
6 has to be resolved in favor of the freest use of
7 real estate.

8 MR. WILLIAMS: But that deals with
9 restrictive covenants, not a zoning --

10 MR. JOHNSON: The principle is no
11 different.

12 JUDGE DUKES: All right. Well, let
13 me -- somewhere in this I suppose I should have the
14 extension agreement. What did you call it?

15 MR. WILLIAMS: Categorical exemption.

16 MR. JOHNSON: It said it's Exhibit D
17 to their application. This thing to the BZA.

18 JUDGE DUKES: Anything else from

19 anyone? Somebody's going to get me the transcript
20 of the --

21 MR. JOHNSON: I'm going to do that,
22 Judge.

23 (OFF RECORD DISCUSSION)

24 JUDGE DUKES: Okay. Great. And why
25 don't we do this if we -- I think Heather might

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1 already be gone. But if you all would if you all
2 would shoot her an e-mail tomorrow at some point in
3 the near future, and let's set up about two weeks
4 out, three weeks a conference call to follow up on
5 this. Just so I can think about it.

6 MR. ALFORD: You got a lot to think
7 about.

8 JUDGE DUKES: All right. That will
9 conclude the hearing.

10 (Whereupon, the hearing was concluded
11 at 3:48 p.m.)

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1 Certificate of Reporter

2

3 I, Deborah S. Thomas, Certified Verbatim
4 Reporter and Notary Public in and for the State of
5 South Carolina, do hereby certify that I reported
6 the hearing of 2016-CP-07-02712, Beachwalk Hotel &
7 Condominiums Association, Inc., et al v. The Town of
8 Hilton Head Island, et al, on the 16th day of
9 November, 2020, and that the foregoing pages
10 constitute a true and correct transcription of the
 said hearing.

7

8 I further certify that I am neither
9 attorney nor counsel for, nor related to or employed
10 by, any of the parties connected with this action,
 nor am I financially interested in said cause.

10

11 I further certify that the original of
12 said transcript shall be hereafter delivered to
13 Thomas C. Taylor, Esquire, Law Office of Thomas C.
14 Taylor, LLC, Post Office Box 5550, 22 Bow Circle,
15 Suite A (29928), Hilton Head Island, South Carolina
16 29938-5550

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18 In witness whereof, I set my hand and
19 sealed this 11th of April, 2020.

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My Commission expires 2/7/28	Deborah S. Thomas, CVRM and Notary Public for the State of South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Case # 2016-CP-07-02712
final hrg.

EXHIBITS

Plaintiff(s) Beachwalk Hotel + Condo Assoc, Inc. et al
vs.
Defendant(s) The Town of HHI, et al

Appx. No. 1

PLAINTIFF'S EXHIBITS	DEFENDANT'S EXHIBITS	COURT'S EXHIBITS
1 <u>Transcript 11-28-16</u> <u>'BZA hrg.'</u>	1	1 <u>Affidavit</u>
2	2	2
3	3	3
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Court Reporter Deborah Thomas Trial Judge Dukes
Clerk of Court _____

Date 11-16-17

ELECTRONICALLY FILED - 2017 Nov 17 9:17 AM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

5/11/16
Maria Parker 3343

ADD DMP Record 12/22/2016 11:06:49 AM
BEAUFORT COUNTY TAX MAP REFERENCE
Dist Map SMap Parcel Block Week
R552 018 000 0202 0000 00

BEAUFORT COUNTY SC - ROD
BK 3539 Pgs 1445-1469
FILE NUM 2016068593
12/21/2016 10:38:13 AM
REC'D BY rbins RCPT# 834100
RECORDING FEES \$11.00

STATE OF SOUTH CAROLINA) AFFIDAVIT OF CORRECTION
) OF NAME OF GRANTEE
COUNTY OF BEAUFORT)

The within Affidavit is made this 20th day of December, 2016 by Maria Belbas Parker, Esq.,
counsel to SDC Properties, Inc.

The undersigned hereby warrants and represents the following to be true and correct
statements of fact:

1. This Affidavit is made and recorded to correct the spelling of the name of the Grantee identified in the deed recorded July 29, 1999 in Book 1195 at Page 942, a certified true copy of which is attached hereto and incorporated herein by reference (hereinafter, the "Deed").
2. The undersigned is general counsel to SDC Properties, Inc., and is familiar with the transaction related to the conveyance of the property referenced in the Deed.
3. In the first paragraph of the Deed, the name of the Grantee was incorrectly spelled as "SCD PROPERTIES, INC., a Utah Corporation". Due to an inadvertent scrivener's error, the name of the Grantee was incorrectly spelled as "SCD Properties, Inc." when the correct spelling of the Grantee's name is "SDC Properties, Inc."
4. There are three (3) additional references to the name of the Grantee in the Deed: in all three remaining instances, the name of the Grantee is correctly spelled as "SDC Properties, Inc."
5. The habendum clause of the Deed correctly identifies the name of the Grantee as "SDC Properties, Inc."
6. The undersigned hereby affirmatively states that the incorrect spelling of the name of the Grantee as "SCD Properties, Inc." in the first paragraph of the Deed was an inadvertent oversight and error by the scrivener. This Affidavit is made and recorded to identify and correct the spelling of the Grantee's name in the Deed as SDC Properties, Inc.
7. The undersigned affiant sayeth nothing further.

CERTIFIED TRUE COPY
of the document recorded in the Offices of the
Register of Deeds for Beaufort County, S.C., on
(date): December 21, 2016
in OR Book 3539 Page 1445
This document contains 5 pages.
Catherine Evans 12/29/16
Register of Deeds - Beaufort County, SC

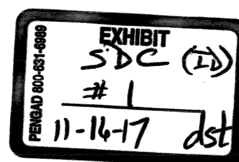
Maria Belbas Parker
Maria Belbas Parker, Esq.
Law Office of Maria Belbas Parker, PA
PO Box 7926, Hilton Head, SC 29938

Angela M. Finkler

Sworn to before me this 20th day of December, 2016

Notary for South Carolina/My commission expires: 8/3/19

Book3539/Page1465 CFN#2016068593



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STATE OF SOUTH CAROLINA
BEAUFORT COUNTY

BEFORE THE BOARD OF ZONING
APPEALS OF THE TOWN OF
HILTON HEAD, SOUTH CAROLINA

TO THE APPEAL APPLICATION OF:
BEACHWALK HOTEL & CONDIMINIUMS ASSOCIATION,
INC., and BEACHWALK HILTON HEAD, LLC

-----/

The BOARD OF ZONING APPEALS of
BEACHWALK, a witness in the above-entitled
cause, taken pursuant to Notice and agreement,
before Kyle J. Saniga, Certified Court Reporter

BZA MEETING 8-27-2018.txt
21 and Notary Public, at the Offices of The Town of
22 Hilton Head Island, One Town Center Court,
23 Hilton Head, South Carolina, on the 27th day of
24 August 2018, commencing at or about the hour of
25 12:56 p.m.
COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

↑

2

1 APPEARANCES OF COUNSEL:
2 FOR FOR BEACHWALK HOTEL CONDOMINIUMS
ASSOCIATION AND BEACHWALK HILTON HEAD, LLC: :
3
4 THOMAS TAYLOR, ESQUIRE
Law Office of Thomas C. Taylor, L.L.C.
22 Bow Circle
5 Suite A
Hilton Head, South Carolina 29928
6
7 AND
8
9 CHESTER C. WILLIAMS, ESQUIRE
Law Office of Chester Williams, L.L.C.
Post Office Box 6028
10 Hilton Head Island, SC 29938-6028
11
12 FOR SDC PROPERTIES INCORPORATED:
13 BARRY L. JOHNSON, ESQUIRE
Johnson & Davis
14 The Victoria Building

Page 2

BZA MEETING 8-27-2018.txt

Suite 300

15 10 Pinckney Colony Road
16 Bluffton, South Carolina 29909
17 barry@jd-pa.com
18 843.815.7121

19 FOR THE TOWN OF HILTON HEAD ISLAND:

20 GREG ALFORD, ESQUIRE
21 Alford & Thoreson, L.L.C.
22 18 Executive Park Road,
23 Suite 1
24 Post Office Box 8008
25 Hilton Head, South Carolina 29928

- - -

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4 EXHIBIT INDEX ----- 4

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6 OPENING REMARKS AND STIPULATIONS ----- 5

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EXAMINATION OF CURTIS COLTRANE:

13 By Mr. Taylor ----- 26

14 EXAMINATION OF TERI LEWIS:

By Mr. Taylor ----- 45

15 By Mr. Alford ----- 51

By Mr. Taylor ----- 52

16

EXAMINATION OF NICOLE DIXON:

17 By Mr. Cutrer ----- 150

By Mr. Williams ----- 170

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25 CERTIFICATE ----- 256

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1

D O C U M E N T A R Y E V I D E N C E

BZA MEETING 8-27-2018.txt

2	NUMBER	DESCRIPTION	PAGE
3	EX-1	Memorandum and subpoena and Town Response	5
4	EX-2	Attachment H	5
5	EX-3	Handwritten Note	5
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COASTAL COURT REPORTING & VIDEO SERVICES

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1 (Whereupon, Exhibit
2 Numbers 1 through 3 were marked for
3 identification.)
4 MR. FINGERHUT: Teresa, please
5 call the roll.
6 MS. HALEY: Mr. Walczak?
7 MR. WALCZAK: Present.
8 MS. HALEY: Mr. Johnson?
9 MR. JOHNSON: Present.
10 MS. HALEY: Mr. Fingerhut?
11 MR. FINGERHUT: Present.
12 MS. HALEY: Mr. Cutrer?
13 MR. CUTRER: Present.
14 MS. HALEY: Mr. White?
15 MR. WHITE: Present.
16 MS. HALEY: Ms. Laudermilch?
17 MS. LAUDERMILCH: Present.
18 (INAUDIBLE)
19 UNIDENTIFIED SPEAKER: Yes, sir,

20 we are.

21 MR. FINGERHUT: Thank you. Before

22 we begin we're going to have a swearing

23 in of our two of our members, Jerry

24 Cutrer and Brian White. Brian

25 Hulbert's going to do it.

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1 (Whereupon, the above members were

2 duly sworn in.)

3 MR. FINGERHUT: Congratulations

4 gentleman. Thank you, both.

5 Welcome to the Board of Zoning and

6 Appeals.

7 A special bulletin today for

8 Councilman Ames for and on behalf of

9 members of the town council present.

10 Today we have one matter on our

11 agenda. It's the hearing of Appeal

12 Number 16732016 from the Beachwalk

BZA MEETING 8-27-2018.txt

13 Hotel and Condominiums regarding a
14 determination of the Town that was made
15 August 23rd 2016.

16 This appeal was first heard by the
17 BZA on November 28th 2016. The Town's
18 determination was upheld and the
19 decision was appealed to the Circuit
20 Court.

21 After consideration of the appeal
22 the Circuit Court remanded the case
23 back to the BZA for a rehearing.

24 The court ordered that the BZA
25 focus on answering the following
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1 questions for the court's further
2 consideration in addition to the
3 hearing;

4 Number 1, Is Parcel E -- the PD-2
5 Overlay District established by the
6 LMO?

7 Number 2, If Parcel E is in the
8 PD-2 Overlay District, is Parcel E
9 subject to the LMO's PD-2 Overlay
10 District regulations?

11 Number 3, If Parcel E is subject
12 to the LMO's PD-2's Overlay District
13 regulations, what affect does that have
14 on the development of Parcel E?

15 And must the existing development
16 of the other parcels within that PD-2
17 Overlay District be taken into account
18 in connection with the proposed
19 development of the Parcel E?

20 Regardless of what else we do here
21 today, the Court has specifically
22 directed us to answer those three
23 questions.

24 Now on July 26th 2018 a meeting

25 was held among council for all the
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1 parties, town staff and meeting and the
2 following was agreed to in that
3 meeting.

4 Number 1, SDC Properties Inc.,
5 represented by Johnson and Davis is a
6 necessary party to the appeal and will
7 be entitled to be heard as such before
8 the BZA.

9 Number 2, the appeal will be given
10 a full rehearing in addition to
11 answering the court's questions.

12 And Number 3, the appellant will
13 present its case first followed by SDC
14 Properties Inc., and finally the Town.
15 All parties shall have 45 minutes --
16 or, excuse me, up to 45 minutes,
17 however, I've been encouraged to
18 explained that it's not mandatory that
19 the parties take all 45 minutes.

20 MR. WILLIAMS: Understood.

21 UNIDENTIFIED SPEAKER: Frowned
22 upon.

23 MR. FINGERHUT: The appellant will
24 be permitted rebuttal and any other

25 rebuttal will be at the discretion of
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1 -- there will be no -- amongst you.
2 (Phonetic)
3 Have a motion to approve to the
4 agenda?
5 MR. CUTRER: Move to approve the
6 agenda.
7 MR. FINGERHUT: Is there a second?
8 UNIDENTIFIED SPEAKER: Second that
9 motion.
10 MR. FINGERHUT: All in favor?
11 THE BODY: I.
12 MR. FINGERHUT: Motion to approve
13 the minutes of the June 25th 2018
14 meeting.
15 MR. JOHNSON: Move for approval of
16 the minutes as written.
17 MR. FINGERHUT: Any discussion on

18 the minutes? All in favor say I.

19 THE BODY: I.

20 MR. FINGERHUT: Now, there's no
21 unfinished business on the agenda so
22 our new business is Appeal Number
23 16732016. Council.

24 MR. TAYLOR: Mr. Chairman, very
25 briefly, I am Tom Taylor. I believe
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10

1 I've had the privilege of meeting most
2 of you but those of you who I've not,
3 welcome to the BZA and thank you for
4 your service on this board and for
5 being here today.

6 Mr. Chairman, just a couple of
7 very brief quick housekeeping matters
8 if you'd please, first.

9 The record that was forwarded to
10 the BZA for consideration, the large
11 package unbelievably did not contain

12 two things. I know y'all would find
13 that hard to believe but I want to make
14 sure the record is clear on appeal
15 first and foremost the December 2nd
16 2016 petition for rehearing was not
17 included in what was sent to you and
18 the January minutes of the January 23rd
19 2017 meeting when the rehearing on the
20 initial appeal was held and denied are
21 also not in the record --

22 MR. WILLIAMS: Reconsideration.

23 MR. TAYLOR: Reconsideration,
24 pardon me. I'm too used to being in

25 Circuit Court -- for reconsideration
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11

1 and I would like to move or to hand up
2 to the clerk copies of both of those
3 documents so that they can be included
4 in the final version of this particular

5 hearing and the transcript that will
6 emanate from that.

7 MR. FINGERHUT: I have a question
8 but go ahead.

9 MR. TAYLOR: Yes, sir. And the
10 last thing, sir, I have handed to each
11 of you and have handed to opposing
12 counsel and the clerk a short
13 memorandum on subpoena and Town
14 response which I will probably address
15 in a little bit when I have the
16 opportunity but it -- basically it
17 outlines a subpoena that was issued on
18 August 1st at our request and the
19 Town's response to that and then as
20 part of our argument I will add in a
21 little bit of argumentation about that.
22 Those are just the three housekeeping
23 matters I wanted to put forth. Mr.
24 Chairman?

25 MR. FINGERHUT: Counsel, the only
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1 thing that I would ask is that when we
2 met we discussed the visions and it was
3 pretty clear given the size of this
4 record that one of the things within
5 our rules which is no more than
6 four days before the hearing.

7 MR. TAYLOR: Yes, sir.

8 MR. FINGERHUT: Is -- do you
9 consider these matters crucial or
10 things that you can't supplement during
11 the hearing, itself?

