

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

vs.

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

Respondents.

Appellants,

RECORD ON APPEAL – VOLUME III OF VI

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13 .697 acres.

14 Parcel E is 1.608 acres.

15 Parcels A and C constitute

16 2.6 acres.

17 Parcel B is .377 acres.

18 MR. CUTRER: B as in Bravo?

19 MR. WILLIAMS: B was taken out.

20 MR. ALFORD: Okay. B is out, I'm

21 sorry. So, really you've got F, E and

22 A and C, right?

23 MR. WILLIAMS: And D.

24 MR. ALFORD: And D is --

25 MR. WILLIAMS: The right-of-way.

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1 MR. ALFORD: D is the --

2 MR. CUTRER: 10.735.

3 MR. ALFORD: Yes, sir. Parcel F,

4 10.735. Parcel D, 0.697.

5 MR. CUTRER: Okay. .697.

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6 MR. ALFORD: Yes, sir. Parcel

7 E -- 1.068.

8 MR. FINGERHUT: Point 06?

9 MR. ALFORD: 1.068. Parcels A and
10 C together are 2.6 acres.

11 MR. CUTRER: That adds up to 15.1.

12 MR. ALFORD: Yes.

13 MR. CUTRER: Okay. Now, you just
14 said F, which is the Spinnaker
15 Development.

16 MR. ALFORD: Yes, sir.

17 MR. CUTRER: Comprise 10.735 acres
18 of which nine of open space.

19 MR. ALFORD: Yes, sir.

20 MR. CUTRER: That's 198 units.

21 You telling me they compromise
22 1.7 acres?

23 MR. ALFORD: Possibly. The
24 nine acres is -- is spread out.

25 MR. CUTRER: That's 198 units. I
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1 drove that whole property. Can't be.
2 Those units can they really be on 1.7
3 acres?

4 MR. ROBERT JOHNSON: For
5 clarification, the nine acres is spread
6 throughout these other acreage.

7 MR. ALFORD: Clearly, when you
8 call it 'open space' it is open space
9 that is utilized by and sprinkled
10 around in the Spinnaker developments
11 there. Is that what you were asking?

12 MR. ROBERT JOHNSON: Yes. The
13 other clarification I think for some of
14 the board members is the right-of-way
15 is actually allowed to be put into that
16 acreage --

17 MR. ALFORD: It is.

18 MR. ROBERT JOHNSON: -- to increase
19 the density?

20 MR. ALFORD: That's correct.
21 That's correct.

22 MR. FINGERHUT: So, how much
23 acreage do you need for 198 units?

24 MR. ALFORD: Well, I think the way
25 the PD operates you needed -- because
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1 keep in mind, when they were built,
2 they were operating in the different --
3 MR. FINGERHUT: Right. Today, how
4 much? I think it's in the LMO right in
5 front of you.
6 MR. ALFORD: Hold on. Hold on.
7 16 units per net acre.
8 MR. FINGERHUT: Okay. So what
9 does that mean?
10 MR. ALFORD: You'd need 13.
11 MR. FINGERHUT: 13 acres?
12 MR. ALFORD: (Witness nods head.)
13 Right?
14 MR. FINGERHUT: That's for 198
15 units, so then what would you need for
16 the hotel?
17 MR. ALFORD: Unless --

18 MR. FINGERHUT: Can you do the
19 calculation?

20 MR. ALFORD: Yeah. Let's do it.
21 Yeah, I understand.

22 Hotel; 35 rooms per net acre --
23 there's a footnote.

24 MR. CUTRER: 2.6 acres, wouldn't
25 it be?

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1 MR. TAYLOR: Yes.

2 MR. ALFORD: So you would need
3 from --

4 MR. WILLIAMS: 91 divided by 35 is
5 2.6.

6 MR. FINGERHUT: Then the only
7 other thing to add is the
8 nonresidential development, correct?

9 MR. ALFORD: So 8,000.

10 MR. FINGERHUT: Okay. And so how

11 much acreage do you need for that?

12 MR. ALFORD: One.

13 MR. WILLIAMS: Existing?

14 MR. ALFORD: 7,500. It's less
15 than -- oh yeah, the 52 -- there's
16 5,262 square feet already -- yes, built
17 and that is on a -- that takes up
18 .65 acres. (Phonetic)

19 MR. FINGERHUT: I think that gets
20 us over 15.1 and that's -- that was my
21 point to the exercise. How do we avoid
22 that? It's all very interesting. The
23 other thing, it's really confusing but
24 how do we avoid that?

25 MR. ALFORD: Because I don't think
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1 you can have it both ways. He doesn't
2 get the PD-2 flexibility and then take
3 away the use of the land. (Phonetic)

4 MR. FINGERHUT: Okay. But that's

5 -- okay. But, first, you just did the
6 math, so yu now agree with the math so
7 now you're saying it shouldn't count.
8 Different -- there's a lot of smoke
9 here.

10 MR. ALFORD: I think the
11 determination is that you have to use
12 the commercial allocation, you haven't
13 used it and that's when I go back to
14 this other section that defines how you
15 use density.

16 What y'all are doing,
17 respectfully, is you're conflating and
18 cross pollenating these different types
19 of residential and commercial.

20 MR. FINGERHUT: Mr. Alford, you
21 just did it. I didn't --

22 MR. ALFORD: You know what I'm
23 saying, density wise, though, the land
24 is there. The land is there. Under

25 that PUD standard because the

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1 nine acres has been taken out and put
2 into -- so as is contemplated by the
3 code. As is contemplated by the G --
4 as is contemplated by G, I'm sorry, by
5 4A, if you look at that, that tells you
6 you can overload -- if you offset it
7 with open space, that's exactly what
8 they're trying to do here, that's that
9 flexibility.

10 I mean, look, 'May be built out of
11 density which is greater than site
12 specific density allowed by an
13 underlying base -- provided these such
14 offset by an area of lower density in
15 another section -- of planned
16 development or -- designation common
17 open space elsewhere in the --
18 development. That's exactly what
19 happened here.

20 You have substantial portions of
21 the large space that is open space.

22 MS. LAUDERMILCH: Greg, forgive my

23 ignorance. Parking and driveways, do
24 they constitute open space? I --

25 MR. ALFORD: I'll have to defer.
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1 MS. LAUDERMILCH: It doesn't seem
2 like open space to me.

3 MR. ALFORD: I would say they said
4 might be common property but not open
5 space.

6 MR. LAUDERMILCH: Common -- common
7 space.

8 MR. ALFORD: I will say, like, for
9 example, drainage infrastructure,
10 lagoons, those types of things are open
11 space.

12 MS. DIXON: Definition of open
13 space in the LMO is land not utilized
14 for single family -- right-of-way,
15 commercial buildings, local -- parking

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or loading areas.

MS. LAUDERMILCH: So parking does
not count for open space?

MR. ALFORD: What section is that?

MS. DIXON: It's in the
definition.

MR. ALFORD: My concern is, you
take their reading with -- 102B1 out --
density, then it's apples to oranges

and I also think you would render 4A to
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take their -- do your strict
mathematical calculation. You walk me
through -- and you're right, it exceeds
the 15.1 but then it leaves 4A,
flexibility built in and the Spinnaker
guys who own this piece of land gave up
acreage exactly as the code told them
to do and now it's, oh no, now, you
don't get to use your property. Puts

10 the Town in a tough spot.

11 MR. FINGERHUT: Any other
12 questions for Mr. Alford?

13 Before you leave, Mr. Alford,
14 there's a lot of documents that might
15 be exhibits. The large map arguably
16 has a little more detail than what's in
17 the record.

18 MR. WILLIAMS: Correct.

19 MR. ALFORD: This is in the
20 record.

21 MR. FINGERHUT: Is that in the
22 record?

23 MR. WILLIAMS: A photo reduced
24 copy of it.

25 MR. FINGERHUT: With the same
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1 information on it, as well?

2 MR. WILLIAMS: Yes. It's

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attached, as well.

MR. FINGERHUT: Then the sheet
from -- the charts from 1987, is that
--

MR. ALFORD: That is in the
record.

MR. FINGERHUT: That is? Okay. I
didn't see it. Okay.

UNIDENTIFIED SPEAKER: Part of
Attachment H --

MR. TAYLOR: Mr. Chairman, I would
propose that be, though, as an
attachment just so that we don't have
to dig through it and that --

MR. FINGERHUT: That's fine.
Are there other questions for the
Town? There are, I apologize. My
apologies.

MR. CUTRER: I have one question.

MR. FINGERHUT: Mr. Alford, I
think we have one more question.

MR. ALFORD: I hope I have one
more answer.

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1 MR. CUTRER: In your opinion, if
2 Parcel E -- let me backup.

3 The appellants are the owners of
4 units in the hotel so I'm going to call
5 them the hotel owners.

6 MR. ALFORD: A and C.

7 MR. CUTRER: Parcel, they have
8 certain rights to redevelop that
9 property because it's already been
10 developed once but they have rights
11 with respect to the 2.6 acres that
12 comprise the property.

13 If Parcel E were developed as
14 proposed by the developer, in your
15 opinion, how would the appellants,
16 Beachwalk Hotel be injured?

17 MR. ALFORD: Honest answer, I
18 don't know. I could offer some
19 conjecture.

20 The way that they want to do the

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21 math and exclude the nine acres of

22 common property which I think skews the

23 math and then I think there's even part

24 of the code -- I think the fear that

25 they have, being honest with you, is

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1 that any other development out there

2 might impede their ability to come back

3 and ask for whatever else might be

4 there.

5 In other words, if there was -- if

6 there was X amount within that PD-22

7 development.

8 MR. CUTRER: They've got

9 2.6 acres.

10 MR. ALFORD: Yes, sir.

11 MR. CUTRER: Zoning permits 35

12 hotel units per acre. You can do the

13 math.

14 MR. ALFORD: Right.

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15 MR. CUTRER: They've got the right
16 to tear that property down and rebuild
17 it to however many -- by 35 --

18 MR. ALFORD: Same number, really,
19 yeah. You know what, to answer your
20 question, under that current zoning
21 none. Now, the answer the way it's set
22 up, none, because they only have X
23 amount of acres and they don't have any
24 commitment to open spaces -- so yeah.

25 MR. CUTRER: And they have -- am I
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1 correct that Beachwalk Hotel has no
2 right to Parcel E.