12 MR. TAYLOR: No, sir.

13 MR. FINGERHUT: Since we would
14 enforce them against all the parties
15 here I would ask that you do it that
16 way instead and not give us more
17 reading.

18 MR. TAYLOR: Very good.

19 MR. FINGERHUT: Thank you.

20 MR. TAYLOR: Thank you. Mr.
21 Chairman, for the record --

22 MR. FINGERHUT: Yes.

BZA MEETING 8-27-2018.txt

23 MR. TAYLOR: -- Ms. Dixon did

24 refer to both of those in her memo.

25 They just simply were not made a part
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1 of the record. Apparently I'm sure by
2 inadvertence and that's the only reason
3 why we wanted to put them in the record
4 today.

5 MR. FINGERHUT: Thank you,
6 counsel. Counsel?

7 MR. ALFORD: We have no objection
8 to the documents other than you'd have
9 to read them we don't object to them.

10 MR. JOHNSON: Same.

11 MR. FINGERHUT: Hearing no
12 objection from any of the parties and
13 given the brevity of the documents they
14 can come in as part of the record.

15 MR. TAYLOR: Thank you. I'll hand
16 them to the clerk, sir.

17 MR. FINGERHUT: Thank you.
18 MR. WILLIAMS: Good afternoon, Mr.
19 Chairman.
20 MR. FINGERHUT: Good afternoon.
21 MR. WILLIAMS: I'm Chester
22 Williams. Mr. Taylor's co-counsel here
23 and I appreciate y'all taking the time
24 to go back through this again. I know,
25 Mr. White, you weren't here at the
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14

1 meeting in November 2016, Mr. Walczak,
2 you weren't on the board at the time.
3 The other four of y'all heard this
4 appeal then.
5 So, for the record, Mr. Walczak,
6 Mr. White we're here on an appeal of
7 the determination letter that Nicole
8 Dixon sent to me as counsel for the
9 appellants dated August 23rd 2016.

BZA MEETING 8-27-2018.txt

10 In that letter Nicole said that
11 the proposed developments of the
12 Spinnaker Welcome Center -- on the
13 tract of land that's commonly referred
14 to here as Parcel E is permitted, as
15 long as it does not exceed -- and
16 allowed in the master plan and the
17 master plan for the waterside PUD --
18 permitted by the current LMO.

19 The four of y'all who were here at
20 the meeting last time may recall that
21 near the end of the meeting Ms. Dixon
22 did concede that no property owner
23 can't development the property as
24 provided for in the master plan because

25 of the expiration of a categorical

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15

1 exemption they no longer have a right
2 to the property and Mr. Taylor will
3 address some of the issues -- Mr.

4 Coltrane in a little while.

5 MR. CUTRER: Mr. Chairman, if I
6 might, could I have direct a question
7 to Mr. Williams.

8 MR. FINGERHUT: Yes.

9 MR. CUTRER: Mr. Williams, this
10 question was asked and not answered in
11 the November 16th or November of 2016
12 hearing.

13 You represent Beachwalk Hotel and
14 Condominiums Association and the
15 Beachwalk Hilton Head, LLC. Both of
16 whom are owners of units in the
17 Beachwalk Hotel.

18 MR. WILLIAMS: Well, the owners
19 association doesn't owning any of the
20 units. The association -- it's an
21 association of all the owners.

22 MR. CUTRER: But the claims do,
23 they apparently own either if not all,
24 many or most of these units and the

25 whole purpose of the hours that we

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1 spent in 2016, the whole purpose of the
2 filing with the District Court and
3 remanding back to this BZA is to
4 prevent the development of this welcome
5 center on this property on Parcel E.

6 Here's my question, and this is
7 important to me, may or may not be
8 important to my fellow board members,
9 you are the -- or your clients are the
10 aggrieved party in this case. How are
11 they aggrieved? How will these parties
12 be injured if this property is
13 developed as proposed?

14 MR. WILLIAMS: Our clients are
15 owners of property that's located in
16 the waterside PUD and are such are
17 bound by all the terms of the waterside
18 PUD and all the LMO regulations that
19 govern PUD's, including the average
20 density regulations, including the open
21 space regulations, including the

22 impervious, pervious regulations.

23 In trying to figure out what our

24 clients can do with their property,

25 because sooner or later I think

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1 everybody knows something's going to be

2 done with the Beachwalk Hotel. It's --

3 I can't tell you when but I suspect

4 sooner something will happen and at

5 that point it's important to understand

6 what the rules are.

7 Nicole's been through the rules

8 here with the proposed development, the

9 welcome center, and we think she got it

10 wrong, so we need to make sure that we

11 understand and protect our client's

12 interest with respect to what happens

13 in the future on the Beachwalk Hotel

14 property because it is all part and

15 parcel of the same PUD overlay.

16 MR. CUTRER: But the Beachwalk

17 Hotel property is not Parcel E.

18 MR. WILLIAMS: Correct.

19 MR. CUTRER: There are -- I assume

20 you and Mr. Taylor aren't working on a

21 pro bono basis so there've been

22 thousands of dollars of legal expenses

23 expended. The District Court has had

24 the case for a year. This body has

25 spent a number of hours plus we had the

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18

1 opportunity to read 1,098 pages

2 recently and surely there's more

3 involved here than just a citizen's

4 concern that every eye --

5 MR. WILLIAMS: I just explained,

6 we need to know what the rules are for

7 future actions with respect to other

8 properties that are in the same PUD

9 overlay, that is the Beachwalk Hotel,
10 and the only way to make sure that we
11 understand what the rules are is to
12 make sure that the Town staff has
13 applied the rules. We don't think
14 they've applied them correctly and let
15 me correct -- you said the goal of this
16 appeal was to prevent the development,
17 that's not correct.

18 The goal of this appeal is to make
19 sure that any development of Parcel E
20 is done in conformance with existing
21 LMO requirements.

22 MR. CUTRER: But your position is
23 what you've allocated if that, in fact,
24 is the case then there's no density

25 available with this Parcel E,
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1 therefore, it cannot be developed.

2 MR. WILLIAMS: We think that
3 follows from the application of the
4 reference of the LMO, yes.

5 MR. CUTRER: So I'm going to ask
6 you one more time and you can choose to
7 indicate or talk around it if you like
8 but how would your client be injured if
9 Parcel E is developed as proposed?

10 MR. WILLIAMS: If Parcel E is
11 developed as proposed the entire PD-2
12 Overlay District becomes nonconforming.
13 That has an adverse -- material adverse
14 affect on our clients. We're here to
15 make sure that the rules are properly
16 followed. You have oversight
17 jurisdiction on the actions of the Town
18 staff and that's why we're here.

19 MR. CUTRER: Okay.

20 MR. FINGERHUT: Mr. Williams,
21 please.

22 MR. WILLIAMS: Thank you.

23 Again, this is a -- I'd like to
24 think that, Mr. White, you and Mr.

25 Walczak read through all that thousand
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1 or 1,100 pages of stuff so maybe you're
2 familiar with some of the stuff I'll go
3 over and I'll -- I have to agree, a lot
4 of that stuff really is not necessary
5 to the determination here. The Town
6 staff that was required to provide you
7 with all the documents on which the
8 decision appeal was rendered and I'm
9 not sure it was really necessary to
10 include all the permitting documents
11 but be that as it may it's all in there
12 but the waterside PUD was established
13 -- was originally permitted by the
14 Beaufort County Joint Planning
15 Commission in 1984 before the Town had
16 deregulation issues on those sorts of
17 matters. It was amended by the Town
18 most recently on -- in May of 1987 and
19 that amendment resulted in what

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20 everybody commonly accepts what the
21 approved master plan is even though the
22 Town has been unable to locate a copy
23 of the master plan with that stamped
24 approval on it.

25 There are 15.1 acres in the
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21

1 waterside PUD.

2 The original approval -- excuse me
3 one second -- the approvals for the
4 county and then ultimately is revised
5 by the Town provided for 20 -- almost
6 22,000 square feet of office use. Over
7 36,000 square feet of retail use. 94
8 hotel rooms and 200 residential units.

9 When the Town was incorporated the
10 first LMO was adopted. It turns out
11 that those densities were far in excess
12 of what the Town permitted. It --
13 under the current code if someone had

14 come in to develop approvals at that
15 time and again Mr. Coltrane will
16 address some of the issues having to do
17 with categorical exemption and maybe --
18 Mr. Taylor, maybe this is a good time
19 to get Mr. Coltrane to offer his -- it
20 is important, to a large extent, you
21 understand the issues and the effect of
22 categorical exemption, so for -- I'll
23 turn things over to Mr. Taylor, for
24 just a moment.

25 MR. TAYLOR: Petitioners call as a
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1 witness Mr. Curtis Coltrane, please,
2 Mr. Chairman.

3 MR. JOHNSON: Unless he's going to
4 testify to something different than
5 what he testified to that was contained
6 at length in the transcripts that are

7 before you I objects to his testimony.

8 MR. FINGERHUT: Counsel?

9 MR. TAYLOR: Your Honor, this is
10 rehearing, Your Honor -- Mr. Chairman,
11 as was decided and -- this is a
12 rehearing in toto.

13 While it's certainly appropriate
14 for this group to look at the former
15 transcript testimony it is actually
16 nothing but hearsay insofar as this
17 goes and it is important that we have I
18 believe a brief discussion which it
19 will be brief and certainly it is not
20 inappropriate in that --

21 MR. FINGERHUT: Thank you. I'll
22 overrule that objection. We'll hear
23 the witness on this.

24 MR. JOHNSON: Objection's noted
25 for the record?

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1 MR. FINGERHUT: Yes, indeed.

2 MR. CUTRER: May I ask a question
3 before we proceed?

4 MR. FINGERHUT: Certainly.

5 MR. CUTRER: We had a lengthy
6 discussion in the 2016 about the
7 category exemption -- categorical
8 exemption and how that went away in
9 2000 and my understanding, which may be
10 incorrect was, it no longer is
11 applicable, so could you explain to us,
12 before we get into this testimony, why
13 we need to go through this again if
14 it's no longer applicable?

15 MR. TAYLOR: Yes, sir. Because
16 for the very reason that you said and I
17 think, Mr. Cutrer, that this shows --
18 am I getting that right?

19 MR. CUTRER: Close enough. Call
20 me Jerry.

21 MR. TAYLOR: This shows a little
22 bit about the misunderstanding of --
23 some process because exactly what you
24 said is correct. It is no longer

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25 applicable, which means that they may
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1 not build, right now, the way they're
2 asking to build because they were
3 allowed a categorical exemption for
4 five years to do so and when they did
5 not move under that our argument is
6 that it is no longer valid and
7 therefore they have no right,
8 whatsoever, to build and argue that
9 they're entitled to build under the old
10 code provisions or to not be considered
11 -- a better way to put it is, to not be
12 considered under the current LMO which
13 is exactly what the Town staff says
14 they have the right to do is to build
15 but not be considered and controlled by
16 the current LMO provisions.

17 An understanding of the
18 categorical exemption and why the Town

19 adopted it and what it meant and what
20 rights they had and abandoned by not
21 moving forward I think is vitally
22 important to this Board, especially to
23 the two members who were not here
24 prior.

25 MR. ALFORD: Mr. Chairman. I'm
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1 sorry. I would interpose an objection.
2 It's clearly not relevant. We
3 stipulate that the categorical
4 exemption is expired.

5 With respect to the conclusion
6 that Mr. Taylor draws thereafter which
7 is, well, if it's expired they can't do
8 it. I think that's the battleground
9 which really get to the question which
10 I think better suits -- however, it's
11 his case to put it up any way he wants.

12 If the Court -- I'm sorry, the
13 body would note my objection. It is --
14 it's irrelevant and it is a waste of
15 our resources but if he wants to put it
16 up and you want to let him there's no
17 objection.

18 MR. FINGERHUT: Thank you.

19 MR. TAYLOR: Mr. Chairman, I would
20 like to note for the record that we
21 couldn't even get opposing counsel to
22 agree to the two steps -- Judge Dukes
23 two steps prior to coming in here, so
24 certainly there's no been no consent
25 offered or turned down by the

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1 categorical exemption.

2 MR. FINGERHUT: I agree, counsel.

3 Your objection is noted but overruled.

4 This is -- looking at the document
5 filed by the Town it's clear that the

6 affect of the categorical exemption is
7 one of the issues in this case and as
8 you say and I do agree with this, it's
9 their 45 minutes, they can present it
10 any way they want.

11 MR. CUTRER: 41 minutes now.

12 MR. FINGERHUT: Counsel?

13 MR. TAYLOR: Mr. Chairman, I'd
14 like to call Mr. Coltrane. Have him
15 sworn, please.

16 CURTIS COLTRANE,
17 having been produced and first duly sworn as a
18 witness, testified as follows:

19 EXAMINATION

20 BY MR. TAYLOR:

21 Q Curtis, can you state your full name
22 for the record.

23 A For the record my name is Curtis Lee
24 Coltrane.

25 Q And Curtis, can you tell the members of
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1 the BZA, please, what your background is insofar
2 as relationship with the Town especially during
3 the timeframe of 1990 through 2000.

4 A In June of 1989 I was appointed to
5 serve as the Town Attorney for Hilton Head
6 Island.

7 I served in that capacity until June of
8 2003 at which point I left to pursue other
9 things but during the period from '89 to the
10 middle of 2003 I served as Town Attorney.

11 Q And Curtis, you are a licensed lawyer
12 and have been for more than 30 years, correct?

13 A That is true.

14 Q Curtis, did you work with the Town
15 Council when they adopted the provisions
16 concerning what is now known as a categorical
17 exemption?

18 A I did.

19 Q Did you help draft that ordinance?

20 A I did.

21 Q Curtis, would you explain to the BZA
22 basically what the categorical exemption
23 ordinance was designed to do and how it

24 applied to developments?

25 MR. ALFORD: Interposing an
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1 objection. The law is the law, it
2 speaks for itself with respect to --
3 and I have tremendous respect for Mr.
4 Coltrane -- but with respect to his
5 interpretation or his recollection of
6 the intent of the law is absolutely
7 irrelevant. The law says what it says
8 and that's why it's the law. We all
9 got to argue about what it meant after
10 at came in. (Phonetic)

11 MR. FINGERHUT: Counsel?

12 MR. TAYLOR: Mr. Chairman, all of
13 the provisions concerning the
14 categorical exemption have been taken
15 out of the code now so there is not a
16 categorical exemption provision for you

17 all to look at and interpret.

18 In addition, Mr. Coltrane is being
19 offered as basically an expert witness
20 to some extent because he worked with
21 the Town Council. He knew how this was
22 supposed to work and how it did work.
23 We would find -- we would argue that
24 the testimony would be entirely

25 relevant and as all testimony can be
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1 considered by each council member to
2 the extent they choose to consider it.

3 MR. FINGERHUT: Thank you,
4 counsel. I overrule the objection and
5 will let it in.

6 MR. ALFORD: Thank you.

7 THE WITNESS: At the time that the
8 council considered the ordinance and
9 the procedures that became the
10 categorical exemption process there

11 were a number of permits that had been
12 issued on property on Hilton Head
13 Island that had been issued either by
14 Beaufort County or by the Town Council
15 under the first iteration of the
16 development standards organization.