3 MR. ALFORD: None. None. So
4 you're right, they wouldn't have any.

5 MR. CUTRER: Thank you.

6 MR. FINGERHUT: Mr. Williams. Ms.
7 Dixon.

8 MS. DIXON: Good afternoon.

9 MR. WILLIAMS: Mr. Chairman, we'd
10 ask that she be sworn before she
11 testifies.

12 MR. FINGERHUT: Is she offering
13 testimony or is she answering
14 questions? I think she's answering
15 questions.

16 MR. WILLIAMS: We'll be asking her
17 questions so she'll have to be sworn,
18 at that point.

19 NICOLE DIXON,
20 having been produced and first duly sworn as a
21 witness, testified as follows:

22 EXAMINATION

23 BY MR. CUTRER:

24 Q The appellants on Beachwalk Hotel,
25 Parcels A and C, 2.6 acres on which currently
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1 exists, to my understanding, 91 units of empty

2 hotel zoned 35 hotel units per acre, 2.6 times
3 is 91, so the building that exists, even though
4 it's not occupied -- to the RD zoning district,
5 correct?

6 A I think when Mr. Williams did the math
7 based on the 91 units, 2.6 acres would be
8 required to have that amount of density. I
9 don't know that that's existing density of that
10 parcel.

11 MR. WILLIAMS: There are 91 units,
12 hotel units.

13 MS. DIXON: But I don't think the
14 parcel, itself, that the hotel site is
15 on 2.6.

16 MR. WILLIAMS: It is 2 -- it's
17 exactly 2.6. acres, yes. Parcels A
18 and C, 2.600 acres.

19 MS. DIXON: So then yes, you're
20 correct.

21 BY MR. CUTRER:

22 Q 2.6 acres times 35 hotel units per acre
23 is 91 hotel units.

24 A Yes.

25 Q Which is what currently exists.
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1 They do not own or have any right to
2 what's being referred to as Parcel E, is that
3 correct?

4 A Correct.

5 Q If Parcel E were developed as proposed
6 by the developer, how would Beachwalk Hotel
7 owners be injured with respect to the rights
8 they have and their property?

9 A I don't know that. I'm not aware that
10 they would be. I'm not aware that they would be
11 injured.

12 Q Okay, thank you. I hesitate to do this
13 but -- we have parcels totalling 10.735, that's
14 A and C, 1.068, that's -- we have parcels that
15 add up to 15.1 acres.

16 If Parcel E was developed as proposed,
17 7,500 square feet of commercial space, could you
18 explain to this Board how, in your opinion, that
19 would conform to the current LMO.

20 A Because Parcel E is zoned RD, resort
21 development, the underlying zoning, which allows
22 8,000 square feet per net acre.

23 Because there was an old PD-2 adopted
24 for the entire development, staff does not look
25 at the development, density development

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1 standards. We were talking about the average
2 that the appellant is using to calculate those,
3 staff does not believe that that is how the site
4 should currently be looked at. It was a PD-2
5 that was developed back many years ago. We
6 don't think that there was any kind of use it or
7 lose it clause where once that capital exemption
8 expired in 2000 that that meant they could no
9 longer develop the property, it specifically
10 said they had to abide by the current LMO's
11 regulations which allows for 8,000 square feet
12 per net acre and that's how I came to my

13 determination that they can have 8,400 square
14 feet on that property.

15 Q Okay. Parcels A and C, which are the
16 hotel --

17 A Uh-huh.

18 Q -- we've already just established have
19 exactly the number of units permitted under RD,
20 so Parcel E, they're requesting 7,500 square
21 feet in a tract that's zoned for 8,000 square
22 feet, so that would comply.

23 A Yes, sir.

24 Q Which leaves us with the Spinnaker

25 Development, itself, 198 units, I believe.

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1 In your opinion, does the Spinnaker
2 Development, 198 units plus the 5,000 and change
3 nonresidential development is Parcel F in
4 compliance with the current RD zoning?

5 A Can you break -- restate that?

6 Q There are three uses or three parcels

7 at discussion here.

8 Parcel E, which is proposed for
9 development.

10 Parcel A and C, which is the hotel.

11 And then Parcel F, which is the big
12 Spinnaker Development, which consists of 198
13 residential units and 5,262 square feet of
14 nonresidential.

15 We just established that E, if
16 developed, would be within the limits sets by RD
17 zoning.

18 We've already established that the
19 hotel is in compliance with the 35 units per
20 acre, so my question is, in your opinion, does
21 the remaining Parcel F, which is the 198 units
22 and the 5,262 square feet of nonresidential, is
23 Parcel F in compliance with the RD zoning?

24 A I believe so because I believe the math

25 that was done earlier indicated that 12 acres is

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1 required for -- I don't have that in front of
2 me.

3 Q So, am I correct that your assertion
4 would be that if E is developed, then Parcel F,
5 Spinnaker Development, Parcel A and C, the
6 hotel, and Parcel E, the site of the proposed
7 welcome center would all be in compliance with
8 RD zoning under the current LMO?

9 A Yes, sir.

10 MR. CUTRER: Thank you.

11 MR. FINGERHUT: Any other
12 questions?

13 MS. DIXON: If you both want to
14 come in and redevelop the property it
15 would be looked at under the current RD
16 zoning, which applies the 35 units per
17 acre.

18 MR. FINGERHUT: Then I have a
19 question, Ms. Dixon, based on what your
20 testimony is here, do you want to
21 change your answer to Judge Dukes'
22 second question?

23 The question is; Is Parcel E
24 subject to the LMO's PD-2 Overlay

25 District regulations?
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1 Because I understand your answer
2 to be, it's in the district but it's
3 not subject to the regulations, so
4 that's -- you wanted to change that to
5 no?

6 MS. DIXON: No, I do not. In
7 discussions that I had with the LMO
8 official and with the Town attorney we
9 determined or interpreted the section
10 that the appellant's referring to where
11 you average the density and all of
12 those development standards would apply
13 to new development of a PUD, so where
14 it talks about where you could take
15 density from one area of the proposed
16 PUD and concentrate open place in one
17 area and use that density in other --

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18 in the PUD, those are old development
19 standards we would looked at when in
20 the new PUD came in. This is something
21 that was created a long time ago prior
22 to the Town incorporating this master
23 plan.

24 So, there was a categorical
25 exemption that vested them for certain
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1 density amount for those tracts. That
2 expired. So that -- staff does not
3 believe that they are vested for the
4 densities that were allowed on the
5 master plan in that table that was
6 referenced earlier. We think that
7 they're allowed to develop with the
8 current LMO regulations, which is 8,000
9 square feet per net acre.

10 BY MR. CUTRER:

11 Q Without -- PD-2 regulations? Because

12 those only apply to new units? I'm just trying
13 to -- because that's different from, yes.
14 That's all I'm implying. That's why -- like,
15 yes, it applies, you're saying.

16 A Well, it's part of PD-2. Yes, they
17 should comply with the PD-2 regulations but the
18 development standards that are being questioned
19 staff interprets those as being development
20 standards for the new PD-2. If you're not going
21 to take something that was developed and then
22 now apply current development standards to it,
23 that's why categorical exemptions specifically
24 said to go by the density use standards in the
25 underlying base district of the LMO.

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1 So when you -- RD District allows 8,000
2 square feet per net acre.
3 MR. FINGERHUT: Thank you. Any
4 other questions for Ms. Dixon?

5 MR. CUTRER: I have a followup.

6 BY MR. CUTRER:

7 Q If the PD-2 overlay were not there and
8 this property was only subject to the RD
9 District, if the 7,500 foot welcome center were
10 developed, would the entire Waterside property,
11 which consists of Spinnaker, the hotel and the
12 welcome center be in compliance with the current
13 LMO from a density standpoint?

14 A I believe we said earlier that, yes, it
15 would.

16 MR. CUTRER: Thank you.

17 MR. FINGERHUT: Thank you.

18 Counsel, do you have questions for Ms.
19 Dixon before you give your rebuttal?

20 MR. WILLIAMS: I think I need to
21 wait on questions for Ms. Dixon. I
22 want to get through a couple of other
23 things first if you don't mind.

24 MR. FINGERHUT: Thank you.

25 MR. WILLIAMS: Nine acres of open
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1 space. I don't know that there's
2 anything in the record that establishes
3 that there's nine acres of open space
4 and if there is I'd ask that somebody
5 point me to it.

6 Mr. Johnson, in his presentation,
7 mentioned the rule in South Carolina
8 about interpretation of restrictive
9 covenants, land use covenants that when
10 they're ambiguous or uncertain that
11 they are construed so as to allowed --
12 construed -- property to allow the
13 freest and broadest use of use of
14 property and that's -- I think that's
15 an accurate statement when it comes to
16 restrictive covenants but we're not
17 talking about restrictive covenants,
18 we're talking about the provisions of
19 the Town's Land Management Ordinance.

20 I apologize. I'm getting to use
21 Mr. Alford's term, a little conflated.

22 When you're talking about

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23 construing the LMO, the LMO has its own

24 rules for that and those are the rules

25 that you have to follow.

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1 LMO Section 16-1-10.A.1 says,
2 where any LMO provision is inconsistent
3 with another LMO provision the more
4 restrictive provision shall govern
5 unless the terms of the more
6 restrictive provision specify
7 otherwise.

8 And this is all set out in the
9 petition of reconsideration -- there's
10 no reason why the covenants weren't
11 included with that -- LMO Section
12 16-1-106.8.2 says when there is a
13 conflict between an overlay zoning
14 district and an underlying base zoning
15 district the provisions of the Overlay
16 District shall control.

17 Note the use of the mandatory
18 term, 'shall'.
19 16-3-101.B language in the Town is
20 classified by this ordinance to be
21 within one -- several zoning districts.
22 The land within any base of a zoning
23 district may also be classified of one
24 or more -- restriction.

25 In this case, regulations --
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1 developed in the Overlay District shall
2 apply in addition to the regulations
3 governing the development in the
4 underlying base zoning district.
5 16-3-102.C; Regulations governing
6 development of an Overlay District
7 shall apply in addition to those
8 regulations governing development in an
9 underlying base zoning.

10 The standards governing the
11 overlay zoning district shall control
12 whether they are more restrictive or
13 less restriction than the base zoning
14 district.

15 So, the rules of interpretation
16 here are that if you're in an overlay
17 zoning district, the overlay zoning
18 district regulations control. Okay.

19 So, the issue about restrictive
20 covenants is a nonissue here.

21 All right. Let's take a look at
22 16-10-102.B.1.

23 Dwelling units for residential.

24 Hotel rooms for hotel.

25 Square footage for commercial.

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1 That's how you go about calculating
2 density.

3 In a mixed use development,

4 acreage allocated for present land use
5 shall not be used to govern
6 nonresidential density and acreage
7 allocated for nonresidential use shall
8 not be used as a residential use.

9 (Phonetic)

10 What that means is, if you have
11 let's say an acre, ten-acre tract in
12 the RD District, we all know the RD
13 District has commercial 8,000 square
14 feet per unit -- I'm sorry, 8,000
15 square feet per acre, residential
16 16 units per acre. You could develop
17 that for 160 residential units or you
18 can develop it for 80,000 square feet
19 of commercial space or you could
20 develop it for 80 units of residential
21 and 40,000-square foot of commercial
22 space but you can't double dip. That's
23 what those provisions are saying.
24 Okay.

25 And as close as I can follow what
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1 Mr. Alford is arguing is they want to
2 say here, yeah, you had to double dip
3 because it's the PD-2 District, so if
4 you look at the commercial density and
5 you looked at the residential density
6 and you looked at the nonresidential
7 density all separate and independent.
8 That's not what the code says though.

9 163-106G4A.

10 And Mr. -- Mr. Fingerhut, also,
11 y'all sort of hit on it, the purpose of
12 a PD-2 Overlay District is to allow for
13 flexibility for shifting around of
14 densities and open space, so as to
15 protect sensitive areas and put the
16 development in more appropriate areas.

17 So, again, if you had a
18 10,000-square foot -- ten-acre parcel
19 in the RD District that was in a PD-2
20 overlay, well then you could take, you
21 know, 140 residential units and put it

22 on half of the property but at the same
23 time that restricts the other half
24 because, like it says, a section or
25 phase of a plan development may be

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1 built in a density which is greater
2 than the site specific -- so here, my
3 example, you can have five acres of
4 that -- but you have 140 units on it.
5 That's well above -- well above
6 16 units per acre. I don't have a
7 calculator -- provided that any such
8 concentration of densities offset by an
9 area of a lower density in another
10 section or phase, so that means that
11 other five acres you can't build a
12 maximum density there because you've
13 got to look at an average, overall.

14 Mr. Alford and Mr. and Ms. Dixon

15 want you to believe that, no, that's
16 not the case. That only applies in
17 established PUD's. (Phonetic)

18 Well, the code doesn't say that.
19 The categorical exemption, categorical
20 exemption says expires five years from
21 the date hereof.

22 MR. TAYLOR: It's on the last
23 page.

24 MR. WILLIAMS: And afterwards it

25 says -- and Nicole said it dealt with
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1 density units and that's not the case.
2 It says, afterwards it shall be subject
3 to all relevant provisions of the then
4 existing LMO.

5 You know, we got what we got here
6 and that's the only thing we have to
7 deal with.

8 What -- the sheet that Mr. Alford

9 kept referring to that's marked as
10 Exhibit 2, approved 5687. This has
11 nothing to do, anymore, with available
12 density on these tract because after
13 the expiration of the categorical
14 exemption the property owners no longer
15 had any right to rely on this.

16 Mr. Alford referred to also to the
17 density requirements of the RD District
18 in Section 16-3-105L but looking solely
19 at the density in the RD District
20 ignores the average density
21 requirements of the PD-2 overlay.
22 You've got to take a look at that
23 average density.

24 And Mr. Johnson, I apologize, I

25 need to ask you a question. You had

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1 said that there was 15,000 square feet

2 of nonresidential -- I don't recall

3 that figure coming up can you?

4 MR. ROBERT JOHNSON: I don't

5 recall saying that. Did I?

6 MR. WILLIAMS: Mr. Fingerhut, your

7 questions to Mr. Johnson about SDC

8 Properties I would submit to you that

9 SDC is an acronym for Spinnaker

10 Development Corporation which is I

11 think the overall master umbrella that

12 those folks have for all of those

13 affiliates. I don't think there's any

14 questions that SDC Properties is an

15 affiliate of the developers new --

16 Mr. Cutrer, I was struck by your

17 comment, you got 198 units on

18 1.7 acres? I don't see how that's

19 possible.

20 And, again, I would submit to you

21 that there's nothing in the record that

22 deals with nine acres of open space

23 that's out there and even if there is,

24 the issue here isn't open space, it's

25 the density. That's the underlying



1 issue. The -- Mr. Alford, do you have
2 something?

3 MR. ALFORD: Third page second
4 full paragraph. That's in the record.

5 MR. WILLIAMS: This is in the
6 record. The entire Waterside PUD --
7 it says approximately 9.6 acres of open
8 space.

9 I don't recall -- and that's based
10 on a statement from Todd Theodore who
11 testified at the first hearing. I
12 don't recall him testifying --

13 MR. WALCZAK: Where is the open
14 space on the map? Can you show us?

15 MR. ALFORD: I would tell you --
16 sir, I believe what you find is it
17 consists of the right-of-way and then
18 that balance of it is interspersed in
19 that ten point -- what, was it, 10

20 point --

21 MR. WHITE: 735.

22 MR. ALFORD: In that 10.735 acres

23 and you've got it -- it's sprinkled

24 around. Keep in mind that the acres

25 calculation because these are -- I

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1 don't want to say Hilton Head high-rise

2 units, they're not, something like --

3 they're dense in the sense that

4 they're --

5 MR. CUTRER: This is five stories

6 with a -- under parking.

7 MR. ALFORD: Parking. And they're

8 going close together, so they're -- you

9 have that common space interspersed

10 around which would -- drains -- those

11 kinds of things does not include the

12 parking and those kinds of things, so

13 that's --

14 MR. JOHNSON: We don't have an
15 as-built part of this record
16 specifically --

17 MR. WILLIAMS: And there is --

18 MR. JOHNSON: Theodore did
19 calculate into the land planner for
20 this one acre and --

21 MR. WILLIAMS: And that's a
22 hearsay statement but -- so Nicole read
23 the definition of open space, land not
24 utilized for single family lots,

25 rights-of-way, commercial buildings,
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1 multi-family buildings, parking or
2 loading areas.

3 Maybe but I don't see how you get
4 9.6 acres out of 15 acres is about
5 two-thirds of the total acreage and I
6 don't see how there's any way possible

7 that you got two-thirds -- you have
8 67 percent open space. I mean that's
9 far in excess of what the code requires
10 and I just don't see that those figures
11 are there.

12 I would like to call Ms. Dixon
13 back up.

14 MR. ALFORD: I'm going to
15 interpose an objection to that. He had
16 an opportunity to question her, an
17 opportunity in this case to question
18 her. You offered him an opportunity to
19 question her -- he deferred. I mean
20 now how long are we going to go? 45
21 minutes unlimited? Sorry.

22 MR. FINGERHUT: Well this -- we're
23 dealing now with the appellants
24 rebuttal case and although I'm inclined

25 to agree we will be pretty liberal with
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1 time here since Town staff said they'd
2 make themselves available -- you know,
3 what, Mr. Williams, you'll risk now is
4 having each of you question her on what
5 he's done because on rebuttal that's --

6 MR. ALFORD: And, in fact, it has
7 to be questions that rebut her
8 statements. It can't be new stuff.

9 MR. FINGERHUT: Questions that
10 rebut -- rebut -- of her case. He's
11 not cross examining her on her
12 testimony. He's --

13 MR. ALFORD: You're right. But it
14 does have to be rebuttal.

15 MR. FINGERHUT: Yes, I agree.

16 EXAMINATION

17 BY MR. WILLIAMS:

18 Q State your name for the record and tell
19 us what you do, please.

20 A Nicole Dixon Development Review
21 Administrator.

22 Q And you have been intimately involved
23 in the welcome center development process from
24 the inception?

25

A Yes, sir.

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1

Q Earlier Mr. Cutrer asked you if the

2

existing development on Parcel F, which is I

3

think we've all agreed, 198 residential units

4

and 5,262 square feet of commercial spaces, if

5

that is conforming with the RD requirements?

6

As I recall the testimony from Mr.

7

Alford and Mr. Johnson's calculations that the

8

198 units requires 13 acres under the RD

9

District to support that density and then the

10

5,262 square feet requires about 6 -- point 65

11

acres.

12

Now, would you look at -- tell us the

13

acreage of Parcel F?

14

A 10.735.

15

Q The testimony earlier was we needed a

16

little over 13 and-a-half acres to support the

17

existing density, so do you still stand by your

18

statement that the Spinnaker Development on

19 Parcel F is conforming with the current RD
20 requirements?

21 A Well, I think if you add in the other
22 parcels that comprises the Spinnaker
23 Development, so the right-of-way --

24 Q All right. If you add the right-of-way
25 in you're at about 11.4 acres.

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1 A I mean I don't have the math numbers in
2 front of me.

3 Q Well, I'll be glad to wait -- let's get
4 your calculator because you told Mr. Cutrer that
5 it's conforming. I don't see how that's
6 possible if you need 13 and-a-half acres of
7 property to support that development how you get
8 to the point of saying 10.735 or even 10.735
9 plus .697 results in conforming density under
10 the RD District, so I would like to get that --

11 A Well, I --

12 MR. ALFORD: I would object. He's
13 asking her to draw a legal conclusion.

14 MR. WILLIAMS: No. I'm asking her
15 to do the math.

16 MR. ALFORD: You're asking her to
17 draw a legal conclusion.

18 MR. WILLIAMS: But she's --

19 MR. ALFORD: Excuse me, may I
20 complete my objection without you
21 talking over me? Thank you.

22 Conforming or nonconforming is a
23 legal question. Ask about all the math
24 you want, conforming, nonconforming is
25 a legal question and that's my

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1 objection.

2 MR. WILLIAMS: And she's already
3 answered that question.

4 MR. FINGERHUT: My issue with the
5 objection is that she's already

6 answered the question and nobody's
7 objected so it's fair game out.
8 It's --

9 MR. ALFORD: Thank you.

10 MR. FINGERHUT: Ms. Dixon, if you
11 need a moment to check the numbers
12 that's absolutely fine.

13 MS. DIXON: I believe what Mr.
14 Cutrer asked me earlier I said I don't
15 have the number in front of me but I
16 believe that according to the math that
17 was said earlier that it was in
18 conformance, so I didn't have any
19 numbers on me and I don't have right
20 now.

21 MR. WILLIAMS: Mr. Chairman, it
22 seems to be very much a math driven
23 argument, at this point. I'm content
24 to let her check the math.

25 MR. ROBERT JOHNSON: Mr. Williams,
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1 can you directly attach this piece of
2 property with any of the other -- I
3 know that you said it's probably under
4 the umbrella of the Spinnaker Group and
5 but can you attach this directly to any
6 of the other pieces of property
7 ownership?