17 The thought that drove the
18 creation of the ordinance was that the
19 council simply wished to get a handle
20 on what would actually be built in the
21 context of what it was trying to do
22 with respect to its decisions on
23 infrastructure for the Town, largely
24 traffic at the time, and so, the intent

25 of the council in looking at this was

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1 to create a process that would allow
2 council to have some level of certainty
3 as to which of the older permits that

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4 being pre-LMO permits would actually be
5 developed and which of them would not,
6 and so the framework that was developed
7 is that it was set out in the ordinance
8 and the procedures which is that permit
9 holders were given an opportunity to
10 bring their permits to the Town to
11 determine the validity of them and what
12 was allowable under them and the Town
13 would issue -- in every case that it
14 was done a categorical exemption that
15 had a life of five years and beyond
16 that. At the end of the five years the
17 landed owner was able to move forward
18 with the permit or not. If they didn't
19 move forward then as was stated in the
20 ordinance and as is stated in the
21 categorical exemption that was issued
22 with respect to the property at issue
23 here then when and if someone moved
24 forward to develop the property he did

25 so under the LMO that exists at the

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1 time that you actually move forward.

2 (Phonetic)

3 BY MR. TAYLOR:

4 Q Mr. Coltrane, referring to the document
5 you just mentioned, the Board of Zoning Appeals
6 has a copy in their packet but for the record
7 there was a letter apparently issued by Thomas
8 Grechco (phonetic) acting as the Chief of
9 Planning for the Town of Hilton Head Island on
10 March 3rd, 1995 to Robert L. Graves. Are you
11 familiar with that letter?

12 A I am.

13 Q All right. Have you reviewed it before
14 we came into this?

15 A Yes.

16 Q All right. And is that, in fact, what
17 would be termed in the vernacular, a categorical
18 exemption letter?

19 A Yes. It was a notification. The
20 applicant in this case had filed an application
21 for one, I suspect, through the offices of Mr.

22 Johnson and this was the Town's response to it.

23 The categorical exemption was granted, given a

24 life of five years beyond the date of it and --

25 as previously discussed.

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1 Q And, Mr. Coltrane, this was to be
2 applicable to what we now know as Parcel E,
3 correct?

4 MR. ALFORD: Objection, leading.

5 THE WITNESS: No, no. I think it
6 must have been -- it was a little
7 broader than that. It was -- it dealt
8 with several tracts, one of which --

9 BY MR. TAYLOR:

10 Q For several -- that was poorly worded.

11 A One of which was Parcel E.

12 Q That's what I -- excuse me.

13 Did the categorical exemption letter
14 dated March 3rd 1995 apply to Tract E and other
15 tracts that we are currently not talking about?

16 A Yes.

17 Q Okay. And by its own terms, did this
18 letter expire on March 3rd 2000?

19 A Yes and so stated on the final page.

20 Q Very good.

21 MR. TAYLOR: I don't have any
22 other questions for Mr. Coltrane.

23 MR. FINGERHUT: Counsel?

24 MR. JOHNSON: None, Mr. Chairman.

25 MR. ALFORD: No, sir.

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1 MR. FINGERHUT: Any questions from
2 the Town of Mr. Coltrane while he's --

3 MR. CUTRER: Sorry to be
4 asking another question but I've got to
5 understand this.

6 We have -- seems to me the real
7 issue is the PD-2 overlay or one of the
8 big -- was the PD-2 overlay created by

9 the categorical exemption or did it
10 exist prior to the categorical
11 exemption?

12 MR. COLTRANE: Standing here right
13 now I can't tell you exactly when the
14 PD-2 overlay was first adopted as a
15 part of the LMO.

16 The categorical exemption, though,
17 allowed the recipient of it to move
18 forward based on whatever prior
19 approval it had.

20 MR. CUTRER: Within a certain
21 period?

22 MR. COLTRANE: Within a certain
23 time period.

24 So irrespective of what the law

25 was on March 3rd 2005 the applicant in
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1 this case was entitled to move forward
2 with its previous approval.

3 MR. CUTRER: So, with the
4 expiration March 3rd, a momentous day
5 because it's my birthday -- March 3rd
6 2000 the categorical exemption went
7 away and so the regulations are
8 constraints on this property within --
9 go back to what they were before the
10 categorical exemption with respect to
11 PD-2 and the then current LMO, is that
12 fair?

13 MR. COLTRANE: No. No, the way it
14 would work is that if the permit, the
15 previous permit wasn't executed by
16 March 3rd 2000, then any time after
17 that that the land owner wished to move
18 forward he would then move forward
19 under the terms of the LMO existing on
20 the date that he move forward.

21 MR. CUTRER: So why do I care
22 about -- as a BZA member, why do I care
23 about the categorical exemption and its
24 history?

25 MR. COLTRANE: Well our hearts --
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1 MR. WILLIAMS: May I -- I'll be
2 glad to address that.

3 MR. COLTRANE: -- suggest what may
4 or may not be important to you, it's --
5 I was asked to come here because I
6 think mainly for the point that
7 following the expiration of the
8 categorical exemption the property then
9 becomes bound by whatever the LMO is at
10 any point after that, you know, pegged
11 to the time that you move forward and
12 see to improve it or something.

13 MR. CUTRER: Okay.

14 MR. FINGERHUT: Any other
15 questions of Mr. Coltrane? I have one.

16 MR. COLTRANE: Okay.

17 MR. FINGERHUT: Is the -- when the
18 categorical exemption expires is there
19 any carrying over effect as a result of
20 it having been in place on a particular

21 property?

22 MR. COLTRANE: It's expired

23 without any further action having been

24 taken, meaning they haven't moved

25 forward with the development of a plan

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1 approval or building permit then

2 whatever existed before that also

3 expired.

4 MR. FINGERHUT: So it's previous

5 existence would then have no effect on

6 what's happening today, is that

7 correct?

8 MR. COLTRANE: That was -- yes,

9 that is -- that was the intent in how

10 it was intended to work.

11 MR. FINGERHUT: Okay. Thank you.

12 MR. COLTRANE: Anything else? May

13 I be excused?

14 MR. TAYLOR: That was going to be
15 my question. Mr. Chairman, may he be
16 exposed?

17 MR. FINGERHUT: Absolutely. No
18 objection.

19 MR. TAYLOR: Thank you.

20 MR. WILLIAMS: One moment while
21 I -- Mr. Chairman, that's just for my
22 reference. Y'all have a copy of that
23 in your package.

24 Mr. Cutrer, your question, if I

25 may address it a little bit about the
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1 categorical exemption and the PD-2
2 overlay, the categorical exemption
3 letter for this particular project
4 vested the uses and densities that were
5 provided for in the previously approved
6 master plan.

7 Prior to the application for the

8 categorical exemption the structure
9 that is now Beachwalk Hotel had already
10 been built. It was commenced
11 immediately following the 1987
12 amendment to the master plan by the
13 Town's planning commission.

14 So that left what's referred to as
15 Parcel F, a 10.735-acre tract, Parcel
16 D, which is the right-of-way area
17 .697-acre tract and Parcel E, which is
18 1.068 acre which we're dealing with
19 today. The Beachwalk Hotel is
20 constructed on what's referred to as
21 Parcel A and C 2.6-acre tract, so the
22 categorical exemption -- categorical
23 exemption was designed to allow people
24 to continue to rely on previously
25 issued permits.

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1 MR. CUTRER: Up to a certain
2 point.

3 MR. WILLIAMS: Up to a certain
4 point, correct, so what's now the
5 Spinnaker Development, Spinnaker, that
6 was built in the line on the
7 categorical exemption and as allowed
8 under the waterside PUD Master Plan.

9 Nothing ever transpired on Parcel
10 E and the expiration date is important
11 because -- and again, this is a
12 document that's in your package. The
13 current owner of the property, Mr.
14 Johnson's client, acquired the property
15 by way of a deed recorded on July --
16 recorded on July 20th 1999 prior to the
17 expiration of the categorical
18 exemption, so when Mr. Johnson's client
19 SDC Properties acquired the property at
20 that time they could have built all
21 those huge numbers of density that were
22 referred to in the categorical
23 exemption letter. Tom, do you have a
24 copy?

25 MR. TAYLOR: I do.

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1 MR. CUTRER: Well, they didn't so
2 that's irrelevant.

3 MR. WILLIAMS: Right. But this is
4 goes to one of Mr. Johnson's points,
5 that if you apply all the requirements
6 of the LMO that there's no density
7 left, then that's a taking, it's simply
8 not because Mr. Johnson's client had
9 the ability to develop that property
10 with a categorical exemption at the
11 time it acquired the property and it
12 chose not to. That is one of the main
13 reasons why it's important to
14 understand what the effect the
15 expiration of the categorical exemption
16 is.

17 MR. CUTRER: It just seems to me,
18 Mr. Williams, that we would all be

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19 better served if we focused on what the
20 requirements are in place today.

21 MR. WILLIAMS: I agree and --

22 MR. CUTRER: -- and moved on.

23 MR. WILLIAMS: But for Mr. White
24 and Mr. Walczak not being here for the

25 last meeting I'd be more than happy to
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1 do that and if Mr. White and Mr.
2 Walczak tell me, Chet, we understand
3 all that. Let's move onto the
4 questions.

5 MR. WHITE: If that's what you're
6 looking for then let me give it to you.

7 MR. WILLIAMS: Right. So then
8 let's do this. Let's move to the order
9 from Judge Dukes and the responses.

10 Page 27 we have the hearing, first
11 hearing back in November 2016.

12 Petition for reconsideration denied in

Page 50

13 January 2017 appealed in Circuit Court.
14 April of this year the Circuit Court's
15 order comes down sending -- remanding
16 it back to y'all.

17 Clearly, Judge Dukes didn't
18 understand the rationale for the
19 board's decision and so he wants me to
20 address three questions, so the first
21 question; Is Parcel E in a PD-2 Overlay
22 District established by the LMO?

23 We argued in the first hearing
24 that it was. Mr. Johnson and Nicole

25 Dixon -- both admitted that it was, so
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1 I don't think there's any question that
2 the property is in a PUD Overlay
3 District.

4 Number 2; If Parcel E is in a PD-2
5 Overlay District, is Parcel E subject

6 to the LMO's PD-2 Overlay District
7 regulations?

8 We think that's readily evident as
9 was Nicole and Mr. Johnson, so, the
10 facts aren't in dispute here.

11 The only thing that's in dispute
12 is what the law is or more accurately
13 the interpretation of an unambiguous
14 provision of the LMO should be in this
15 application for this particular piece
16 of property.

17 The third question is a little
18 more difficult but we think the answer
19 follows easily for the prior two
20 questions.

21 If Parcel E is subject to the
22 LMO's PD-2 Overlay District, what
23 effect does that have on the
24 development of Parcel E, and must the
25 existing development on the other

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1 parcels within the PD-2 Overlay
2 District be taken into account in
3 connection with any proposed
4 development of Parcel E?

5 Our position is the code says if
6 you're in a PD-2 Overlay District, the
7 PD-2 overlay district's off. The
8 regulations always control the base
9 zoning regulation and Nicole, in her
10 memo to you says, yes, it's in a PD-2
11 Overlay District. Yes, the regulations
12 for a PD-2 Overlay District shall apply
13 but not all of them and we're sort of
14 baffled by that position because you
15 see nothing, at all, no evidence, no
16 support for that position in the code.
17 The code doesn't carve out any
18 exceptions for the applicability of the
19 PD-2 Overlay District and that's the
20 crux of this matter here. Do the
21 average density regulations apply in
22 figuring out the development potential
23 of Parcel E or do they not? (Phonetic)

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24 And I don't know that there's much

25 else to say on that point. I think I

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1 pretty well went over it in my

2 memorandum on the demand for you.

3 If you have any questions about

4 any of those I'll be glad to try and

5 address those.

6 We think there's several different

7 reasons that council is wrong, Town

8 staff is wrong on that particular issue

9 and position.

10 LMO Section 16-3-1 -- says; land

11 is located in the Overlay District the

12 LMO's regulations regarding development

13 of building district shall apply in

14 addition to the regulations -- in the

15 development -- (Phonetic)

16 The Town would have you believe

17 that, well, that's not always the case

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18 and they have -- I mean Nicole had
19 couched it in terms of the staff
20 believes that this provision is
21 inapplicable. It's applicable only to
22 new PD-2 Overlay District. The code
23 doesn't say that anywhere and that's
24 a -- it's a tortured interpretation of

25 the provisions of the code in order to
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1 get to the point that the Town staff
2 apparently want to get to.
3 The existing development that's in
4 the PD-2 District is easy to determine,
5 198 residential, five thousand --
6 5,262 square feet of commercial space,
7 91 hotel groups. When you add all that
8 up and you average that over 15 acres,
9 15.1 acres you're at the point where
10 you require more than 15 point acres --

11 15.1 acres to support to justify that
12 development. The developers have their
13 cake and now they want to eat it, too.

14 Like I said, it seems that the
15 staff is interpreting this particular
16 provision but it seems like they are
17 doing it out of the blue.

18 Mr. Taylor, through you, Mr.
19 Fingerhut, had a subpoena issued to
20 Teri Lewis. I'd like you to address
21 those issues right now if you would.

22 MR. TAYLOR: Mr. Chairman, call
23 Teri Lewis, very briefly.

24 TERI LEWIS,
25 having been produced and first duly sworn as a
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1 witness, testified as follows:

2 EXAMINATION

3 BY MR. TAYLOR:

4 Q Teri, can you state your full name for

5 the record.

6 A Sure. Teresa Lewis.

7 Q All right. And what do you do, ma'am?

8 A I am the Land Management Ordinance
9 official for the Town of Hilton Head Island.

10 Q And have you held that role during the
11 entirety of the process which we are here about
12 today?

13 A I have.

14 Q All right. Ms. Lewis, I'll show you
15 what has been previously marked and placed in
16 this -- it's previously been mark and handed up
17 as a memorandum.

18 It's called a subpoena to Teri Lewis.
19 Do you see that in front of you?

20 A I do.

21 Q Okay. It was issued or about August
22 the 3rd. Did you receive that at around that
23 timeframe?

24 A I did.

25 Q All right. And Ms. Lewis, did you read
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1 it?

2 A I did.

3 Q All right. As part of your job for the
4 Town of Hilton Head, did you attempt to respond
5 to it?

6 A I did.

7 Q Okay. For the record, Mr. Chairman,
8 the subpoena required the product of the
9 following documents;

10 Any and all written interpretations of
11 or determinations under the land management
12 ordinance or other decisions of the LMO official
13 or her designee in which the LMO official or her
14 designee decided that one or more sections or
15 provisions of the LMO applied or apply only
16 prospectively to new proposed development or
17 that one or more sections or provisions of the
18 LMO did not apply or do not apply to a
19 development that was previously approved under
20 prior regulations and partially constructed.

21 Did you endeavor to search and see if
22 there were any documents in the Town's staff's

23 possession, custody or control that matched that
24 request?

25 A I did.

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1 Q Were there any?

2 A I did not find any.

3 Q All right. Secondly, it required the
4 production of any and all written
5 interpretations of or determinations under the
6 LMO or other decisions of the LMO official or
7 her designees to which the LMO official or her
8 designee decided that one or more provisions of
9 LMO Section 16-3-106G did not or do not apply to
10 a tract or parcel of land located in a PD-2
11 Overlay District.

12 Did you attempt to find whether there
13 were any documents that would support that
14 position had been taken previously?

15 A I did.

16 Q And did you find any?

17 A Did not.

18 Q All right. And then it provided that
19 you shall produce any and all written
20 interpretations of or determinations under the
21 LMO or other decisions of the LMO official or
22 her designees in which the LMO official or her
23 designee decided that the provisions of an LMO
24 Overlay District did not or do not control over
25 the provisions of the LMO base zoning district.

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1 Did you try to determine whether that
2 kind of document had ever been produced before?