8 MR. WILLIAMS: No. I haven't
9 tried to do that and owners -- general
10 rules, zonings ordinance don't deal
11 with ownership. (Phonetic)

12 MR. ROBERT JOHNSON: This is
13 probably off base but -- and it's a
14 little bit of a discussion with the
15 Board I'm sure Judge Dukes sent this
16 back for some reason and I don't know
17 whether you eluded to it or anybody
18 even discussed it but even if we say
19 that we agree with you I feel very
20 strongly that's taking property from
21 somebody and making it valueless and
22 then even if Mr. Dukes or Judge Dukes
23 supports our position it's going to go

24 to South Carolina and if it goes to --
25 and South Carolina agrees it's going to
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1 go to the district or whatever the next
2 level is. I don't think, as a Board,
3 we can deny somebody the right to build
4 on a piece of property. I mean I -- I
5 don't know much about --

6 MR. WILLIAMS: About the law.

7 MR. ROBERT JOHNSON: I'm an
8 architect but tell us how --

9 MR. WILLIAMS: Let me give you an
10 example.

11 Several weeks ago the Town council
12 considered rezoning application for a
13 little I guess it's a -- Florence
14 Graham Island, which is out in Jarvis
15 Creek right behind Oldhouse Creek and
16 notwithstanding the fact that the Town

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17 planners freely admitted with all the
18 hearings that without the zoning the
19 owners had no permitted uses of the
20 property. Nonetheless, Town council
21 refused to change the zoning, so those
22 people have no economically viable use
23 of their property but that's not an
24 issue for this hearing. That is an

25 issue that is the subject of a
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1 condemnation action shall Mr. Johnson
2 choose to file that later on.

3 Personally, I think he's got a big
4 problem because SDC Properties owned
5 Parcel E during the period of time when
6 the categorical exemption -- still
7 valid and in that case if they had
8 wanted to, they could have developed it
9 and, of course, they chose not to.

10 In hindsight maybe not such a

11 great decision but that was a decision
12 that they made.

13 If all the density is used up it's
14 not because of what the Town did.
15 Rather, it's because what SDC
16 Properties didn't do and I don't think
17 that gives rise to -- but be that as it
18 may, the question here is did the Town
19 staff follow the code correctly because
20 it's not unusual for following the code
21 correctly to end up with a result
22 that's terribly onerous on a property
23 owner. Thank you.

24 MR. CUTRER: Mr. Williams?

25 MR. WILLIAMS: Yes.

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1 MR. CUTRER: We have in the town a
2 number of parcels that are classified
3 as nonconforming.

4 MR. WILLIAMS: Right.

5 MR. CUTRER: We've established
6 that Parcels A and C, which are hotel,
7 even though -- are currently conforming
8 to the 6 -- 35 rooms per acre.

9 We've also established that Parcel
10 E is apparently subject to 8,000 square
11 foot -- they're proposing 75 so if you
12 develop it one could argue that could
13 be conforming.

14 The combination of Parcels F,
15 10.735, which is Spinnaker, and Parcel
16 D, which is the right-of-way which I'm
17 confused on whether you count it or
18 not, that adds up to 11.432 acres but
19 it's developed. It's been there for 20
20 or 30 years, so whether it either
21 conforms or it doesn't conform, Parcel
22 F, if it doesn't conform, then it's a
23 nonconforming use, one of a number on
24 this island.

25 MR. WILLIAMS: Well, it's not on
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1 the use -- is a permitted use, the
2 density is nonconforming.

3 MR. CUTRER: Okay.

4 MR. WILLIAMS: -- five -- or
5 10,5 -- (inaudible)

6 MR. CUTRER: So my question to you
7 as counsel for the appellants is, if it
8 is determined or determined that Parcel
9 F was nonconforming with respect to the
10 density, how would that impact Parcel
11 E?

12 MR. WILLIAMS: You go back to the
13 average density standards of the clear,
14 unambiguous mandatory provisions of LMO
15 Section 16-3-106G4.

16 This is a situation where Parcel F
17 was built at a density which is greater
18 than the site specific density allowed
19 by the underlying base zoning district
20 and you can do that provided that you
21 offset that by other area that has a

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22 density that is lower than the base

23 zoning district. That's where the

24 averaging comes into play. That is --

25 that's one of the primary, if not the

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1 primary function of the PD-2 Overlay

2 District. It allows for that density

3 average and the fact that Parcel F is

4 over developed and means that Parcel E

5 needs to be underdeveloped, the

6 question is, how much?

7 And the -- I went through for you

8 before shows that off density -- so

9 that's -- I mean that's how the effect

10 of Parcel F being overbuilt impacts

11 Parcel E.

12 MR. CUTRER: You answered me what

13 your feeling is. Let's go to Parcel A

14 and C of the 2.6 acres owned by your

15 client.

16 Under the RD District there are
17 one, two, three, four possible uses for
18 that property.

19 MR. WILLIAMS: I'm sorry,
20 underneath?

21 MR. CUTRER: -- RD zoning. I'll
22 tell you the answer. There are four
23 possible uses because there are four
24 allowed uses under the RD zoning;

25 hotel, residential, nonresidential and
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1 B and B.

2 So you have 2.6 acres currently
3 being used by a vacant hotel and the
4 hotel allows 35 rooms per acre. 2.6
5 times 35 is 91 units and that's what's
6 there.

7 This property could be redeveloped
8 with another new 91 torn down and

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redesveloped with 91 hotel units.

10 If the owner chose to do
11 residential, 2.6 acres times 16 to the
12 acre it would allow them 41
13 residential units.

14 If they choose to do or chose to
15 do nonresidential, i.e. commercial, 2.6
16 acres times 8,000 square feet would
17 allow 20,800 square feet of
18 nonresidential and if they chose to do
19 a B and B, ten units or ten rooms to
20 the acre would give them 26 B and B
21 units and so your client's property
22 could be redeveloped with 91 hotel
23 units or 41 residential units or
24 20,800 square feet of residential --

25 pardon me nonresidential or 26 B and B
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1 units.

2 Those are all the rights which

3 your clients have. If Parcel E is
4 developed as proposed, how is your
5 client prejudiced in any of these
6 development opportunities?

7 How are you injured?

8 And please tell me an answer other
9 than we'd like to see the Town code --

10 MR. WILLIAMS: Section 16-3-106G4,
11 the standards for impervious -- open
12 space within a PD-2 Overlay District
13 shall -- satisfied the district as a
14 whole but do not have to be satisfied
15 with a site specific basis within
16 mutual phases of planned development.

17 I don't know if our site is
18 conforming. I don't know if the other
19 sites are conforming with respect to
20 the pervious coverage and open space,
21 so it's a question that I can't answer
22 right now because often in the abstract
23 while you can put 91 hotel rooms on a
24 piece of property you can't meet the

25 development standards in order to allow

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1 you to maximize your property, so I
2 can't answer that.

3 MR. CUTRER: But your client owns
4 2.6 acres on which it sits a derelict
5 hotel. All they've got is 2.6 acres.
6 That's all they can develop.

7 So whatever the pervious or
8 impervious or the wetlands or all these
9 other things that have setbacks and
10 buffers and all these things that
11 impact the actual development of
12 acreage, your clients owns 2.6 acres
13 which can be zoned or is zoned for 91
14 hotel units, 41 residential units,
15 20,800 square feet of nonresidential or
16 26 B and B units.

17 If Parcel E is developed, how is
18 your client's prejudiced from doing any
19 of those things within the setback and
20 impervious, pervious --

21 MR. WILLIAMS: The overall average
22 density for PD-2 --

23 MR. CUTRER: That's not my
24 question.

25 MR. WILLIAMS: Well but it's
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1 Germain to the --

2 MR. CUTRER: My question I asked
3 is -- Parcels A and C?

4 MR. WILLIAMS: It's Germain to the
5 explanation. It's Germain to the
6 explanation.

7 When you look at the average
8 density requirements you're already
9 over the average density required for
10 15.1 acres.

11 If you further exacerbate that by
12 adding yet more density and going
13 further over the RD average density

14 limitations I don't know what the Town
15 staff's response is going to be when we
16 come back, at some point, and want to
17 redevelop and they say, well, we
18 discussed -- it's already over. You've
19 got to look at the average. It's
20 already over and, gosh, you know, you
21 can't put 90 units there.

22 MR. CUTRER: You know, my
23 understanding is this property has been
24 viewed as an eye sore and a real

25 problem within the Town and I would

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1 submit that if your clients came back
2 with any kind of reasonable development
3 plan to get rid of that empty property
4 right now which has caused a lot of
5 social problems within the community,
6 my guess is the Town would be pretty
7 receptive to that.

8 MR. WILLIAMS: And that may well
9 be.

10 MR. CUTRER: So in the absence of
11 any evidentiary material presented to
12 this Board that your client is going to
13 be harmed by the development of Parcel
14 E, we've heard the testimony. You
15 know, I've asked the question to you,
16 Mr. Johnson, Mr. Alford, Ms. Dixon and
17 I've gotten, what's the impact? None.
18 None. None and --

19 MR. WILLIAMS: And I don't know
20 because --

21 MR. CUTRER: So, in the absence of
22 any evidentiary material at this
23 hearing I don't see how your client has
24 standing for this appeal.

25 MR. WILLIAMS: And you're entitled
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1 to your opinion. And the people that
2 said you had standing, we've standing
3 and I think we do have standing and I
4 think --

5 MR. CUTRER: All right.

6 MR. FINGERHUT: Ms. Dixon, are you
7 ready for -- to answer the question,
8 the math questions on Monday afternoon
9 at 4:58?

10 MS. DIXON: What I will say is
11 that I incorrectly spoke earlier in
12 that the development is not complaint
13 with the RD standards as it exists
14 today because it's -- Spinnaker
15 Development was developed under
16 previous regulations and it was in
17 conformance with those regulations, so
18 the site is not nonconforming based on
19 the plans that it was approved under.

20 Going forward and the way I
21 reviewed the DPR when it came in for
22 Parcel E we are looking at as the base
23 zoning district of RD standards and
24 insuring clients with those standards,
25 so, it was mentioned, you know, the

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1 Beachwalk Property owners wanted to
2 come if for redevelopment we would look
3 at for compliance with the RD
4 standards. (Phonetic)

5 MR. CUTRER: Ms. Dixon, if I'm an
6 apartment developer and I buy ten acres
7 of land in Hilton Head zoned 16 to the
8 acre, I can build 160 units on it.

9 MS. DIXON: Uh-huh.

10 MR. CUTRER: -- if I build
11 160-unit apartment project and
12 five years later the Town changes that
13 whole zoning district to eight units to
14 the acre I've got more units existing
15 that are allowed under the current
16 zoning.

17 MS. DIXON: Then we'd look at it
18 as a legally conforming structure.

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19 MR. CUTRER: Legally nonconforming
20 structure. So your argument here is
21 that Parcel F, which has either 10.735
22 or 11.42 acres, if you count
23 right-of-way is a legally nonconforming
24 structure?

25 MS. DIXON: A legally
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1 nonconforming structure, based on
2 density standards, so if they were to
3 come in and add on more units to the
4 Spinnaker Development we would not
5 allow that, we would not permit that
6 because it's currently nonconforming.
7 They're wishing to add on -- they're
8 wishing to develop a vacant parcel and
9 so that's why when I reviewed the DPR I
10 looked at the resort development
11 district standards and insured
12 compliance with those standards.

13 MR. CUTRER: Thank you.

14 BY MR. WILLIAMS:

15 Q Nicole, you just testified that when
16 the Spinnaker project came in for approval that
17 it was conforming to the code at that time?

18 A I'm assuming it was conforming to the
19 code at that time or the covenant plan or the
20 master plan that was approved.

21 Q So now I thought you had made a factual
22 statement that it was in conformance with the
23 code at the time.

24 A It was in conformance with the approved
25 conceptual plan and had committee authority --
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1 Q You're talking about the master plan,
2 the Waterside community master plan?

3 A Yes.

4 Q Okay. So -- and I agree that the
5 200 units were allowed, at that point. Was it

6 in conformance with the RD District at the time?

7 A I don't know that there was an RD
8 District at the time. I don't know what the
9 zoning was at the time. The current base zoning
10 is RD and it is not in conformance with the
11 current standards. It was not instructed under
12 the current standards. (Phonetic)

13 Q All right. So let's talk about average
14 densities and let's talk about the definition of
15 density that was -- 16-10-102.B.1 and let's
16 pretend that this is one tract of 15.1 acres.

17 A Uh-huh.

18 Q And I want to build 198 residential
19 units and 5,262 square feet commercial space on
20 -- how do I need to -- how do I subdivide that
21 out? How much acreage do I need to subdivide
22 out of the 15.1?

23 A Well, I think you said earlier, it was
24 like 12, 12 or 13 acres.

25 Q Okay. And so then after that's done I
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1 want to build 91 hotel rooms, how much do I have
2 to subdivide out of the parcel to do that?

3 A The 2.61 --

4 MR. JOHNSON: Objection, calls for
5 speculation.

6 MS. DIXON: But you're talking
7 about developing a new -- so you're
8 talking the proposed development and
9 then at that point the average density
10 would comply.

11 BY MR. WILLIAMS:

12 Q So, when does the average density no
13 longer come into play?

14 A Well, I mean the way staff looked at it
15 was that this was a previously developed
16 property, previously developed master plan
17 community.

18 Q But Parcel E is not developed, is it?

19 A No.

20 Q So it wasn't fully developed?

21 A And staff does not think that we can
22 determine that the lot is unbuildable.

23 Q So --

24 A It meets -- standards.

25 Q All right. So let's look at LMO
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1 Section 16-3-106.G.4.A, where in the code does
2 it say this section is applicable only to
3 previously approved PD-2 plans that are
4 substantially completed?

5 A It does not say it in black and white
6 and the discussion that I had with an LMO
7 official and Town attorney on interpretation of
8 whether that section applies to an already built
9 PD-2.

10 Q So --

11 A So we obviously disagree and that's why
12 we're here.

13 Q Correct. So and correct me if I'm
14 wrong, this is really the only issue in dispute,
15 at this point, isn't it?

16 A Correct.

17 Q So, Parcel E is in the PD-2 Overlay

18 District and it's subject to the P-D2 overlay
19 regulations but not to this PD-2 Overlay
20 District.

21 What is it that separates this
22 particular section out from the rest of the PD-2
23 regulations that makes it inapplicable to this
24 situation when everything else having to do with
25 the PD-2 regulations is applicable?

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1 A Well, I explained earlier that staff
2 looks at this section as being pertinent to a
3 new PD-2 coming out.

4 When this was originally approved this
5 was not approved under these regulations, so, we
6 don't think because the allotted density that
7 was assigned during the conceptual plan -- just
8 because it was not built to those standards or
9 to that density we don't think that they've lost
10 all rights to build out there.

11 As long as they can meet the current
12 regulations that's the way we reviewed the plan
13 when it came in.

14 Q So, what you do is for this you ignore
15 those sections of the code?

16 MR. ALFORD: Object to the form.

17 THE WITNESS: I didn't say that I
18 ignored it.

19 I said I discussed with the LMO
20 official and we decided and interpreted
21 that section to apply to new plans
22 coming in where you would average out
23 density, apply certain areas to a
24 certain space, take density from out of
25 those areas, reserve it and use it in

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1 other areas of the PD-2 and we assume
2 that was all done when it was
3 originally -- this was tract was
4 identified as commercial space.

5 BY MR. WILLIAMS:

6 Q Under the master plan that's no longer
7 in effect?

8 A Right but it did not say that it was
9 not built by 2014 density --

10 Q Correct. But doesn't the categorical
11 exemption say that they do have to comply to all
12 the current code requirements?

13 A Right. And they complied with the RD
14 standards which is within the property zoning.

15 Q So, is this section part of the current
16 code requirements?

17 A It is.

18 Q Okay. But it doesn't have to comply
19 with the PD-2 notwithstanding the fact of a
20 categorical exemption as it says it does?

21 A This is a decision staff made.

22 Q They've made an interpretation we think
23 they're wrong about that and I don't know that I
24 have anything further.

25 MR. FINGERHUT: Any further
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1 questions for Ms. Dixon?

2 MR. TAYLOR: No further questions
3 for Ms. Dixon but I would like to have
4 a minute on the stand if I could.

5 MR. WILLIAMS: No further
6 questions.

7 MR. FINGERHUT: Anybody else have
8 any questions for Ms. Dixon?

9 MR. ALFORD: No.

10 MR. FINGERHUT: Thank you.
11 Anything else on rebuttal?

12 MR. WILLIAMS: We just want to
13 address -- issues but one of the things
14 that I would like to address is I think
15 at least once, maybe several times Mr.
16 Alford has ascribed to our client's --
17 well, they've all got density here.

18 If you follow our argument, there
19 is no density but one, so I don't know
20 where he gets these ideas and I don't
21 know why he's throwing them out there
22 but, you know, all our client wants

23 everybody to do is play by the rules
24 that everybody else has to play by.

25 We think the Town staff has made
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1 an incorrect interpretation.

2 As far as the figures go -- where
3 is the page that you put up that you
4 marked -- the section that's -- the
5 paragraph that's -- footnote 12. This
6 deals with they exceed the average
7 density.

8 Footnote 12 as you correctly
9 pointed out, Chairman Fingerhut, Ms.
10 Dixon testified in the November 2016
11 hearing that this, in fact, was the
12 case.

13 It's include -- the portions from
14 the transcript are attached to our
15 memorandum on demand at Exhibit D and

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16 if you don't mind, Mr. Fingerhut, your
17 question was; 'You would stipulate to
18 the math?

19 I'm sorry, I didn't hear that.

20 You're saying the theory is
21 incorrect but the math is correct is
22 what you're saying?

23 Ms. Dixon, if you're going to look
24 at the entire PD-2 and based on your

25 density and current LMO but use of what
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1 is existing out there right now then
2 Chet has demonstrated in his math that
3 they would not be allowed to do what
4 they're proposing.

5 And Mr. Fingerhut; So, you're
6 concurring that the math is correct?

7 Ms. Dixon, I concur that the math
8 is correct but I don't interpret the
9 LMO that way.'

10 So, for some reason or another,
11 again, I don't think it's been
12 adequately explained the Town staff to
13 say yes, it's in the PD-2 Overlay
14 District, yes it's subject to the
15 regulations but, no, it's not subject
16 to all the regulations and they just
17 believe it should not be interpreted
18 that way.

19 The law is that when there's
20 nothing that's ambiguous, there's no
21 interpretation to be had. You apply
22 the -- attached and in this case that
23 means you get the average density.

24 When you look at the average density

25 you used it all up for this PD-2s and

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1 that's an unfortunate state of affairs
2 for the property owner but they could

3 have done something about that several
4 years ago and they chose not to.
5 Questions?

6 MR. FINGERHUT: Any questions?
7 No. Thank you.

8 MR. TAYLOR: Mr. Fingerhut, may I
9 have just a couple of minutes?

10 MR. FINGERHUT: Sure.

11 MR. TAYLOR: Board of Zoning
12 Members, I want to talk about not the
13 specifics of this case but what we've
14 seen today and what y'all's job is.

15 I've had the fortunate ability to
16 practice law in the courts of our state
17 for more than 34 years and I know a
18 number of judges very well and when you
19 talk to them outside the courtroom
20 they'll tell you, one of the hardest
21 things they have to do is to keep their
22 mouth shut and listen and let the
23 lawyers try their case sometimes
24 because sometimes they want to come

25 over -- and they'll ask questions and

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1 they want to try to guide the people
2 into something they're thinking already
3 but they don't do it because the
4 judge's job and your job, today, is to
5 give the parties in this case a fair
6 hearing.

7 Both sides come before the BZA in
8 order to achieve a fair hearing and you
9 all are acting as independent impartial
10 finders of whether or not this process
11 was adequately voted. This community
12 has worked here for many, many years
13 because of people like you who are
14 willing to be involved and who are
15 willing to sit for four hours and
16 listen to this type of thing but I am
17 begging you, when you go back, today,
18 remember what your job is because your
19 job is not to come in here with a
20 predetermined belief that the Town was

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21 right or the predetermined belief that

22 we were wrong, for some reason.

23 Because the question that has been

24 repeatedly asked by Mr. Cutrer, today,

25 about standing is one that has already

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1 been decided in this case and, believe
2 me, Greg handed it very smoothly like
3 he does but this question is one of
4 pleadings which has already been in
5 front of Judge Dukes and if there was
6 any question to our standing he would
7 have already addressed it and everybody
8 in here knows that. It was before
9 Judge Dukes, there was no question
10 about but what we had happen here today
11 was someone who came from this Board
12 and raised that issue repeatedly, you
13 saw lawyers come to it like blood in
14 the water. That issue is not before

15 you. It was not raised by staff. It
16 was not raised by lawyers. It has not
17 been adjudicated by Judge Dukes. It is
18 clearly something that only one member
19 of this Boards wants to hammer out
20 today and, once again, it came in that
21 everybody came to it. It's the same as
22 Barry's argument about it being a take.
23 That issue is not before this Board.

24 Everybody may have an idea about
25 it. It may not seem fair to people but

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1 the issue of whether or not this is a
2 taking has not been litigated.

3 You all who have been on this
4 Board for two years and who have heard
5 this will remember, this is about one
6 thing. This is about whether the
7 density requirements of the PD-2

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Overlay District apply.