3 A I did.

4 Q Okay. And did you find any?

5 A I did not.

6 Q All right. Ms. Lewis, is it a fair
7 summary from that subpoena at issue and the
8 Town's response, which was that there are no
9 documents available, to say that there has, as

10 far as you can tell as the LMO official, never
11 been an interpretation of this type of
12 categorical determination -- terribly worded
13 question -- would it be fair to say that after
14 having worked, you cannot find any former
15 decisions that are similar to the interpretation
16 being made in this case?

17 A For projects other than this one?

18 Q For projects other than this one, yes,
19 ma'am.

20 A Then yes, that's a correct statement.

21 Q Never before as far as the staff can
22 tell had that determination been made?

23 A As far as I can tell.

24 Q Ms. Lewis what happens to a developed

25 parcel when the LMO is amended in a manner and

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1 that the parcel no longer complies with it -- in
2 a manner such that the parcel no longer complies

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3 with it?

4 A Potentially it becomes a legally -- has
5 legal nonconformity.

6 Q It becomes nonconforming if it's
7 already there or has already been approved,
8 correct?

9 A Yes.

10 Q Okay.

11 MR. TAYLOR: Nothing further for
12 this witness.

13 MR. FINGERHUT: Any questions for
14 Ms. Lewis?

15 MR. ALFORD: No, sir.

16 MR. JOHNSON: No.

17 MR. FINGERHUT: Any questions from
18 the Board for Ms. Lewis? Sorry. No.
19 Okay. Thank you.

20 MR. TAYLOR: Mr. Chairman, I'd
21 like to move that the subpoena be put
22 into evidence. I'm not sure whether
23 your ruling earlier applied to it or
24 not.

25 MR. FINGERHUT: It's part of the
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1 record, isn't it?

2 MR. WILLIAMS: Out of an abundance
3 of caution we move that all the
4 information previously applies -- and
5 Nicole's memo also be included in the
6 record here because I don't think
7 anybody has moved --

8 MR. FINGERHUT: Counsel? I think
9 counsel has agreed to that already.

10 MR. ALFORD: I don't know what
11 that meant but I'll say this, I just
12 want to be clear that the response to
13 the subpoena -- maybe I should recall
14 Ms. Lewis -- the response to the
15 subpoena was we don't have anything
16 that we haven't already put in this
17 already for the -- record.

18 Not -- in other words, everything
19 we got is in the record. It wasn't
20 that it was not responsive. What's

21 responsive is already existing in the
22 record before you.

23 MR. FINGERHUT: That's not the
24 testimony that I heard but it doesn't

25 make sense. Counsel's representation
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1 that --

2 MR. ALFORD: No. I think what she
3 said is, I don't have anything else
4 other than about this property, is
5 that --

6 MR. FINGERHUT: That isn't what --

7 MR. CUTRER: That's not what I
8 heard.

9 MR. FINGERHUT: Yeah, that's not
10 what I heard, either. I heard there
11 isn't a -- having to do with anything
12 other than this there isn't anything
13 else so maybe what you're saying --

14 MR. CUTRER: Call her back and

15 have her testify.

16 MR. ALFORD: I'm happy to recall
17 her at this point.

18 MR. FINGERHUT: Sure. That's
19 fine.

20 MR. ALFORD: Ms. Lewis, I'm sorry.

21 EXAMINATION

22 BY MR. ALFORD:

23 Q Ms. Lewis, you got a subpoena.

24 A Okay.

25 Q That asked you questions about similar
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1 circumstances?

2 A Yes.

3 Q Okay. You didn't have anything dealing
4 with it?

5 A That's correct.

6 Q Anything that you have dealing with
7 this question is in this record?

8 A That's correct. And that was my
9 response back I was just looking at the e-mails
10 that I sent where it said everything's included
11 in the record. There wasn't anything else other
12 than this and that's why I asked for
13 clarification if we meant other than this
14 project.

15 MR. FINGERHUT: Thank you.

16 MR. ALFORD: I' sorry if I
17 inartfully expressed that. That's what
18 I wanted to say.

19 MR. TAYLOR: Mr. Chairman, to
20 clean that up, please, sir, I think I
21 -- just one question.

22 EXAMINATION

23 BY MR. TAYLOR:

24 Q Ms. Lewis, you were looking for an
25 e-mail. I have it here. It appears and I think
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1 you can look at it with me. Mr. Hulbert wrote

2 you and said, can you tell me if you have
3 located any documents related to Mr. Taylor's
4 subpoena?

5 And you wrote back and said, Brian, I
6 have consulted with Nicole and we have not
7 located any additional documents. The decisions
8 that were reached were as a result of documents
9 that already exist as part of the record.

10 A That's correct.

11 Q That's what you were looking for?

12 A That is right.

13 Q And a summation of that is that you
14 were unable to find a document ever produced by
15 the Town staff in any other matter where a
16 decision of this stature was made, only the ones
17 that relate to this particular case?

18 A That's correct.

19 MR. TAYLOR: Nothing further.

20 MR. FINGERHUT: Thank you.

21 Please, Mr. Cutrer.

22 MR. WILLIAMS: I'd rather answer
23 your questions --

24 MR. CUTRER: It's your time and
25 you use it how you want but here's my
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1 question, Attachment G, which is your
2 memorandum on remand --

3 MR. WILLIAMS: Okay.

4 MR. CUTRER: -- page 7 says the
5 following -- and you just said it a
6 little while ago -- the applicable LMO
7 section requires that the average
8 density for the PD-2 Overlay District
9 shall not exceed the maximum density
10 permitted in the base zoning district.
11 For Parcel E the base zoning district
12 is the resort development district.

13 MR. WILLIAMS: Correct.

14 MR. CUTRER: The next paragraph
15 goes on and identifies five -- pardon
16 me, well, five parcels which make up
17 four developments. Parcel D is the
18 Waterside Drive right-of-way.

19 MR. WILLIAMS: Right.

20 MR. CUTRER: Parcel A and C is the
21 Beachwalk Hotel.

22 MR. WILLIAMS: Correct.

23 MR. CUTRER: F is the big
24 Spinnaker development, which includes

25 residential and 5,200 and some odd
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1 square feet of commercial I guess it is
2 and then E is the subject parcel.

3 MR. WILLIAMS: Correct.

4 MR. CUTRER: What I hope you'll
5 get to either now or some point is show
6 this body your interpretation of how
7 this whole development pencils out from
8 the development standpoint and how it
9 either does or does not comply with the
10 resort development district which you
11 say is the governing document.

12 MR. WILLIAMS: On the next page,

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13 on the bottom of that page continuing
14 onto the next page, the Town's records
15 show that over the years of development
16 of the Spinnaker project building
17 permits were issued for 198 dwelling
18 units.

19 In addition, one building permit
20 was issued for 5,262 square feet of
21 nonresidential, commercial space.

22 MR. CUTRER: That would be Parcel
23 F.

24 MR. WILLIAMS: Correct. So under
25 the current RD District regulations

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1 which allow a maximum of 16 dwelling
2 units per acre the LMO now requires
3 12.375 acres to support the existing
4 198 dwelling units of the Spinnaker
5 project and considering the RD
6 district's 8,000 square feet per net

7 acre cap for nonresidential it requires
8 0.658 acres to support the existing
9 nonresidential development as part of
10 the Spinnaker project, therefore, under
11 the current LMO regulations the
12 Spinnaker project's existing density
13 would take about 13.033-acres of land
14 in the RD District, okay?

15 MR. CUTRER: Okay.

16 MR. WILLIAMS: All right. The
17 Beachwalk Hotel was originally
18 developed with 91 hotels.

19 MR. CUTRER: That's Parcels A and
20 C.

21 MR. WILLIAMS: That's correct.
22 Under the current LMO regulations the
23 RD District allows up to 35 hotel rooms
24 per net acre so the LMO now requires

25 2.6 acres to support the existing 91

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1 hotels that are on the Beachwalk Hotel
2 tract, so we're up to 13.033 plus 2.6,
3 which is 15.633, which is more than
4 15.1.

5 MR. CUTRER: How does the Parcel D
6 right-of-way factor into that?

7 MR. WILLIAMS: There's no density
8 assigned to the Parcel D right-of-way
9 but that's included in the 15.1 acres,
10 so the density there is already used
11 up. (Phonetic)

12 MR. CUTRER: Okay.

13 MR. WILLIAMS: The point being
14 that because SDC Properties didn't
15 develop Parcel E as they could have
16 prior to the expiration of the
17 categorical exemption on March 3, 2000
18 they now have to comply with the
19 current code requirements, the average
20 density requirements of PD-2 are
21 applicable to all PD-2 districts and
22 already exceed the density, the average
23 density of the base -- zoning district.

24 MR. CUTRER: Thank you.

25 MR. WILLIAMS: Does that make
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1 sense?

2 Getting back to, real quick, the
3 subpoena, what we were looking for was
4 whether or not the Town had taken a
5 similar position in any other
6 circumstance and the answer is, no, we
7 haven't.

8 So I believe this is one-off here
9 and we don't know what's driving this
10 particular intersection.

11 Teri, in response to Tom's last
12 question Teri said, well, when the code
13 changes of a previously development
14 parcel that no longer complies with the
15 current code requirement it's
16 nonconforming. Happens all the time.
17 Well, not all the time but it happens

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18 not infrequently. That's exactly what
19 has happened here.

20 In fact, if you read the
21 categorical exemption letter it
22 specifically says, no, if you develop
23 everything out here under -- as you can
24 under the categorical exemption then it
25 may be nonconforming under the LMO.

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1 That's exactly what we ended up with, a
2 nonconforming situation and allowing
3 any development -- and keep in mind, I
4 certainly want the Town staff to check
5 my figures and the way you do that is
6 to go back and review this for
7 conformance with the PD-2 requirements
8 but if you have a nonconforming PD-2
9 overlay because it already exceeds the
10 average density for base zoning
11 district and you allow more development

12 there then you're violating the Town
13 code provisions on increasing the scope
14 of nonconforming and I don't think it
15 can be permitted and it's important
16 that we understand what the rules are
17 here and how we go about planning for
18 the future. We -- sooner or later all
19 this area's going to be redeveloped.
20 Some people might argue that Beachwalk
21 Hotel -- development.

22 At some point I would suggest that
23 Spinnaker be redeveloped and it's
24 important to understand what the rules
25 and how they apply because certainly

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1 the code will change multiple times in
2 the future and you've got to play by
3 the rules that are in effect at the
4 time you file your application.

5 I think we've covered most
6 everything that we see is the issues
7 here. It's a question of
8 interpretation and -- package, City of
9 Myrtle Beach against -- Corporation.
10 The South Carolina Courts have
11 consistently held that when construing
12 a statute its words must be given their
13 plain and ordinary meaning without --
14 subtle or enforce construction to limit
15 or expand the statute's operations.

16 It seems that us at the Town staff
17 is interpreting the average density
18 provision in a manner that limits it so
19 it doesn't apply to this particular
20 PD-2 development.

21 What other PD-2 developments does
22 it apply to? Are there any others? We
23 don't know the answer to that. Town
24 staff has never addressed that issue,

25 apparently, and there's nothing, at

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1 all, in the code that would lead anyone
2 to believe that there's any sort of
3 carve out for previously existing
4 substantially completed PD-2
5 developments that exempts them from
6 compliance with the average
7 density requirements.

8 This is nothing but a -- phase of
9 development of the PD-2 and,
10 unfortunately, it's all been used --
11 and unfortunately SDC Properties
12 allowed their rights to develop the
13 property lapse and they're now in a
14 position where they have to comply with
15 the current code requirements.
16 Questions? (Phonetic)

17 MR. FINGERHUT: Any questions for
18 Mr. Williams? Thank you.

19 MR. WILLIAMS: Thank you.

20 MR. FINGERHUT: Yes, sir.

21 MR. JOHNSON: Good afternoon, Mr.
22 Chairman, members of the Board.

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23 My name is Barry Johnson. I'm

24 from the Bluffton firm of Johnson and

25 Davis but as was eluded to by Mr.

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1 Coltrane I've had an intensive role in
2 legal matters affected the Town of
3 Hilton Head Island since about the time
4 Town of Hilton Head was created
5 including the prior categorical
6 exemption process that the subject
7 property went through.

8 I'm going to get back to the
9 answer that Mr. Coltrane gave you to
10 your question, Mr. Cutrer, but I'd like
11 to do a couple of other things, first.

12 First thing I want to do is to
13 remind us that we're here for a
14 rehearing as well as to answer three
15 questions from Judge Dukes.

16 In the component of what brings us

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17 here today that has to do with the
18 rehearing I just want to confirm with
19 the chair and the board that you have
20 the opportunity to affirm the appeals
21 from determination of the LMO official
22 or to modify it or to reverse it in
23 addition to answering Judge Duke's
24 three questions and when I get through

25 speaking you may find that you can

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1 exercise appropriately either the
2 option to affirm the LMO official or
3 the option to modify her decision and
4 be consistent with the facts and the
5 law as I expect to lay them out for
6 you.

7 So, with that understood I'm not
8 going to waste any time on the first
9 two of Judge Duke's questions.

10 I've indicated at the last
11 hearing, in essence, answers to those
12 two questions were yes.

13 So, we're going to focus on the
14 third question and as was evident
15 through discussion about the subpoena
16 we're dealing with a novel situation
17 here. It's an issue for Town staff,
18 for you and I suspect for all the
19 lawyers first impression and as Mr.
20 Williams responded to questions nearing
21 the end of his presentation to question
22 the interpretation here.

23 So, I think that that issue, the
24 question of interpretation can lend

25 support to the idea that the LMO
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1 official acted properly within her
2 authority in making a determination
3 that required her to make a

4 interpretation of the LMO and
5 apparently counsel on the other side
6 agrees that it's a question of
7 interpretation even though it is a
8 novel question of the first impression.

9 Now, I don't know that everybody's
10 been out there but I wanted to -- I
11 don't know how to work this thing
12 necessarily there.

13 MR. CUTRER: Just like that.

14 MR. JOHNSON: Just that easy. All
15 right. There's some glare up there on
16 that board but there's a parking lot
17 kind of in the center here. That's the
18 empty parking lot. The long building
19 that runs up and down across here is
20 the Beachwalk property and just for
21 your reference I believe the parking
22 lot over here to my left is a parking
23 lot around Aunt Chiladas restaurant and
24 this wooded area that is right up in

25 here is the subject property, Parcel E,
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1 and then there's a similar view of --
2 taken from kind of above the Aunt
3 Chiladas property with subject property
4 over here and the Beachwalk and these
5 green top buildings back here are the
6 Waterside by Spinnaker properties and
7 this is a more straight on view of what
8 it looks like from I think from the
9 edge of the -- my client's property
10 looking over at Beachwalk.

11 That's the circumstance on the
12 ground that it looks like.

13 As I have indicated in my filing
14 in the remand memorandum I take no
15 issue with the staff report of
16 August 1st by Ms. Lewis and agree with
17 it and I think that's an appropriate
18 basis on which you can affirm her
19 decision and I agree with the thrust of
20 Mr. Cutrer's question that the
21 appellants are not aggrieved parties to

22 whom any relief can be granted and I
23 won't go into this in detail but this
24 principal has been long discussed in
25 the legal circles around here going
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1 back to cases related to the
2 development of Harbortown that in the
3 absence of clear restrictions and
4 covenants, plats or code statute courts
5 must interpret and I submit you
6 standing in the shoes of a court as an
7 interpretive body must interpret land
8 restrictions, land use restrictions in
9 favor of the freer less restricted use
10 of the property.