8
9 Nicole testified in November of
10 2016 that if you accept that Chet's
11 math is right. It's as simple as that.

12 I'd ask that you all please
13 remember what your job is when y'all go
14 back to the jury room, y'all go back to
15 your executive session room. It's not
16 to give gifts to one side or to punish
17 another, it's to independently evaluate
18 the facts that were in front of you to
19 come to a fair resolution.

20 Thank you, Mr. Chairman.

21 MR. FINGERHUT: Thank you. Any
22 questions of Mr. Taylor? Thank you.

23 Counsel, you want to do some
24 rebuttal?

25 MR. JOHNSON: No, sir. I've been
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1 waiting a few minutes now

2 notwithstanding the comments just made
3 by my friend, Tom Taylor.

4 This is the first occasion when in
5 the record there had been established
6 that the appellants are not aggrieved
7 parties and I base what we have learned
8 about that today as the foundation for
9 a motion I'm about to make and the
10 motion is for you to dismiss the appeal
11 for lack of standing.

12 The Town code in Section 16-2-103,
13 T as in Tom, Sections 2 says that 'Any
14 person who's aggrieved by the decision
15 or interpretation of an LMO official or
16 other administrative official may
17 appeal.

18 Subsection B -- that's in
19 Subsection A.

20 Subsection B says 'For purposes of
21 this subsection a person is aggrieved
22 if there are some special or
23 particularized injury to that person or
24 that person's property resulting from a
25 decision or written interpretation.'

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1 The record is clear. They do not
2 have a particularized or special injury
3 to themselves as legal persons or their
4 property resulting from the decisions
5 of the LMO official. They don't have
6 standing. The matter should be
7 dismissed where it stands. The
8 standing is a jurisdictional issue. It
9 can be raised at any time. Thank you.

10 MR. FINGERHUT: Counsel? Fair
11 enough. Mr. Alford.

12 MR. ALFORD: I'll about be.

13 I join in Mr. Johnson's motion. I
14 think this motion should be dismissed.

15 I think -- I disagree with Mr.
16 Taylor when he says that it's not
17 something for you to consider.
18 Jurisdiction can be raised at any time.
19 Standards can be raised at any time

20 and, keep in mind, we all agreed with
21 Judge Dukes that this would be a full
22 rehearing. Everything's on the table.
23 They wanted testimony, goose/gander.
24 They said, no, we want you to hear this
25 testimony. Okay, it's a rehearing.

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1 It's a new day. That issue's on the
2 table now. They've conceded. They
3 have no injury.
4 MR. WILLIAMS: Mr. Johnson is
5 incorrect when he says this is the
6 first time it's been raised. We
7 specifically -- we had standing when we
8 filed the initial appeal. It's all in
9 the record.
10 MR. FINGERHUT: Anything else on
11 that particular issue?
12 MR. WILLIAMS: No.

13 MR. TAYLOR: No, sir.

14 MR. FINGERHUT: Are there any
15 other comments on the appeal, itself?

16 Okay. So I'm going to close the
17 argument section. We're going to
18 address the motion section as part of
19 our decision.

20 Before I -- Brian, what's the time
21 on this? I can work until whenever but
22 -- and I ask everybody on the Board the
23 same thing.

24 MR. HULBERT: You've got the room

25 for as long as you want tonight but if
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1 you come back in the morning I have to
2 check the calendar but I do believe
3 it's open tomorrow morning.

4 MR. FINGERHUT: So that closes the
5 arguments of the appeal.

6 Let's discuss the standing issue

7 first.

8 MR. CUTRER: After receiving my
9 lecture from Mr. Taylor I apologize for
10 using the wrong word. I have referred
11 to 'standing' several times and I think
12 what I was really talking about was
13 grievance or injured and I don't have
14 the citation Mr. Johnson just gave us
15 but it speaks to injury and grievance.

16 Mr. Johnson, would you like me to
17 refresh that for us, sir? Section
18 16-2-103 T, Capital T. 16-2-103 and --

19 My iteration is on page 2-54. Let
20 me get there.

21 So that's page 2 --

22 MR. JOHNSON: It's print it out
23 the same. It's up on the screen, too,
24 and you can see --

25 MR. CUTRER: I'd like to find it
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1 in my book.

2 MR. JOHNSON: Yes, sir. You see
3 up here at the top it's got the code
4 section of which this is the
5 subsection.

6 MR. CUTRER: Okay. So I want to
7 apologize for using the word 'standing'
8 and what I was really trying to get to
9 is whether this is an aggrieved party
10 that's going to suffer injury from the
11 ruling that the Town has -- determined
12 -- Town has made so thank you for that
13 citation.

14 THE COURT: Any of you have any
15 particular thoughts on standing? Mr.
16 Cutrer, would you like to start?

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

20 MR. FINGERHUT: Yes.

21 MR. ROBERT JOHNSON: It's
22 contiguous.

23 MR. WILLIAMS: Parcel E is
24 contiguous with the Beachwalk Hotel

25 site --
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1 MR. ROBERT JOHNSON: Which is your
2 client?
3 MR. WILLIAMS: Yes.
4 MR. ROBERT JOHNSON: Yes.
5 MR. FINGERHUT: How do you feel
6 that impacts on standing in your
7 experience?
8 MR. ROBERT JOHNSON: In my
9 experience, if there was a distance of,
10 you know, could be hundred yards, could
11 be ten feet. If there's a distance
12 between it there's some -- there could
13 be some discussion or argument that you
14 can't be aggrieved from a thousand feet
15 away. I mean you've got to have
16 some -- you know, can you see this
17 building? Can you see that building?

18 Can you --

19 MR. FINGERHUT: What's your view
20 in this case?

21 MR. ROBERT JOHNSON: Well, I think
22 that because it's contiguous there
23 could be an argument to the aggrieved
24 only through the fact that it's
25 contiguous.

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1 MR. FINGERHUT: Mr. Walczak?

2 MR. WALCZAK: I agree with that
3 interpretation.

4 I also agree -- I also agree that
5 it should be -- this was brought back
6 to us. I wasn't here the first time
7 but this was sent back to us because of
8 a judge's decision.

9 MR. FINGERHUT: Yes.

10 MR. WALCZAK: So I think we should
11 honor that judge's decision and take it

12 as it was said, a brand new hearing and
13 I think the -- really, the issue is the
14 interpretation of the code and I just
15 -- that's where we should be at.

16 MR. FINGERHUT: Okay. Any other
17 thoughts on standing?

18 MS. LAUDERMILCH: No. I agree.
19 Sometimes there -- it always seems to
20 me like the attorneys use either bigger
21 words or focus on issues that get
22 beyond common sense but I totally agree
23 with the property contiguous.

24 I would argue increased density

25 could, not necessarily does, but could,

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1 reduce future property value in the
2 eyes of a prospective buyer, so, I do
3 think -- I agree with the fact that the
4 location of the tract, the fact that

5 it's contiguous, I think it has a very
6 direction impact. To me there's
7 standing.

8 MR. FINGERHUT: Mr. White?

9 MR. WHITE: I agree. You know, it
10 may not have a direct impact but it has
11 a potential impact.

12 MR. WALCZAK: Correct.

13 MS. LAUDERMILCH: Correct.

14 MR. CUTRER: Well, as I've stated,
15 a number of times, it's not clear to me
16 that the appellant has a valid
17 grievance and so, in that regard I
18 don't personally see that there's any
19 relief due them but the appellant is
20 the owner of Parcels A and C, which is
21 currently developed to its maximum
22 density as a hotel. The hotel doesn't
23 operate, I suppose that's irrelevant,
24 but the parcel can be developed under
25 the current zoning as a hotel,

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1 91 units, as residential, 41 units, as
2 nonresidential 20,800 square feet or as
3 a B and B 26 unit rooms for B and B.

4 So, whether or not Parcel E is
5 developed it's just not clear to me in
6 that the appellant has any valid
7 aggrievance or would in any way be
8 injured.

9 I've asked that question numerous
10 times and the answer that I get from
11 the appellants is, we want to make sure
12 that the Town code is complied with,
13 which strikes me as some what
14 disingenuous so I don't think that
15 there -- the testimony, today, we have
16 a new hearing, which we do, I don't
17 see, in my mind, that the testimony,
18 today, has established that there's a
19 valid aggrivance or injury to the
20 appellant.

21 Going on -- maybe I should stop
22 there.

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23 MR. FINGERHUT: Let's keep on.

24 We're going to dispose of the motion

25 and then go to the next step.

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1 MR. CUTRER: It seems to me that

2 -- well, the testimony is that Parcels

3 A and C conform to the current LMO of

4 35 units per -- 35 hotel rooms per

5 acre.

6 Parcel E, which is the proposed

7 welcome center, if developed, as

8 requested would have 7,500 square feet

9 out of an allowable 8,000 per acre, you

10 actually have a little more than an

11 acre so -- Parcel E, if developed as

12 proposed, would comply with the current

13 LMO.

14 Parcel F is a bit of a problem.

15 With 198 units and 5,262 square feet of

16 nonresidential but it was built prior

17 to the 2014 LMO and what the testimony
18 today I believe has been is that we've
19 got to comply with the current LMO.

20 So we've heard testimony that
21 Parcel F, under the Town code, would be
22 treated as a legally nonconforming
23 development with respect to density.

24 You can't make them tear down

25 units in the Spinnaker Development, so
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1 it's a legally nonconforming
2 development with respect to density,
3 which my understanding means it's okay
4 that it's there, you're free to
5 redevelop it. You couldn't put as many
6 units as you got now.

7 So, the question becomes, these
8 three different parcels, the hotel
9 parcel, the Spinnaker parcel and the

10 welcome center parcel, do they comply
11 or would they comply with the current
12 LMO?

13 The hotel does. The welcome
14 center site would and the Spinnaker
15 Development does because it's a legally
16 nonconforming development with respect
17 to density and our LMO provides for
18 that.

19 MR. FINGERHUT: You're still on
20 the standing issue, right?

21 MR. CUTRER: No, I'm not --

22 MR. FINGERHUT: No, no, no. We're
23 going to decide that first and --

24 MR. CUTRER: All right.

25 MR. FINGERHUT: -- a position from
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1 counsel and we're discussing how we're
2 going to resolve that issue and get it
3 out of the way, one way or the other.

4 I'd like to hear a motion from a
5 Board member on the question of
6 counsel's motion to dismiss?

7 MR. WALCZAK: Well, as I've said,
8 earlier, you know, it was sent here to
9 us to make a decision and I don't think
10 we should summarily dismiss it as they
11 suggest, so whatever appropriate motion
12 is for that I so move.

13 MR. FINGERHUT: So your motion is
14 deny counsel the motion to dismiss for
15 lack of standing?

16 MR. WALCZAK: Correct.

17 MR. FINGERHUT: Is there a second?

18 MR. WHITE: I'll second it.

19 MR. FINGERHUT: Thank you, Mr.
20 White. Any further discussion on that
21 voting?

22 MR. CUTRER: So just to be clear,
23 this is a motion to deny --

24 MR. FINGERHUT: Correct. This is

25 a motion to deny the motion to dismiss
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1 for standing.

2 MR. CUTRER: Okay.

3 MR. FINGERHUT: Teresa, will you
4 please call the roll?

5 MS. HALEY: Mr. Walczak?

6 MR. WALCZAK: For the motion.

7 MS. HALEY: Mr. Johnson?

8 MR. ROBERT JOHNSON: For the
9 motion.

10 MS. HALEY: Mr. Fingerhut?

11 MR. FINGERHUT: For the motion.

12 MS. HALEY: Mr. Cutrer?

13 MR. CUTRER: For the motion.

14 MS. HALEY: Mr. White?

15 MR. WHITE: For the motion.

16 MS. HALEY: Ms. Laudermilch?

17 MS. LAUDERMILCH: For the motion.

18 MR. FINGERHUT: Okay, thank you.

19 Now we just have the appeal.

20 I think it would be appropriate,
21 because we were ordered by Judge Dukes

22 to do this, let's answer his questions
23 and then after we -- because, frankly,
24 as we answer the questions I think it's
25 going to lead to the result but it may

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1 not but since we -- what else we do we
2 must answer the questions as we have
3 been told to, so, Question 1 as posed,
4 Is Parcel E in the PD-2 Overlay
5 District established by the LMO?

6 MR. ROBERT JOHNSON: I make a
7 motion that it is.

8 I make a motion that we affirm
9 that it is in the -- parcel E is in a
10 PD-2 Overlay District established by
11 the LMO.

12 MR. WALCZAK: Second.

13 MR. FINGERHUT: Any discussions on
14 that motion?

15 Okay. Teresa, please call the
16 roll.

17 MS. HALEY: Mr. Walczak?

18 MR. WALCZAK: For the motion.

19 MS. HALEY: Mr. Johnson?

20 MR. ROBERT JOHNSON: For the
21 motion.

22 MS. HALEY: Mr. Fingerhut?

23 MR. FINGERHUT: For the motion.

24 MS. HALEY: Mr. Cutrer?

25 MR. CUTRER: For the motion.

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1 MS. HALEY: Mr. White?

2 MR. WHITE: For the motion.

3 MS. HALEY: Ms. Laudermilch?

4 MS. LAUDERMILCH: For the motion.

5 MR. FINGERHUT: Thank you.

6 Question B, If parcel E is in the
7 PD-2 Overlay District, is Parcel E
8 subject to the LMO's PD-2 Overlay

9 District regulations?

10 And we've heard testimony, the
11 appellants are clearly a yes. I
12 believe that the Town and the SDC are,
13 in essence a yes but perhaps -- if you
14 will, anybody have any thoughts on that
15 rule or would like to make a motion on
16 that question?

17 MS. LAUDERMILCH: I would make the
18 motion that Parcel E is subject to the
19 LMO's PD-2 Overlay District
20 regulations.

21 MR. FINGERHUT: Do we have a
22 motion to second?

23 MR. ROBERT JOHNSON: I second the
24 motion.

25 MR. FINGERHUT: Any discussion on
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1 that motion? Teresa, please call the

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roll.

MS. HALEY: Mr. Walczak?

MR. WALCZAK: For the motion.

MS. HALEY: Mr. Johnson?

MR. ROBERT JOHNSON: For the
motion.

MR. HALEY: Mr. Fingerhut.

MR. FINGERHUT: For the motion.

MS. HALEY: Mr. Cutrer?

MR. CUTRER: I guess for the
motion.

MS. HALEY: Mr. White?

MR. WHITE: For the motion.

MS. HALEY: Ms. Laudermilch.

MS. LAUDERMILCH: For the motion.

MR. FINGERHUT: Thank you.

Question C, If Parcel E is subject
to the LMO's PD-2 Overlay District
regulations -- which we decided they
are -- 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
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1 connection with any proposed
2 development of Parcel E? A more
3 complex question. Any thoughts on that
4 question?

5 Mr. Cutrer?

6 MR. CUTRER: The testimony we've
7 heard says that apparently RD -- I'm
8 sorry, PD-2 came about back in the
9 '80's. The requirement now is that the
10 Town or the property is conformed to
11 the current LMO -- so it's still not
12 totally clear to me how the PD District
13 or overlay conflicts with the Town's RD
14 District.

15 MR. FINGERHUT: Does anybody have
16 any thoughts in response to that?

17 MR. WHITE: The issue here is --
18 the issue is the importance of legally
19 nonconforming and what we heard was

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20 that, in fact, this is what's driving

21 the process and that based on the

22 master plan what was in effect at the

23 time that it was conforming and that

24 subsequent changes have taken place to

25 develop the plan -- the LMO that allows

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1 them to continue as long as they are

2 going to redevelop and once they

3 redevelop it goes back into the hopper

4 and they've got to re -- with respect

5 to you all. Is that basically what I

6 heard?

7 MR. FINGERHUT: He can't -- we

8 can't talk -- so are you saying that --

9 well, that it has to comply with the

10 current law, I don't think that's in

11 dispute, I guess, but does the

12 development of Parcel E as approved by

13 the Town comply to the LMO? What do

14 you think?

15 MR. WHITE: I do think it applies.

16 Again, when you dissect this there are
17 sections, Section F is legally
18 nonconforming.

19 A and C is conforming. E is not
20 developed and so it would have to meet
21 the criteria of the LMO, which it does.

22 MR. FINGERHUT: Well, how do you
23 deal with the PD-2 overlay regulations
24 when they talk about density?

25 MR. WHITE: I guess my own
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1 personal opinion is that the density
2 question again gets back to the
3 co-mingling of the different aspect in
4 and of itself -- except for --
5 (inaudible)

6 MS. LAUDERMILCH: As I -- yeah.

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7 As I look at this the fact that it is a
8 PD-2 Overlay District, the other
9 parcels singularly are -- irrelevant
10 because they are not the subject of
11 either the hearing but they are not
12 being developed. They exist as they
13 are.

14 Parcel E is being proposed to be
15 developed and because it is part of the
16 PD-2 over lay district I think we're
17 required to consider the totality of
18 the density of the PD-2 District.

19 If it were not in the PD-2
20 District you could look at it solely
21 from a position of the resort, the RD
22 zoning but it is not outside of the
23 PD-2 District, so I think we need to
24 look at the totality of the density.

25 The specific density of the other
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1 individual parcels is irrelevant but
2 the total density is what's important.

3 MR. FINGERHUT: Mr. Cutrer?

4 MR. CUTRER: I guess I'm confused
5 over how Parcel F could be legally -- a
6 legally nonconforming parcel with
7 respect to the LMO but not a legally
8 nonconforming parcel with respect to
9 the PD-2 overlay. It either is or it
10 isn't and we have this somewhat
11 restrictive PD-2 overlay which, if
12 applied here, is only to prevent a
13 parcel from being developed and we've
14 heard that the court and the law tend
15 to allow people to develop their
16 property.

17 The Lucas case was cited earlier.
18 It seems to me that the property, as a
19 whole, is conforming with the PD-2
20 overlay because Parcel A and C conform.

21 F -- pardon me, E would conform,
22 if developed, but F is a legally
23 nonconforming development with respect
24 to density, so I guess what I'm coming

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25 down to is, because F is a legally
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1 nonconforming development with respect
2 to density, A and C meet the
3 requirement. F would, based on the
4 square footage.

5 Seems to me that the totality of
6 this is F had a density exemption is
7 the way I see it and so -- but the
8 proposed development taken with the
9 Spinnaker and the hotel would all
10 comply with the RD-2 pardon me, the --
11 PD-2 and LMO -- district.

12 MR. FINGERHUT: It seems to me
13 that the whole PD-2 is legally
14 nonconforming. That's the function of
15 it to view it as whole.

16 MR. CUTRER: That's a good point.
17 The whole purpose, as I understand it,
18 of allowing legally nonconforming uses

19 are densities is all this gets done
20 over time and you can't take away
21 something that's already there, so I
22 don't know how we penalize Parcel E
23 because of a legally nonconforming use
24 in Parcel F.

25 MR. WALCZAK: Can I say something?
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1 MR. FINGERHUT: Yes.

2 MR. WALCZAK: Because we would be
3 penalizing Parcel A and C but they have
4 a right to redevelop that property and
5 if they decide to do something with
6 that property if we allow development
7 in Parcel E they may -- they would be
8 aggrieved because of that.

9 MR. ROBERT JOHNSON: No.

10 MR. WALCZAK: Why is that?

11 MR. ROBERT JOHNSON: Because

12 they're already at the maximum. I
13 think I'm going to agree with Jerry
14 that to restate it, I don't think we
15 can penalize a piece of property, E,
16 for what was done on property F. You
17 almost have to assume or calculate the
18 allowances based on it not actually
19 being per code but getting it --
20 getting the calculation that it meets
21 the code and then you put the other
22 properties in there.

23 MR. WALCZAK: See, I just think
24 this is all one --

25 MR. ROBERT JOHNSON: Well, that's
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1 what we're supposed to do.

2 MR. WALCZAK: I see this as one
3 thing. It's a one -- it's a one PUD
4 named PD-2, it's one unit and it's like
5 your neighbor's having an effect on

6 your property, all right, so we have to
7 consider all the neighbors, not just
8 the one man and, you know, I look at
9 this, I'm trying to put myself in the
10 position of both sides and if I were
11 the owner here and I'm going to have
12 somebody that's going to beat me or I
13 look at myself as trying to develop the
14 E parcel apparently, you know, am I
15 going to have an effect on someone
16 else?

17 I don't know. It's just -- it's a
18 tough decision. I think we've got to
19 look at the PUD as a whole like a
20 neighborhood and how it conforms to the
21 LMO or not.

22 MR. FINGERHUT: I would agree but
23 the problem is the result is these
24 owners -- but I will say this and we've
25 said this as a Board many times --

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1 before us, we have to follow the law.
2 That's our charge. That's our job.
3 We're not -- we're not here to agree
4 but we're not here to rewrite the law
5 because we don't like the result and I
6 think that this is one of those
7 difficult cases where the result seems
8 somewhat unfair notwithstanding the
9 fact that I think the party aggrieved
10 here or the party that's going to be
11 harmed here did have some hand in the
12 development of this property.