11 We can cite cases with that but
12 it's a well understood principal of
13 law.

14 Now, I'd like to get my focus on

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15 Mr. Cutrer's question related to Judge
16 Duke's question, Number 3, and I think
17 you may find this is related to my
18 suggestion that upon this discussion
19 you might be able to make a decision
20 today that either affirms the decision
21 of the LMO official, the determination
22 of the LMO official or modifies it and
23 to that end I want to tell you that Mr.
24 Williams in his remand memorandum and
25 in his discussion today in answer to

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1 Mr. Cutrer's question talked about the
2 averaging of the density in the balance
3 of the project and he based that
4 analysis on the calculation of how many
5 other units of residential and how many
6 of hotel and how many of commercial or
7 nonresidential and he gave you the
8 numbers and I don't have any reason to

9 disagree with the numbers. My
10 challenge has to do with his formula to
11 average density that's my challenge,
12 and I started with the proposition that
13 nowhere in the LMO do I find a
14 definition of average density.

15 But I do believe that the LMO
16 provides clear assistance in
17 determining what it is you count in
18 your formula when you average density
19 and this I think is helpful to assist
20 Mr. Williams in getting an answer to
21 his questions of what are the rules and
22 regulations and I submit this rule and
23 regulation is right here in the LMO.
24 It is found in Section 16-10-102. I

25 don't know if I can get both of these
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1 up here. I've kind of overlaid them a

2 little bit and I just pulled this page
3 out of the LMO copy and it is 16-10-102
4 Sub Capital B, Density, Sub 1 Density.

5 And it might can be zoomed in on
6 where you can read it. It says -- I'll
7 let her address that -- this says, and
8 I'm quoting, "The measurement of
9 density of the development of a parcel
10 of land calculated by dividing total
11 number of dwelling units by the net
12 acreage of the parcel for residential
13 development."

14 Then it goes onto say "by dividing
15 the total number of guest rooms by the
16 net acreage of the parcel for hotel
17 development and by dividing the total
18 number of square feet of gross floor
19 area by the net acreage of the parcel
20 for other nonresidential development."

21 "In mixed use developments", in
22 this PUD, Waterside PUD is a mixed use
23 development, "acreage allocated to
24 residential use shall not be used to
25 calculate nonresidential density.

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1 An acreage allocated for
2 nonresidential uses shall not be used
3 to calculate other nonresidential
4 density.

5 An acreage used for other
6 nonresidential uses shall not be used
7 to calculate hotel density."

8 I put the rest in to finish
9 quoting the section but it's not
10 material to this discussion.

11 It is clear that under this
12 section if you're trying to figure out
13 the average commercial density of the
14 Waterside PUD the most you can take
15 into account is the 5,262 square feet
16 in which -- for which to Town issued a
17 building permit many years ago within
18 the PUD.

19 So where does that take us? I

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20 would submit if you apply that LMO
21 section 16-10-102B1, the application of
22 that rule to determine density requires
23 you to average only, at most, and I'm
24 not sure that's even mandated by that
25 statute because it talks about you
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1 don't use other nonresidential square
2 footage to calculate another one, the
3 most you could deal with is 5,262 feet
4 as existing density.

5 All right. In the RD District,
6 which is the underlying base distribute
7 here, in LMO Section 16-3-105L, capital
8 L, within the RD District an office use
9 is allowed as a by right use. Other
10 office type uses are allowed. By right
11 uses. (Phonetic)

12 Subject to this limitation the
13 maximum density for a net acre for

14 nonresidential is 8,000 square feet
15 gross floor area.

16 LMO Section 16-10-102B2 right here
17 defines gross floor area as "The area
18 within the inside perimeter of the
19 exterior walls of a building or other
20 structure with no deductions for car --
21 stairs, closets, thickness of walls,
22 columns or other features exclusive of
23 areas upon an unobstructed to the sky.
24 Unless otherwise expressly provided,

25 gross floor area is measured in square

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1 feet."

2 In the record before you -- this
3 is more of a background -- and I'm
4 talking about the roughly 1,100 pages
5 there's something called Attachment H
6 and these did not get Bates numbers so

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7 -- but they're marked, looks like, like
8 up at the top, I'll put it on the
9 screen. That's the Attachment H. It
10 has a number of pages. This is one of
11 the latter pages of Attachment H and
12 this is what Attachment H is and I put
13 this up to reference the fact that in
14 1987 there was a consideration by the
15 Town of an application for conditional
16 use and special exemption.

17 The background is -- and I was
18 involved in it -- a slice of -- slices
19 of land were exchanged between the
20 Waterside PUD and behind the Aunt
21 Chiladas that had the effect of
22 enlarging the available land on which a
23 hotel could be built. That hotel got
24 built. It is now called Beachwalk and

25 it increased the available density for
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1 that hotel from 50 units to 94 units.

2 And the decision that's outlined
3 in the rest of Attachment H to your
4 record required corresponding reduction
5 of -- densities.

6 There's a letter from Mr. Grechco
7 who wrote my client, Mr. Graves, the
8 note of categorical exemption
9 certification related to this
10 Attachment H in which he said, what you
11 got left is what's shown on here and
12 you'll have -- you'll see PUD has
13 approved in this column, has proposed
14 in this column with the little
15 handwritten note approved on a date,
16 looks like May 6th of '87 is the date
17 of that planning commission meeting
18 where that was approved.

19 Now, the numbers there -- if you
20 can zoom in just a little more so you
21 can see those small numbers better but
22 I'm going to tell you what they say --
23 from this table the PUD's commercial
24 office density was reduced from 36,000

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square feet to 21,913 square feet but
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1 look at the next column in each of
2 those categories, the one that just is
3 entitled density. That did not change,
4 15,652 square feet per acre is -- was
5 the standard before and after that
6 decision.

7 The next category,
8 Commercial/Retail previously had been
9 approved for 52,000 square feet and
10 that was reduced to 36,279 square feet,
11 but again, the density per acre did not
12 change for that category. It remained
13 at 12,093 square feet.

14 All right. We understood in the
15 language of today's LMO for RD District
16 purposes that Commercial/Office and
17 Commercial/Retail would together make
18 up what is now called nonresidential.

19 I submit to you with density of
20 7,500 square feet, which is what has
21 been approved by the LMO official and
22 the Town building -- the Town staff, my
23 client's building on his one point -- a
24 little over one acre .068 acres,

25 something like that is, A, less than

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1 the 8,000 square feet allowed under the
2 RD District, and B, it is considerably
3 less than the densities allowed under
4 the original plan which you could say
5 might have been either 21,913 or 36,279
6 together, 27,355 square feet.

7 We believe, very strongly, that
8 you cannot -- under the code, under
9 Section 16-10-102B1 consider anything
10 more than the other density elsewhere
11 in the PUD and if you do that, we're in

12 compliance with the code regardless of
13 the interpretation of whether --
14 whatever's left, if anything, of the
15 PD-2 Overlay District applies
16 regardless of where solely RD District
17 we comply by right with both of them
18 even as adjusted because of 16-10-102
19 we -- and the related controls for
20 gross floor area in the RD District
21 section as cited here.

22 I think that's a way that you can
23 deal with this and be operating within
24 the code and that can be a way you

25 could do it as a modification of the
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1 official's determination.

2 And I want to address something
3 that Mr. Williams mentioned.

4 He brought up the issue of our
5 prior representation. We've made it to

6 the Court, we made it to you,
7 previously, and we continue to believe
8 it.

9 If you accept his interpretation
10 of the zoning law, the zoning rules and
11 regulations we wind up with an
12 unbuildable piece of property.

13 The question for you, sitting as
14 the interpretive Board for the Town's
15 LMO, what do you think about that?

16 And to help you think about that I
17 want to give you some citations to
18 several South Carolina cases, one's a
19 Supreme Court, two Court of Appeals and
20 one U.S. Supreme Court case. There's
21 lots of others I could give you and it
22 goes like this.

23 The case of Byrd versus the City
24 of North Augusta, 1974, South Carolina

25 Supreme Court considered an appeal from
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1 a Circuit Court decision made by the
2 Honorable Julius B. Ness Junior,
3 Circuit Judge, sitting in Aiken County,
4 Judge Ness became the Chief Justice of
5 South Carolina Supreme Court -- for
6 many years and in this case South
7 Carolina Supreme Court said the zoning
8 power must be exercised as reasonably
9 and not arbitrarily. The zoning
10 regulation is legal or valid only when
11 it is reasonable. A quote in the
12 holding of the trial judge which they
13 upheld "It appears to this court that
14 under the facts in this case the
15 rezoning of this property from
16 commercial to residential use is
17 unreasonable and arbitrary and results
18 in a deprivation of plaintiff's
19 property rights and should be declared
20 invalid."

21 And then the Supreme Court says,
22 'It is obvious to this court -- excuse
23 me, Judge Ness, a continued quote from

24 him -- "It's not up to this court to
25 allow the rezoning of this plan in
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1 controversy from commercial to
2 residential as attempted under the June
3 15, 1971 ordinance enacted by the City
4 of North Augusta through the arbitrary
5 and unreasonable and deprivation of
6 plaintiff's property."

7 That's foundational principal.
8 The law of regulatory taking and
9 inverse condemnation -- has changed a
10 good bit since 1974 but the principals
11 remain substantially the same.

12 The next case I want you to refer
13 you to is a case of Hampton versus
14 Richmond County, Court of Appeals South
15 Carolina decided in 1987.

16 It held that a zoning ordinance

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17 that is confiscatory that renders the
18 property of no value, quote, "of no
19 value" end of quote, is not, quote,
20 "fairly debatable" end of quote, and is
21 therefore, "clearly arbitrary,
22 unreasonable and capricious."

23 I want to go back and read you
24 the -- go on with Hampton.

25 The zoning classification of
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1 property should be held -- upheld as
2 constitutional as some elements that
3 the classification is either
4 unnecessary or confiscatory. (Phonetic)

5 Then there's a case of Peterson
6 versus the City of Myrtle Beach.
7 Peterson Outdoor Advertising versus
8 City of Myrtle Beach decided in 1997 by
9 the Supreme Court of South Carolina in
10 which the court held the decision of

11 the zoning board, quote, "must be
12 decided by standards which are specific
13 in order to prevent the ordinance from
14 being invalid and arbitrary."

15 And last, I want to refer you to a
16 nationally known case originating in
17 South Carolina. The case was Lucas
18 that went to the U.S. Supreme Court and
19 that case ends with a basic
20 proposition, when all economic utility
21 has been zoned or regulated out of a
22 piece of property it has no economic
23 value and that ordinance, an ordinance
24 like that results in an inverse
25 condemnation" --

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1 Okay, so, between the LMO
2 official's determination that's boiled
3 down into the staff report of August 1

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4 this year and your consideration of the
5 suggestions I have made to you with
6 regard to sections of the LMO that
7 others have not focused on, I
8 respectfully urge you to approve the
9 decision of the LMO official and/or
10 modify it based on the LMO sections
11 that I have provided to you and when
12 you do that, you're going to come back
13 down to Judge Duke's third question and
14 on Judge Duke's third question -- I
15 want to make sure I don't misstate
16 it -- his third question; If Parcel E
17 is subject to the LMO's PD-2 Overlay
18 District regulations -- we've all said
19 so it appears -- sub-question -- what
20 effect does that have on the
21 development of Parcel E?

22 My view of the answer to that
23 question is that the effect of the PD-2
24 Overlay District regulation of Parcel

25 B, meaning at most, depending on how
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1 you interpret it, Section 16-10-102B1
2 on what you count, what you don't count
3 when you're comparing densities for
4 different types of uses is the most you
5 can consider is whether you refer for
6 the entire 15.1 one-acre tract to the
7 5,262 square feet of nonresidential
8 permits previously issued. It was not
9 issued on Parcel E, just the overlay.

10 It's not enough to take out even
11 with what we propose on Parcel E of
12 limitations of the LMO as it now stands
13 or the PD-2 Overlay District
14 interpreted under the new LMO as we've
15 discussed.

16 The second sub-question of his
17 question three is, Must the existing
18 development on the other parcels within
19 that PD-2 Overlay District be taken
20 into account in connection with any
21 proposed development of Parcel E? And I

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22 believe the answer to that is the same

23 as I gave you for the first

24 sub-question, yes, but no more than the

25 5,262 feet and I can make an argument

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1 that it ought to be zero under the

2 precise language of 16-10-102B1, so

3 that's where I come down.

4 I think you should affirm and/or

5 modify but in your modification you

6 ought to wind up allowing us to -- at

7 least as far as your role in this is

8 concerned -- go forward and get our

9 building built we've been trying to get

10 built for three years.

11 I don't want to be redundant. I'm

12 happy to try to answer any questions

13 you may have. If not I'll step-down.

14 MR. FINGERHUT: Any questions for

15 Mr. Johnson?

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16 MR. CUTRER: You have suggested at
17 the end of your testimony I guess it's
18 testimony or argument.

19 MR. JOHNSON: Argument.

20 MR. CUTRER: Argument, that the
21 Board of Zoning Appeals might consider
22 -- it has three choices, either
23 affirming -- the two you're proposing,
24 affirming or modifying --

25 MR. JOHNSON: Yes, sir.

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1 MR. CUTRER: -- staff's decision.
2 Might I ask how you would propose or
3 suggest that it be modified?

4 MR. JOHNSON: I would suggest that
5 the modification take the form of -- I
6 have to do a preamble if you don't
7 mind.

8 MR. CUTRER: Sure.

9 MR. JOHNSON: Say what you're
10 going to modify, you need to say what
11 it is you're modifying, but I think
12 it's undisputed from the various
13 arguments that what we're dealing with
14 is a question of interpretation and
15 some novel question of first impression
16 here and in that the LMO official has
17 given a determination.

18 The result of that determination
19 is that my client can build its
20 building. What I'm suggesting to you
21 is some clarification of that by way of
22 modification of her decision that in
23 addition to the issues of
24 interpretation that all counsel agree

25 were there and I think you agree were

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1 there and perhaps you could argue Judge
2 Dukes -- there because he didn't figure

3 out when it was up in front of him --
4 that there is this basis in the code
5 which is clearly applicable and affords
6 a direct separate rationale to get to
7 the same result the LMO originally got
8 to.

9 MR. CUTRER: This basis in the
10 code being the 16-10B1?

11 MR. JOHNSON: 16-10-102B1, yes,
12 sir.

13 MR. CUTRER: The density.

14 MR. JOHNSON: And that mechanism
15 for how you calculate density when
16 you're comparing densities, which is
17 what you're doing here, trying to
18 compare the density on the -- proposed
19 density on Parcel E to what one part of
20 the code says it's average density but
21 nowhere in the code does it define
22 average density except when you get
23 into 16-10-102B1 and then it tells you
24 what you consider and what you don't.

25 MR. CUTRER: Okay.

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1 MR. JOHNSON: And under that
2 formula the LMO official got to the
3 right result and we think you should
4 adopt those --

5 MR. CUTRER: Let me ask you this
6 question. If we apply -- I'm a little
7 -- still a little confused. I want to
8 pursue this more with you --

9 MR. JOHNSON: Yes, sir.

10 MR. CUTRER: -- the density
11 discussion in 16-10-102B1 if you look
12 at hotel development, residential
13 development and nonresidential
14 development and you apply this standard
15 that's set forth here, is it
16 conceivable that you could come up with
17 a calculation that would exceed
18 15.1 acres which is the --

19 MR. JOHNSON: It may be but it
20 won't exceed actual use of 15.1 acres

21 but if you -- your question assumes
22 essentially you're buying counsel's --
23 Mr. Williams' argument about how you
24 average density and I'm suggesting to
25 you that 16-10-102B1 doesn't do that.

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1 MR. CUTRER: No my question --
2 that was the first question. Here's
3 the real question.

4 MR. JOHNSON: Yes, sir.

5 MR. CUTRER: I'm a finance guy,
6 not a lawyer.

7 MR. JOHNSON: Yes, sir.

8 MR. CUTRER: And I like to look at
9 the numbers.

10 MR. JOHNSON: Right.

11 MR. CUTRER: So we've had an
12 argument with Mr. Williams that shows a
13 calculation that ends up with more, in

14 his term, average density

15 15.633 acres --

16 MR. JOHNSON: Right.

17 MR. CUTRER: -- that actually
18 exist. What I'd like to ask you is,
19 can you help this Board and step us
20 through how you would recommend using
21 -- how you would recommend calculating
22 the eligible density for the whole
23 property and Parcel E using the
24 constraints set forth in 16-10-102B1.

25 MR. JOHNSON: Yes, sir. I
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1 understand your question I think but --

2 MR. CUTRER: One exhibit over here
3 I'd like you to have a comparable
4 exhibit.

5 MR. JOHNSON: Yes, sir. There
6 will not be a comparable exhibit
7 because the definition of difference is

8 contained in Subsection 102B1 because
9 under that subsection we don't have to
10 consider the potential impacts on the
11 whole property. We only have to
12 consider what the code says in
13 Subsection 102B1 is essentially
14 comparing like uses within a mixed use
15 development, which this is. You don't
16 compare the whole thing so you don't
17 come up with a comparable counter table
18 on the other side. You do come up with
19 one slice of it and that slice is what
20 is the LMO today calls a nonresidential
21 component which says, at least under
22 the base of zoning we cannot exceed
23 8,000 square feet per acre and we've
24 got a hair over one acre and we meet
25 that but how we relate to the PD-2

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1 overlay?

2 One fair analysis is that when the
3 categorical exemption died in 2003,
4 that the PD-2 overlay while on the
5 books became utterly meaningless and I
6 subscribe to that view but that's a
7 real legal argument.

8 What the code tells us, I think,
9 is that when we compare
10 apples-to-apples, which is what the
11 density section in 102B1 requires us to
12 do, we'd only have to look at the
13 nonresidential and non-hotel use in the
14 rest of the property and that's only
15 5,262 square foot out of an allowable
16 27,355 square feet, so there's 22,000,
17 roughly, 21,000 and change square feet
18 under that formula and five, six
19 hundred square feet roughly left under
20 the RD --

21 MR. CUTRER: Let me see if I'm
22 understanding what you're telling us.

23 MR. JOHNSON: Yes, sir.

24 MR. CUTRER: There are one, two,
25 three, four, five parcels, A through F,

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1 B mysteriously vanished. D is the
2 Waterside right-of-way, right?

3 MR. JOHNSON: I think that's
4 right.

5 MR. CUTRER: What we've said
6 doesn't matter. A and C is the hotel.
7 F is the Spinnaker development which
8 includes 5,000 some odd square feet and
9 then E is the subject parcel, so
10 there's really only four.

11 MR. JOHNSON: Yes, sir.

12 MR. CUTRER: But we have three
13 uses within all of this property.

14 We have residential. We have
15 hotel and we have nonresidential, so am
16 I understanding you correctly that if
17 we look at -- let me -- assume for the
18 moment that the Spinnaker Welcome

19 Center is built. If we take the
20 nonresidential -- well, let's start
21 with the hotel.

22 MR. JOHNSON: Yes, sir.

23 MR. CUTRER: If we take the
24 density of the hotel, 9 -- even though

25 94 units were apparently permitted I
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1 believe 91 was built.

2 MR. JOHNSON: That's right, yes,
3 sir.

4 MR. CUTRER: So if we divide 91 by
5 the units -- pardon me, the 91 hotel
6 units by the acreage for the hotel and
7 it's within the limits we're okay with
8 the hotel.

9 If we take the residential units,
10 198 I believe and divide that by the
11 number of acres that are applied for
12 nonresidential use and it does not

13 exceed the RD-2 limit of 16 per acre,
14 we're good there, and if we take the
15 5,200 and change existing
16 nonresidential and the 7,500 I believe
17 proposed square footage and we add
18 those two together, divide that by the
19 amount of acres used for nonresidential
20 we're okay there, too? Have I lost
21 you?

22 MR. JOHNSON: You might be okay
23 but the first two-thirds of that
24 summary I don't think are Germain to
25 our discussion --

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1 MR. CUTRER: Okay.

2 MR. JOHNSON: -- with all due
3 respect. The one place where the PUD,
4 Waterside PUD is in effect came -- PD-2
5 Overlay District is significantly

6 underdeveloped, below what was
7 permitted is actually in nonresidential
8 categories because in those categories
9 there was a total of some 27,000 square
10 feet permitted and 5,000 in change got
11 built and we're asking to build another
12 7,500. That would give you a total of
13 12, 5, 12 -- max, 13,000 square feet,
14 so, one reason things fit the way they
15 do is because you don't have the other
16 14,000 square feet of nonresidential
17 use going on on the properties.

18 MR. CUTRER: Do we know how much
19 acreage is taken up by the existing
20 nonresidential, the 52 --

21 MR. JOHNSON: I don't know. I
22 don't think it's in the record. I
23 don't think it's material because it
24 could well be that the hotel density is
25 greater than would be permitted today

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1 and the Waterside by Spinnaker density
2 is greater and that nonresidential
3 that's in there is really kind of an
4 activity center. It's really a -- you
5 know, it's really part of the project.

6 MR. CUTRER: Sure. It's where
7 people check-in, I assume.

8 MR. JOHNSON: No, they check-in
9 elsewhere.

10 MR. CUTRER: Oh.

11 MR. JOHNSON: There was testimony
12 in the record of it. I forget the
13 details of it but it's a small
14 facility. They use it for storage.
15 They have some activity spaces there.

16 MR. CUTRER: I've seen it. Right
17 about the pool.

18 MR. JOHNSON: Yes, sir. So I
19 suspect that does not have a segregate
20 surveyed piece of land that goes with
21 it other than it's floor plan and I
22 suspect it is owned by the Waterside by
23 Spinnaker Property Owners Association

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24 as part of the common elements of the
25 project. It's not an office or retail
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1 use in the classic nonresidential
2 sense.

3 MR. CUTRER: Okay.

4 MR. JOHNSON: I mean I don't go to
5 the hotel staying -- where you come in
6 and check-in and have meals. They've
7 got a restaurant in there is anything
8 other than part of the hotel.

9 In fact, the early definitions of
10 the hotel or lodging facility in the
11 original development standards
12 ordinance and the earlier iterations of
13 the LMO required you to have those
14 facilities as part of something like
15 that.

16 MR. CUTRER: Okay. I hope some of
17 my colleagues will have some questions,

18 too. I don't mean to dominate this but
19 the third question from the Judge --

20 MR. JOHNSON: Yes.

21 MR. CUTRER: Questions -- the
22 answer to questions 1 and 2 have
23 established that, yes, Parcel E is in
24 the Overlay District and is the subject

25 property subject to the PD-2 Overlay
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1 District, so let's go back to what we
2 all agree is the critical question, If
3 Parcel E is subject to PD-2 -- which we
4 determined it is -- what effect does
5 that have on the development of Parcel
6 E, and must the existing development on
7 the other parcels in the Overlay
8 District be taken into account? And I
9 believe your argument is, because of
10 16-10-102B1 about density, it doesn't

11 have an effect?

12 MR. JOHNSON: Does not have an
13 effect other than potentially to
14 include in the analysis the
15 5,262 square feet. If -- I will just
16 for discussion -- if 27,000 and change
17 square feet of nonresidential were
18 already also built out there prior say
19 to 2000 when categorical exemptions
20 expired, then you couldn't qualify
21 under it no matter what about the
22 acreage and there wouldn't be anything
23 to put on Parcel E, which still raises
24 a valid question related to a
25 confiscatory taking.

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1 MR. CUTRER: Right.

2 MR. JOHNSON: Because the law
3 doesn't favor making land of no
4 economic value.

5 MR. CUTRER: And then the second
6 question the Judge posed related to
7 Number 3, must the existing development
8 on the other parcels within thate PD-2
9 Overlay District be taken into account
10 in connection with any proposed
11 development of Parcel E?

12 MR. JOHNSON: Yes, sir.

13 MR. CUTRER: And your argument is?

14 MR. JOHNSON: Same thing.

15 MR. CUTRER: No, it doesn't
16 because --

17 MR. JOHNSON: Well, it's taken
18 into account only to determine what
19 other development is -- what other
20 commercial development is there and
21 given the nature of that attribute I
22 don't think it's a commercial
23 development.

24 MR. CUTRER: It's -- looks like

25 it's an ancillary use of residential.

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1 MR. JOHNSON: Yes, sir. I
2 would -- but at worst case you consider
3 that there's 5,262 care feet of that
4 use worst case from our perspective.

5 MR. CUTRER: I'll agree with your
6 -- if I could use that word,
7 ancillary --

8 MR. JOHNSON: Yes, sir.

9 MR. CUTRER: -- use. I spent my
10 career financing multi-family
11 properties and they rezoned
12 multi-family but you had to have a
13 leasing office and clubhouse. Nobody
14 lived in those but it was part of
15 the -- okay, so the existing
16 nonresidential you would argue is
17 actually part of the residential and
18 ancillary?

19 MR. JOHNSON: That's my first
20 argument.

21 My second argument on that is even
22 if you count it, A, it's not on our

23 one acre site and that's site specific

24 under the RD District and it's allowed

25 to have 7,500 square feet per acre --

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1 excuse me, 8,000 square feet per acre

2 and we've got a hair over 8,000 --

3 allowable, we're at 7,500. (Phonetic)

4 MR. CUTRER: Thank you.

5 MR. FINGERHUT: Other questions

6 for Mr. Johnson by members of the

7 Board? I have a few.

8 MR. JOHNSON: Yes, sir.

9 MR. FINGERHUT: SDC Properties

10 Inc. owns Parcel E, is that correct?

11 MR. JOHNSON: Yes.

12 MR. FINGERHUT: Does that entity

13 have any relationship to the owner of

14 Parcel F?

15 MR. JOHNSON: Parcel F is -- any

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16 relationship, the answer is probably,
17 yes, but it's not as direct a
18 relationship as you might have
19 contemplated.

20 MR. FINGERHUT: Fair enough. Does
21 the S stand for Spinnaker?

22 MR. JOHNSON: SD --

23 MR. FINGERHUT: Does the S stand
24 for Spinnaker though or is for Steve,
25 something like that?

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1 MR. JOHNSON: I don't -- I can
2 guess the acronym but Spinnaker -- SDC
3 Properties is in a big Spinnaker family
4 of the properties. Exactly what the
5 connections are, I don't know.

6 MR. FINGERHUT: Fair enough.

7 MR. JOHNSON: But much of Parcel F
8 is owned by the POA as common property,
9 including the shell of all the

10 buildings and the footprint of the
11 buildings. The condominium owners only
12 own the space inside.

13 MR. FINGERHUT: Correct, the
14 development.

15 MR. JOHNSON: They each have an
16 undivided interest in the common
17 elements.

18 MR. FINGERHUT: Yeah.

19 MR. JOHNSON: So -- and, you know,
20 do we have some kind of connection, at
21 all, but yeah, it's not direct.

22 MR. FINGERHUT: What about with
23 the entity that developed Parcel F?

24 MR. JOHNSON: That would be
25 Waterside by Spinnaker LLC I think.

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1 MR. FINGERHUT: Okay. So --

2 MR. JOHNSON: And that was a

3 Spinnaker development company.

4 MR. FINGERHUT: I mean is it a
5 fair to statement, do you think, then,
6 that -- because you're talking about
7 regulatory taking which is a strong but
8 important term, but the use of Parcels
9 E and F collectively represent the sum
10 choice of the same principals at some
11 point. I mean Spinnaker did develop
12 the property and what -- your argument
13 is that the owner of Parcel E is
14 somehow being unconstitutionally or
15 unlawfully prejudiced by that.

16 MR. JOHNSON: Right.

17 MR. FINGERHUT: But the owner of
18 Parcel E is not a stranger to the
19 developer of the Parcel F.

20 MR. JOHNSON: Not a stranger. At
21 the time Parcel F was developed it may
22 have been a stranger. It was certainly
23 a stranger when the Beachwalk property,
24 whatever, it's Number A and C was

25 developed, that was originally built

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1 for a group of investors and was
2 flagged as a Super 8 Motel --

3 MR. FINGERHUT: Right.

4 MR. JOHNSON: -- way, way back.

5 Mr. -- built it for them. He's a
6 builder, as well, and how it migrated
7 to Beachwalk I don't really know.

8 But, case law is clear that where
9 a rezoning has the effect of
10 confiscating the economic utility
11 that's a regulatory taking. That would
12 be zoning here. (Phonetic)

13 MR. FINGERHUT: Okay. So now,
14 let's see, Parcel E was not developed
15 but I don't think there's any
16 disagreement that it could have been
17 developed during the categorical
18 exemption, would that be correct?

19 MR. JOHNSON: It could have been
20 developed any time over the last couple

21 hundred years.

22 MR. FINGERHUT: Well, but

23 certainly during the categorical

24 exemption?

25 MR. JOHNSON: It could have been.

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1 MR. FINGERHUT: Is it your
2 contention that the existence of
3 categorical exemption, even though it's
4 expired, has some carry forward effect
5 on that property?

6 MR. JOHNSON: In my opinion it's
7 like a -- I would analogize it and
8 I won't go all the way through but I
9 would analogize it to the appendix in
10 the body. Nobody quite knows what it
11 does. It's been construed to create
12 some problems but I think it lost its
13 impact when the categorical exemption
14 died except it lives on in the appendix

15 of the PD-2 overlay and perhaps Town
16 council and its -- will get around to
17 just removing that overlay because it
18 really doesn't do anything anymore. If
19 they remove that overlay nobody can say
20 we can do more than what the current
21 LMO says it can do which is probably
22 where the Town really wants to be, but
23 conjecture.

24 MR. FINGERHUT: Right. Different
25 law, different result.

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1 MR. JOHNSON: Right.

2 MR. FINGERHUT: Okay. Now, with
3 respect to the formula for average
4 density, is it -- I guess -- hold on.
5 I want to state this correctly, I don't
6 want to confuse the question, I'm
7 sorry -- do you -- can you or do you

8 have a computation indicating that the
9 way you're viewing the LMO the density
10 calculations would come under the
11 numbers that counsel demonstrated in
12 their brief?

13 MR. JOHNSON: I think, without
14 having written it down and handed it to
15 you, I've given that calculation today
16 a couple of times and it is -- I can
17 add one more step to -- you have
18 5,232 square feet and the use that I
19 think is excessively to the condominium
20 project we're asking for 7,500, so if
21 you adds those together 12,700 and --
22 whatever it is, 12, 13,000 square feet.
23 This property was approved for -- take
24 the 13,000 square feet.

25 MR. FINGERHUT: Uh-huh.
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1 MR. JOHNSON: Divide that by

2 15 acres, which I have not done.

3 MR. FINGERHUT: I certainly have
4 not. I'm trying to avoid arithmetic at
5 all costs so if you could map it out
6 that would be helpful.

7 MR. JOHNSON: This gentleman here
8 could.

9 MR. WALCZAK: 40,000 per acre.

10 MR. FINGERHUT: I'm --

11 MR. WALCZAK: -- 43568.

12 MR. JOHNSON: 43,560.

13 MR. WALCZAK: Is an acre.

14 653,400-acre square feet. What do you
15 want me to divide?

16 MR. JOHNSON: By 13,000.

17 MR. CUTRER: 13,5 -- 1.9 percent.

18 (All phonetic)

19 MR. JOHNSON: We're doing this on
20 the fly. I don't know how you get
21 where you want to get to but I know
22 that the density for the use of this
23 acre is less than the LMO requires.

24 MR. FINGERHUT: Fair enough. I'm
25 just trying to understand what you're
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1 asserting. I think -- let me move on.
2 I have a different -- I guess a
3 different question. It's a little
4 confusing. Are you arguing that
5 the strip application for the LMO
6 supports your decision or that the
7 stripped allocation of the LMO is
8 regulatory taking?

9 MR. JOHNSON: I'm arguing that my
10 strip interpretation of the LMO
11 supports my position.

12 The appellants arguments for --
13 strict interpretation of the LMO
14 creates a regulatory taking.

15 MR. FINGERHUT: Okay, Okay.

16 MR. ROBERT JOHNSON: Can I ask a
17 question?

18 MR. FINGERHUT: Please.

19 MR. ROBERT JOHNSON: Earlier on it

20 was mentioned by one party or the other
21 that in some circumstances there was in
22 dividing up or borrowing of pieces of
23 land to get densities and room,
24 quantities, etc. I think it's

25 pertinent to the process if the
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1 original owner was all Spinnaker
2 properties. In other words, if in the
3 past they were taking just for an
4 example, E and borrowing from that to
5 get more units and, you know, dolling
6 it out to increase the densities in
7 certain places, they've already used up
8 the bank and now that the bank's used
9 up they want to have their cake and eat
10 it, too, so to speak, that I think
11 should be explained.

12 MR. JOHNSON: There's nothing in

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13 the record about that and I don't know
14 the answer to that but my impression
15 from all the conversations I've had
16 that that did not happen there.

17 The only time the borrowing
18 happened was when the land exchanged
19 with Aunt Chiladas resulted in having
20 more hotel rooms -- mutual and I'm not
21 aware of anything occurring that added
22 density to the condominium project
23 which is the only other real use
24 besides this one acre.

25 MR. ROBERT JOHNSON: So it's your
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1 opinion that property E never came into
2 the picture as far as helping any of
3 the other properties increase their
4 densities levels during that?

5 MR. JOHNSON: That is my
6 understanding.

7 MR. ROBERT JOHNSON: Okay, thank
8 you.

9 MR. JOHNSON: But also know it's
10 not part of the record because it
11 hadn't been explored by anybody that
12 I'm aware of.

13 MR. FINGERHUT: Any other
14 questions for Mr. Johnson?

15 MR. CUTRER: Mr. Johnson, it's my
16 understanding that Parcels A and C make
17 up what we have referred to as the
18 Beachwalk Hotel.

19 MR. JOHNSON: Yes, sir, that's my
20 understanding.

21 MR. CUTRER: I am assuming that
22 the parties that have brought this
23 appeal are the owners of the Beachwalk
24 Hotel and in response to my question to

25 Mr. Williams, at the beginning, of how
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1 was his clients being injured if this
2 development was permitted to which I
3 got, at least for me an unsatisfactory
4 answer, other than everybody wants to
5 make sure that the Town ordinance is
6 complied with.

7 My question to you is, in your
8 opinion, what effect would allowing
9 Parcel E development, which is your
10 property, what effect would allowing
11 Parcel E development have on the future
12 development rights -- pardon me, future
13 development rights of Parcel A and B,
14 the Beachwalk Hotel -- I'm sorry, A and
15 C.

16 MR. JOHNSON: I think I understand
17 your question. My answer is none.

18 MR. CUTRER: Okay.

19 MR. JOHNSON: Because under the
20 density definition in Subsection 102B1
21 that we've been talking about, you
22 don't compare those. Those are apples
23 and oranges. You only compare apples
24 and apples and they're not comparable.

25

MR. CUTRER: Thank you.
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1

MR. JOHNSON: And I would

2

reiterate the answer to that, that I

3

don't see how they're injured, at all.

4

MR. FINGERHUT: One other

5

question, I'm sorry, just a quick one.

6

MR. JOHNSON: Sure.

7

MR. FINGERHUT: In the

8

November 2016 hearing there was a

9

question asked of Ms. Dixon, obviously

10

-- disagreeing of the interpretation of

11

the law -- of The town but she was

12

asked specifically whether or not the

13

appellant's math was correct on density

14

and the answer to that yes. She agrees

15

with the meaning but the math was

16

correct on that. Do you agree that the

17

math is correct and relevant or not

18 correct?

19 MR. JOHNSON: If you posit their
20 assumption on the correct formula, the
21 average density I'm not trying to
22 retract their numbers. For example, I
23 don't know if it's 91 or 94 or 68 or 78
24 hotel rooms being built and I actually

25 don't know -- by Spinnaker there are

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1 but I've got no reason to think that
2 they've got ahold of the wrong numbers.
3 They've simply got the wrong equation
4 and therefore it's immaterial and
5 irrelevant.

6 MR. FINGERHUT: Okay. Thank you.
7 Anything else for Mr. Johnson? Thank
8 you, sir.

9 MR. JOHNSON: Thank you.

10 MR. CUTRER: I'd like to offer
11 that we have a five-minute recess.

12 (Whereupon, a short break was
13 taken.)

14 MR. FINGERHUT: Okay. We're back.
15 Mr. Alford?

16 MR. ALFORD: Good afternoon. Greg
17 Alford. I represent the Town of Hilton
18 Head Island in a courtroom recently I
19 represented a decision made by this
20 body although not all the same members.

21 You know, things get too
22 complicated, too quickly I think.
23 People over think stuff.

24 I think one of the first questions

25 asked today Mr. Cutrer was, why? Why

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1 are you doing this? What's your
2 interest? Are you aggrieved? And Mr.
3 Williams' answer was well, we just want
4 to know the rules.

5 Well, then you're not aggrieved.

6 Either you're aggrieved or you're not.

7 The standing issue is this whole
8 other -- you know, you've got a right
9 to bring a claim if you're within a
10 certain geographic distance but you
11 have to be aggrieved.

12 On the record, he basically
13 conceded that they're not aggrieved.

14 I don't know the answer to the
15 question. I think there's a reason. I
16 think the reason is there's X amount of
17 density in each category;
18 nonresidential, hotel, residential.

19 You ever heard the expression
20 'built out'? Oh, that subdivision's
21 been built out. Sea Pines' built out,
22 which it's really not.

23 Take the Sea Pines master plan,
24 for example, it has an allocation of X

25 number of commercial square footage. X

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1 number of residential X units, X number
2 of hotel units, okay. That's why you
3 do it.

4 So, when Mr. Williams kind made
5 this argument I had a lawyer one time
6 -- people use big words on me --
7 somebody told me I was conflating
8 something so I had to look it up, I
9 wasn't by the way, but this argument
10 right here, in your memorandum on page
11 eight, Mr. Williams' memorandum, this
12 is where you get into this conflation
13 of this density question that I think
14 all of you have asked about. You asked
15 about the bank, Mr. Johnson. I think
16 you were saying, all right, now, have
17 you gone to this property, sucked some
18 of the density off that so you can use
19 it in another area and the answer is no
20 in the commercial context.

21 A, this isn't residential or hotel
22 context but clearly in this 15-acre

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23 development there's very little

24 commercial, right?

25 I mean is that -- do we agree that
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1 the record reflects there's 5,600 and
2 change of actual built commercial
3 there? I mean I don't think there's
4 any evidence in the record to the
5 contrary, so, that being the case how
6 much commercial density was allowed for
7 this entire acreage or is there
8 evidence that's somewhere along the
9 line which has happened in places, it
10 happened in Shelter Cove, the
11 development there.

12 The developer came in and said,
13 look, I don't need all this commercial.
14 I've got too much commercial. Will you
15 let me swap some of my commercial
16 density for some residential density?

17 And that was done. There's a record of
18 it. It's documented. You don't have
19 anything in the record and it doesn't
20 exist by the body to show that someone,
21 it would have been the Spinnaker guy or
22 whomever was -- somebody at one point
23 who was the control hold and the
24 developer, cohesively, we're going to

25 have this much commercial, this much
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1 residential, and you've going to have
2 this much hotel and as time goes on
3 things don't always work out once the
4 shooting starts, so you end up, this
5 guy owns that and then his interest
6 competes with this guy who owns that
7 and that's a pretty common thing. It
8 happened at Sea Pines it happened at --
9 I haven't really heard about Palmetto

10 Dunes but it happens.

11 There's not any commercial out
12 there except 5,600 and change. Meaning
13 that there's still a substantial amount
14 of commercial to be allocated to be
15 used there. That argument is a
16 conflation and it tries to use what's
17 called the averaging of density, okay.
18 You don't average commercial, hotel,
19 and residential, they're each their
20 own, apple, orange, banana, that's how
21 that works.

22 There is a place where you can
23 talk about average density and it goes
24 to the concept Mr. Johnson eluded to

25 and they cite this in a prior page of
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1 memo 7. Here's a part of the element;
2 only places I could find is Subsection
3 A where they talk about average

4 density, last sentence in A.

5 What this is doing is saying,
6 okay, if we've zoned and planned this
7 one section of land and let's say I'm
8 only allowed, hypothetically, I'm only
9 allowed ten units per acre of
10 residential but within the whole thing
11 I'm allowed a hundred units of
12 residential. What the code will let me
13 do is build 125 percent of what's
14 allowed in the base --

15 MR. CUTRER: What page is this?

16 MR. ALFORD: I'm sorry, this out
17 of the LMO. This is Section 16, 163106
18 and A it's kind of what you were
19 talking about, Mr. Johnson, where you
20 take basically within the PUD you can
21 shift density around in a reasonable
22 manner and let's you do that and so
23 that hasn't happened, commercially,
24 here so I think what you might have
25 been asking hadn't happened.

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1 Really, if we look at the LMO and
2 I'm -- I hate it but I have to look at
3 it sometimes maybe that's why I hate
4 it -- I really find that's the only
5 place you see average density, okay,
6 and what they're talking about here is
7 you've got to read -- under the law you
8 have to read things, if you can you,
9 read statutes and codes, you try to
10 read them consistently.

11 To take that word 'average
12 density' and then you have to do what
13 Mr. Johnson did and you have to jump
14 over to 1610 I think -- I'm terrible
15 about losing stuff -- so I've stuck one
16 section over the other here. Well
17 sorry, I'm trying.

18 So you've got to read this stuff
19 again. What that's telling you is you
20 look at it, apple being residential,
21 orange being hotel and banana being

22 commercial and B1 tells you how to do
23 that and it's pretty -- I mean it's
24 kind of the question you're asking,
25 what's out there? 5,600 feet of
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1 commercial. Okay, how much commercial
2 do we have allocated for this PUD? How
3 much? 15,000? 27,000.
4 27,000. So if we build this,
5 we're at 12, 13. There's still some
6 left, I think. Now, is there any land
7 left to build it on? I don't know.
8 Did they spread out their hotel in such
9 a manner that they can't put commercial
10 on top of it -- that's not my problem,
11 it's not your problem respectfully,
12 although I think I need to dovetail a
13 little bit here because the judge had a
14 question - which is do I need to think

15 about -- how's the -- do I need to
16 calculate -- and I think what he's
17 asking is has the commercial been built
18 out on that site within that PUD
19 because if it has then you would have
20 to say no.

21 In other words, if there were
22 27,000 square feet of commercial out
23 there today or some number less than
24 that, slightly, you wouldn't be able to

25 build anymore, right? I mean it stands

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1 to reason that you wouldn't be able to
2 do it. So, I believe there's been a
3 conflation, although I use that word --
4 I looked it up and I kind of like it --
5 by the appellants in trying to blend
6 this density argument together there
7 today -- when the LMO tells you how to
8 do it and that's exactly what the LMO

9 has told them in the first place. They
10 said, look, there's only this much
11 commercial out here. They've got as
12 much acreage -- they could have built,
13 however, it X per acre. Here it is.
14 We're done.

15 Not real smart and I've got a lot
16 to say but I'll try to answer any
17 questions.

18 MR. ROBERT JOHNSON: For
19 clarification purposes and this is a
20 question for Mr. Johnson, I think that
21 27,000 was prior to --

22 MR. ALFORD: The expiration of the
23 deed --

24 MR. ROBERT JOHNSON: Right.

25 MR. ALFORD: What do you call --
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1 MR. ROBERT JOHNSON: And now you

2 took the Town's overlay. It's
3 15,000'ish just for clarification, is
4 that correct?

5 MR. ALFORD: I think that's why I
6 said 15 -- I do not take issue with
7 that.

8 MR. JOHNSON: To answer your
9 question -- Barry Johnson, I don't take
10 issue with that either. I might say I
11 don't think it's relevant.

12 MR. ROBERT JOHNSON: Right.

13 MR. JOHNSON: But I don't take
14 issue.

15 MR. ALFORD: Well, respectfully,
16 it's relevant only if you get up
17 against that ceiling. If you're not,
18 you're using a bank, if you will. If
19 you're not cashing all those chips --
20 and I think that's what the judge was
21 trying to ask. In Question 3 he says,
22 and must -- must the existing
23 development on the other parcels of
24 that PD-2 Overlay District take into
25 account any -- Parcel E? (Phonetic)

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1 I would answer that in the
2 affirmative. I would say, yes, you
3 have to take it into account so that
4 you make sure you don't go over that
5 15,000 feet ceiling. That's my reading
6 of it because that would -- that would
7 prevent anymore commercial construction
8 out there if they went over whatever
9 the -- I'm sure there'll be a fight
10 about that, sorry, you know, is it 15?
11 Is it 27? I don't know. And I'm
12 not -- I have no authority to take
13 position on that at this juncture
14 but -- so that's -- I think one of the
15 questions that's been asked is, okay,
16 what do you want us to do? What are
17 you asking this body to do -- asking
18 you to do on behalf of the Town and on
19 behalf of yourselves, frankly -- if I

20 have to argue that.

21 I'm asking to you answer these
22 three questions and I think Ms. Dixon
23 did an excellent job in answering these
24 questions. I would ask you to

25 supplement that answer with reliance on
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1 the -- 16-10-102B1 and I think that
2 takes care of the mathematical
3 questions that finance people have
4 because you're then how many apples,
5 how many oranges, how many bananas that
6 you're getting there. You're breaking
7 out -- just like the Sea Pine master
8 plan, how much commercial do we have?
9 How much residential do we have? How
10 many resorts do we have? So those are
11 my -- how many hotel spaces do we have?
12 MR. FINGERHUT: So are you saying
13 that it doesn't lend itself to

14 averaging?

15 MR. ALFORD: It would -- within
16 the categories it lends itself to
17 average, otherwise, no.

18 MR. FINGERHUT: So then -- okay.
19 But then this section of the LMO that
20 you have up there this -- obscured.
21 Let's talk about it let's do it.

22 MR. FINGERHUT: Because it sounds
23 like you can only -- you can't apply
24 both of them and come out with the

25 result that you want, at least I don't
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1 think so.

2 MR. ALFORD: I respectfully
3 disagree. Let me try --

4 MR. FINGERHUT: Explain to me,
5 yeah.

6 MR. ALFORD: Yeah, yeah. So -- I

7 mess up so, density, little 'd' --
8 section planned development may be
9 built adding density which is greater
10 than the site specific density allowed
11 by the -- provided that any such
12 concentration density is offset by an
13 area of lower density in the other
14 sections -- based on the LMO.

15 Okay, if I have approval to build,
16 how do I say this, you -- if I take up
17 all the land building residential I
18 can't build a commercial. I've
19 precluded myself, right? Vice versa.
20 If I -- well, space -- residential
21 density is probably the only one you
22 can -- already tells you can expand so
23 much I don't think commercial is based
24 on square foot, so you'd -- kind of

25 footprint but you have to read them

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1 together, I mean the law requires you
2 do and it says little 'd' density,
3 okay, so in a planned unit development
4 you've got commercial but you don't
5 average, okay, I've used this many
6 residential units so I'm going to
7 average it over -- and take out
8 commercial. Does that make any sense?

9 MR. FINGERHUT: A little bit.

10 MR. ALFORD: -- application.

11 MR. FINGERHUT: But then I go back
12 to then in November 2016 when I thought
13 it was stipulated to that the Town's
14 map was correct on density, they just
15 didn't think it applied, so are you
16 telling me now that that --
17 notwithstanding that testimony, you
18 don't think the calculation is correct
19 in which case I would ask you the same
20 thing, Mr. Johnson, let me see your
21 calculation.

22 MR. ALFORD: Sure. Well, let me
23 say this. I go with Mr. Johnson then,
24 math is math, one plus one is two. The

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25 math may be correct. The formula
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1 wasn't. The formula was -- the
2 formula, as a matter of law, being
3 16-10-103 B, is it 103? I'm sorry
4 16-10-102B, that's where the formula
5 is. They didn't use that formula.

6 MR. FINGERHUT: Are you certain
7 they didn't or not? I'm just asking?

8 MR. ALFORD: Which they go
9 through.

10 MR. FINGERHUT: Yeah. I have a
11 copy of it. Yeah, they clearly said
12 what they did so I'm asking you the
13 same thing.

14 MR. ALFORD: I don't believe they
15 did, no, sir. I think they did not. I
16 believe they spread they did -- here's
17 what I think he did and I think I --

18 MR. WILLIAMS: Mr. Chairman, he's

19 testifying contrary to what the sworn
20 testimony from the last hearing was and
21 we object.

22 MR. FINGERHUT: I'll overrule it.
23 He is answering my question and during
24 his argument I think it's --

25 MR. ALFORD: For the record,
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1 lawyers don't get to testify and I'm
2 not testifying, okay, but I would say
3 this about that, if -- I think the math
4 that I think they want to do is and I
5 understand why and it's because they
6 want to use the density, they want to
7 use the space and -- up and running, I
8 think that's the answer. Mr. Garrett,
9 he asked the question, it's only one or
10 two reasons -- they don't care about
11 the rules. The rules are going to

12 change in the next five or six years
13 and they're -- that's how it works. If
14 you don't like the rules you apply for
15 variances -- kind of zoning magic that
16 these people are famous for -- I'm just
17 saying, it is not based on the rules.
18 There's a competitive business reason
19 that they are doing, okay. They're in
20 a competing business, hotel, timeshare,
21 short-term rentals. It's a competing
22 business.

23 Within that competition now
24 they're all in this Circle, square,

25 whatever shape the property is, there's
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1 only so much to go around. There's
2 only so much hotel, there's only so
3 much commercial, there's only so much
4 residential, so I don't -- I would have
5 answered the question differently. I

6 would have been truthful. I'd said,
7 I'm here because I'm stuck in this PUD
8 with this guy and there's only so much
9 density to go around and I want to take
10 mine, that would have been my answer
11 because I think that's the truth, just
12 my opinion.

13 But going back to your calculation
14 question, I just don't want to
15 overcomplicate things. There's X
16 amount of hotel rooms allowed there.
17 There's X amount of commercial allowed
18 in there and there's X amount of what
19 do you call it, non-hotel or
20 nonresidential, so either it is or it
21 isn't and I believe, respectfully, I
22 don't -- I mean no disrespect, I don't
23 care what their calculations are. This
24 is how we have to do it.

25 MR. FINGERHUT: Would you like a
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1 ten-minute recess to do that for us so
2 we can see it? I'm asking for
3 evidence, that's all because you're
4 asking us to do something, so --

5 MR. ALFORD: I was a -- in college
6 so I've got to stop for a minute and
7 ask -- yes, I would love a short break.
8 Would that be okay?

9 MR. FINGERHUT: If you're going to
10 come back with a number and a --

11 MR. ALFORD: I will endeavor to do
12 that.

13 (Whereupon, a short break was
14 taken.)

15 MR. FINGERHUT: Back in session.

16 MR. ALFORD: Yes, sir. As I told
17 you, I'm not a mathematician. Mr.
18 Walczak can attest.

19 I had a moment to consult with
20 staff and so this is what's out there
21 today. If you want to talk about kind
22 of the average density concept.

23 Right now there's 91 hotel units

24 spread over the 15.1 acres, that's 6.56

25 -- there's 5,260 square feet commercial
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1 spread over 15.1, take that out and you
2 get the 3408.

3 There's 198 residential units,
4 which are timeshares that are out there
5 and then that times 15.01, average out
6 13 on those units -- so, going back to
7 this document, everything out there is
8 under built. Everything category.

9 They could have built 94 or --
10 they could have built 94, they built
11 91.

12 They could have built 200 and they
13 only built 198 and out of the density
14 that they had -- so if you look at the
15 table and I think I understand what
16 they're trying to do, now, they're

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17 trying to say the PUD exists. Under
18 the old rules we have what we have
19 under the PUD but now there's no
20 commercial and I think what staff said
21 is, well, no, we're going to apply the
22 density, the base density numbers to
23 the acreage and they get to build
24 8,400 square feet and they applied for
25 7,500, so, in other words, the

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1 commercial density has not been built
2 out. I don't know if I answered your
3 question.

4 MR. FINGERHUT: Well you --
5 actually -- I'm sorry, Mr. Walczak.

6 MR. WALCZAK: I was going to say,
7 so what is the allowable density under
8 the base district?

9 MR. ALFORD: You could build 8,000
10 square feet per acre right now today

11 under the bas district.

12 MR. WALCZAK: And what is our
13 average density based on your
14 calculations?

15 MR. ALFORD: Average density?

16 MR. WALCZAK: Average density. It
17 seemed to me that those three numbers
18 you found an average? No, or something
19 similar to that?

20 MR. ALFORD: We think they're
21 mixing apples and oranges.

22 MR. WALCZAK: Yeah but that does
23 -- that's what -- isn't that what the
24 ordinance says? The LMO says that?

25 MR. ALFORD: No. Actually it says
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1 -- that section of the LMO that we held
2 up says --

3 MR. CUTRER: There's no

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co-mingling.

MR. ALFORD: Thank you.

MR. FINGERHUT: No co-mingling.

You calculate these densities here
separate, that's correct, but then once
you have done that it seems to me that
103G4 -- 163G4 says you average them,
doesn't it?

MR. ALFORD: It's telling you to
average, at least I think. Yes, I
think what it's telling you to do is
you average -- average them within
their categories is what I'm saying,
so, I do think you can say, okay,
that's what I -- that's my belief, you
average them within your category,
because it otherwise would say to you,
you average it this way and you
disregard Section 16-10-102.

MR. FINGERHUT: Okay. So then but
if you look at Section G1, the same --

163G1, the purpose the PD-2 Overlay
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1 District is intended to encourage
2 creativity and design planning and
3 development of parcels -- acres by
4 allowing greater site flexibility than
5 the underlying base zoning district so
6 that natural futures may be protected
7 and development concentrated in more
8 suitable or -- environmentally
9 sensitive areas, so it's intended to
10 give perhaps have more of one thing
11 less of another and that's why I think
12 the G4 asks you average them and
13 that's -- (Phonetic)

14 MR. ALFORD: I respectfully
15 disagree. I think now I'm starting to
16 think maybe understand it.

17 It's telling you that the PD or
18 PUD planned district, I'm going to get
19 this much residential, I'm going to get
20 this much hotel, I'm going to get this
21 much commercial and what this section

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22 -- the G section you're referring to

23 talks about averaging but it also says

24 you can take more off of one parcel and

25 overpopulate another parcel provided

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1 that you then account for that by
2 creating more open space, things of
3 that nature. There's nine acres of
4 open space in this PUD that his client
5 created nine-acres of open space, so
6 he's -- and you asked the important
7 question, are they related, those
8 entities, the answer is, yes, and so
9 they've given up -- they've for -- I
10 guess they've banked, if you will,
11 already by creating that over space as
12 the section -- I need to find that
13 section, that G section because I think
14 now I'm understanding -- yeah, you
15 don't cross -- yeah, Mr. Johnson made

16 his point. I think it's a good one --
17 right here in mixed use developments,
18 acreage allocated to residential shall
19 not be used to calculate
20 nonresidential. Acreage allocated for
21 nonresidential shall not be used -- so
22 you're not -- I think that -- because
23 you're not going to cross pollenate.

24 MR. FINGERHUT: Well, no, when you

25 calculate the density but overall you

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1 need to know what the total density is
2 and once you have calculated each
3 category correctly you put them
4 together, at least that's how I read it
5 in G4, but that's -- to me that's what
6 the plain language is saying and I'm
7 trying to understand if there's another
8 formula that shows a different number

9 that's great, that's what I'm asking.

10 MR. ALFORD: I guess my --

11 MR. ROBERT JOHNSON: The only
12 thing that doesn't add up there is that
13 some densities are by units and other
14 densities are by square footage. You
15 can't put those two together, you know,
16 it's like putting metric with, you
17 know, American imperial, you just can't
18 do that, that's not possible.

19 MR. ALFORD: That is I think what
20 the LMO is trying to say when they come
21 back about with this other section.

22 MR. ROBERT JOHNSON: The One thing
23 I do take issue with, I believe you're
24 using an old document --

25 MR. ALFORD: I am.
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1 MR. ROBERT JOHNSON: That was pre
2 2000 --

3 MR. WILLIAMS: 2002, pre-2002.

4 MR. TAYLOR: Mr. Chairman, could
5 that be marked for the record, please?

6 MR. FINGERHUT: Absolutely. It
7 can reside in the record, correct.

8 That would be --

9 MR. WILLIAMS: No, but his
10 calculations --

11 MR. TAYLOR: And the calculations
12 both should be marked.

13 MR. ALFORD: Yeah, this in the
14 record.

15 MR. WILLIAMS: Let's mark it so
16 it's attached to the transcript.

17 MR. ROBERT JOHNSON: We need to go
18 by today's LMO and not an agreement
19 that was made pre-LMO.

20 MR. ALFORD: Yes, sir.

21 MR. ROBERT JOHNSON: You're mixing
22 those two up. You need to take that,
23 put it aside.

24 MR. ALFORD: Under today's LMO

25 they're allowed 8,000 feet -- average

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1 per acre on a piece of property --

2 MR. FINGERHUT: Regardless of what
3 else is going on in the --

4 MR. ALFORD: Yeah, as long as they
5 haven't used up everything in the
6 commercial category and that was
7 staff's determination because there's
8 hardly any commercial out there.

9 MR. FINGERHUT: I looked at that.
10 Most of the files that were done in the
11 Circuit Court, did you make this
12 argument there?

13 MR. ALFORD: We didn't get that
14 far in Circuit Court.

15 MR. FINGERHUT: You picked the
16 questions, you sit down --

17 MR. ALFORD: Evidence was put up
18 and Tom was like, he went through the
19 record. He asked us questions. They
20 made those lengthy arguments.

21 Our arguments were more way -- you
22 know, generally when -- you know what
23 the standard of review says, you guys
24 got it made. You can almost never be
25 wrong. It's the any evidence standard.

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1 If there's any evidence in the record
2 to support your decision you're upheld
3 because the court feels like local
4 bodies should make zoning decisions and
5 I think that's a good rule.

6 His problem was, the record -- he
7 wanted to know whether or not -- I
8 guess he wanted to know the question
9 you're asking, have you used up the
10 other density in the commercial, that's
11 question 3. Question 3 is his real
12 meat of trying to make his decision and
13 so we spent time formulating that.

14 The arguments that were made in
15 front of him were essentially, hey,
16 zoning appeals heard all of this.
17 There's some evidence here to support
18 the decision. Look how big this record
19 is. And there's a lot of conflicting
20 statements in this record and a lot
21 of -- you know, I don't know, I think
22 the old zoning document that was --
23 categorical exemption is out. We're
24 going under the new rules, 8,000 feet.

25 MR. WALCZAK: If I may.

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1 MR. FINGERHUT: Please.

2 MR. WALCZAK: Under 16-3-106G4.

3 MR. ALFORD: Yes, sir.

4 MR. WALCZAK: A.

5 MR. ALFORD: Yes.

6 MR. WALCZAK: Sentence says -- we
7 discussed in the past, the average

8 density for PD-2 Overlay District shall
9 not exceed the maximum density
10 permitted in the base zoning direct.

11 MR. ALFORD: Right.

12 MR. WALCZAK: So, how would you
13 calculate the average density with PD
14 overlay so that you can compare it so
15 that it meets this --

16 MR. ALFORD: Well, and I think
17 that goes that then you need to go and
18 look at D1 and it tells you how to
19 apply that formula because there's
20 different kinds of density just as
21 you've noted. There's square footage
22 of commercial density, there's number
23 of units in residential and there's
24 number of hotel rooms and hotel density

25 -- and I think your point's very well

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1 taken, you can't mix --

2 MR. WALCZAK: So if there's three
3 different densities then what are the
4 three different requirements or base
5 requirement which will you have in the
6 PD-2? (Phonetic)

7 MR. ALFORD: Well, I'm sorry, it
8 would depend on what you're trying to
9 build.

10 If you were trying to build hotel
11 rooms you would have one allocation.

12 If you were trying to build
13 residential you'd have X number of
14 units and if you're trying to build
15 commercial you'd have --

16 MR. WALCZAK: Well, we have
17 existing and you're saying in all three
18 cases they're under the requirement of
19 the base district?

20 MR. ALFORD: I am. If you do the
21 math on -- I'm I'll mark it. I'm not
22 scared.

23 MR. WALCZAK: Okay.

24 MR. FINGERHUT: What he's saying
25 is how many acres -- for this use?

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1 MR. CUTRER: There are -- excuse
2 me, one, two, three, four, five. There
3 are five parcels list in this property.

4 MR. WILLIAMS: 15.1 acres.

5 MR. CUTRER: A through F. D is
6 the Waterside Drive right-of-way. What
7 I think you have to do --

8 MR. ALFORD: I'm sorry. Go ahead,
9 sir. A lot of smart people -- there's
10 your answer.

11 MR. CUTRER: I can't do that
12 calculation unless I know how many
13 acres were used. What I want to know,
14 I think we need to know, is how many
15 acres comprise Parcels A and C? How
16 many acres comprises Parcel F? And how
17 many acres comprises Parcel E? We know
18 --

19 UNIDENTIFIED SPEAKER: What's the
20 total?

21 MR. FINGERHUT: I'd like to hear
22 his answer before -- you have rebuttal
23 after that so I'd like to hear if you
24 don't mind.

25 MR. ALFORD: This in the record,
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1 right, Chet?

2 MR. WILLIAMS: Yes, a copy of that
3 is attached to Nicole's memo of
4 August 1st.

5 MR. ALFORD: All right. So I'll
6 go through the numerical designation.

7 Parcel F is 10.735 acres, although
8 nine of those acres are open space.

9 MR. CUTRER: Nine are what?

10 MR. ALFORD: Are open space.

11 Parcel D is the right-of-way which
12 has no allocation and it consists of