13 MR. WALCZAK: Right. And as --
14 pointed out, they had the opportunity
15 to do so.

16 MR. FINGERHUT: And they did not.
17 So, it's going to be harmful -- but I
18 do think that is the -- if you apply
19 the law as written that's what it says
20 I don't think that that that's part of
21 our charge to sort of rework it in a
22 way that has a more favorable result.

23 MR. WALCZAK: So can we make a

24 motion here?

25 MR. CUTRER: I wanted to ask
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1 Charlie a followup.

2 My question is the same a it's
3 been all day, how is Parcel A and C
4 aggrieved? They currently have the
5 right to develop a hotel, residential,
6 nonresidential and B and B. If
7 Spinnaker builds this welcome center,
8 how does that adversely impact the
9 hotel?

10 MR. WALCZAK: Because it would
11 limit what they would be able to do
12 with their property if it weren't
13 developed.

14 MR. CUTRER: How?

15 MR. ROBERT JOHNSON: Because they
16 have 91 units and they can have 91

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17 units if they redevelop or they can
18 have any of the other three categories
19 up to the limit, so they're really not
20 the --

21 MR. CUTRER: They've got 2.6 acres
22 and that zoning allows for hotel,
23 residential, nonresidential, for B and
24 B.

25 MR. WALCZAK: Aren't we at maximum
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1 density or over maximum density?

2 MR. FINGERHUT: We're over that.

3 MR. WALCZAK: For the entire
4 neighborhood? Okay. But how many --

5 MR. ROBERT JOHNSON: But are we
6 calculating that density based on the
7 overflow on Parcel F?

8 MS. LAUDERMILCH: We have to.

9 MR. ROBERT JOHNSON: Well, why?
10 Why do you --

11 MS. LAUDERMILCH: Because it's --

12 MR. ROBERT JOHNSON: Well I'm just

13 --

14 MS. LAUDERMILCH: -- totality.

15 MR. ROBERT JOHNSON: And I --

16 that's okay but I would say what I've

17 tried to say before is take it back to

18 what the LMO says now and use that as a

19 calculation, not the fact that it's

20 over like ten units because basically

21 what you're doing is penalizing

22 somebody else for a grandfathered

23 project. You can't -- that doesn't --

24 MR. FINGERHUT: That's just -- the

25 average density for the PD-2 Overlay

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1 District shall not exceed the maximum

2 density permitted -- so how do we

3 get -- I just don't see how we -- the

4 calculations have been done actually by
5 both sides here in front of us. They
6 both come up with the same numbers -- I
7 just don't see how we don't -- because
8 it's not fair.

9 MR. WALCZAK: We would be
10 extending the nonconformity of that.

11 MR. FINGERHUT: Well, we'd also be
12 substituting our amendment with Town
13 Council -- that LMO.

14 MR. CUTRER: The fact that Parcel
15 F is to use your term we've used,
16 overdeveloped, is in my opinion,
17 irrelevant. It's developed. It's
18 there. The Town code accepted it. You
19 can't unchange that.

20 MR. FINGERHUT: Agreed.

21 MR. CUTRER: So you've got to look
22 at these four parcels, they -- I'm
23 sorry, these three. A and C is one. E
24 is one, F is one. Do they now or would
25 they comply with the LMO?

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1 MR. WALCZAK: See, I look at
2 the --

3 MR. CUTRER: And A and C comply.
4 I'm sorry, F complies because it's a
5 legally nonconforming development with
6 respect to density.

7 MR. WHITE: Charlie, you made a
8 good point. If you're trying to do
9 this in totality and do the mathematics
10 of coming up with the total density,
11 then if, in fact, F has been accepted
12 as a legally nonconforming piece of
13 property, then what you also would have
14 to do is take the next step and say,
15 okay, you also have to accept that
16 legally nonconforming density from way
17 back.

18 MR. WALCZAK: Well, it was
19 conforming way back.

20 MS. LAUDERMILCH: Right.

21 MR. WALCZAK: And has this changed

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22 that they have not conformed but

23 that's -- but now, like I said, they

24 had the opportunity to development

25 Parcel E at the time when it could have
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1 been conforming. The -- opportunity

2 was gone. (Phonetic)

3 MR. WHITE: We can't change what's

4 happened. We can only deal with --

5 MR. WALCZAK: Right.

6 MR. WHITE: -- with what's --

7 what's we have now.

8 MR. CUTRER: Well, when this

9 property was originally a master plan

10 way back in the dark ages there was

11 contemplations that all of these

12 parcels would be developed. One of

13 them got developed with what must have

14 been a permitted density at the time

15 because they got a building permit, and

16 so, Parcel F, which is the Spinnaker,
17 got developed legally but the master
18 plan and the Town fathers at the time
19 all anticipated that each of these
20 parcels would be developed, so now --
21 now there's a passage of time and a
22 changing of the LMO. Parcel F is
23 nonconforming but it's okay because
24 it's permitted under the code.

25 MS. LAUDERMILCH: Yes, it is --
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1 MR. CUTRER: It's nonconforming so
2 it's okay --
3 MS. LAUDERMILCH: -- LMO, uh-huh.
4 MR. CUTRER: -- now, because it
5 was developed over density sometime in
6 the past -- I'm sorry, because it was
7 developed in accordance with the
8 permitted regulations at some time in

9 the past but the density has changed
10 subsequent to that how do you penalize
11 E or what is okay on F? And now --

12 MR. FINGERHUT: You don't
13 penalize, you apply the law.

14 MR. CUTRER: Which is -- I'm
15 sorry, which is 8,000 square feet per
16 acre.

17 MS. LAUDERMILCH: Another way that
18 I look at this is the changes in the
19 LMO over time which resulted in the
20 density changes, that is the very
21 reason in 1995 the developers received
22 a five-year categorical exemption. You
23 put them on notice if things change and
24 they had a five-year window to develop.
25 This was 16 years later.

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1 If they come back one year later,
2 you know, you might have some sympathy

3 or suggest they seek an extension of
4 their exemption but they had a
5 five-year you're on notice --

6 MR. FINGERHUT: Right.

7 MS. LAUDERMILCH: -- categorical
8 exemption to develop as originally
9 intended and this was 16 years later.

10 MR. WHITE: The question is, is
11 the density question in totality for
12 that property because it is the
13 property --

14 MR. WALCZAK: In Totality.

15 MR. FINGERHUT: That's the
16 question. That is literally the third
17 question. Yeah, that brings us --

18 The third question is, If Parcel E
19 is subject to the LMO's PD-2 Overlay
20 District regulations -- and we already
21 voted that it is -- what effect does
22 that have on the development of Parcel
23 E, and must the existing development on
24 the other parcels within the PD-2

25 Overlay District be taken into account

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1 in connection with any proposed
2 development of Parcel E? So I mean
3 this is what we -- this is it.

4 MR. CUTRER: I would submit that
5 -- read the first part of question,
6 what effect --

7 MR. FINGERHUT: Well, okay, If
8 Parcel E subject to PD-2 Overlay
9 District what effect does that have of
10 the development of Parcel E, okay, and
11 must the existing developments on the
12 other parcels within the PD-2 overlay
13 be taken into account in connection
14 with any proposed development of Parcel
15 E?

16 MR. CUTRER: I would propose that,
17 yes, they did. Yes, they must and, in
18 fact, they comply because Parcel F is a
19 nonconform -- legally nonconforming use
20 with respect to density and so, you

21 can't do the calculation of
22 10.735 acres at 16 units to the acre
23 and say that impacts the other.

24 Parcel F complies with the LMO.

25 MR. FINGERHUT: Okay. So you're
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1 saying if this is --

2 MR. CUTRER: I think I said yes
3 and yes, however, the fact that Parcel
4 F is a legally nonconforming
5 development with respect to density it
6 makes all of this acceptable.

7 MR. ROBERT JOHNSON: I'd agree
8 with Jerry. I think what he's been
9 proposing or advocating for is you take
10 each one of these as a parcel, okay,
11 and decide whether they meet the
12 current code but then you put them all
13 together at the end and you say,

14 there's still some room for development
15 because we can't use Parcel F as -- in
16 its entirety. I just can't see how you
17 can -- because it was allowed at the
18 time.

19 MR. WHITE: Yeah, that's right.
20 At the end of the day you can't do the
21 mathematics, so, it takes the totality
22 question out as far as I'm concerned.

23 And then the added thing we didn't
24 discuss is depending on what our

25 response is we either take -- we either

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1 make a -- that property E, either E is
2 viable or not.

3 MR. ROBERT JOHNSON: Right.

4 MR. WHITE: And it is my
5 understanding -- has always been my
6 understanding -- that that is not
7 something you want to do. You -- on a

8 piece of property. (Phonetic)

9 MR. FINGERHUT: Yeah, I just --
10 for me I'm much more wondering about
11 -0- our job is to follow the law and
12 let the Town council decide -- or a
13 property owner. I feel like we have to
14 follow the law as written but that's --
15 but --

16 MR. WALCZAK: We've got to decide
17 on the law, not make it ourselves.

18 MR. FINGERHUT: Okay. Seeing
19 where everybody is, do we have a motion
20 pertaining to the third question?

21 I mean really -- we need to answer
22 the question, so whatever that answer
23 is, I'd ask for -- if somebody would
24 like to do this I feel how the vote is
25 going to come out.

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1 UNIDENTIFIED SPEAKER: Well, does
2 the answer to that question make sense
3 with, yes, is that --

4 MR. FINGERHUT: No, no. The
5 answer's --

6 MR. WHITE: What should the answer
7 be?

8 MR. FINGERHUT: Well, must the
9 existing development -- what effect
10 does that have on Parcel E? That's an
11 open-ended question. If we answer,
12 yes, that's --

13 MR. WHITE: I adopt that.

14 MR. FINGERHUT: Okay. And must
15 the existing developments on the other
16 parcels be taken into account and I'm
17 hearing two different things from two
18 different members, so is there somebody
19 who would like to make a motion that
20 addressed those questions?

21 MR. CUTRER: I move that we
22 respond that Parcel -- in answer to the
23 Judge's third question, that Parcel E
24 is subject to the PD-2 Overlay District
25 regulations, that's part one.

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1 And in response -- the judge's
2 question is; If Parcel E subject to
3 PD-2 -- if Parcel E is subject to --
4 I move in response to Judge Dukes'
5 question, Number 3, which is, If Parcel
6 E is subject to PD-2 Overlay District
7 regulations, A -- this is my A -- what
8 effect does -- on Parcel E development,
9 what is its effect on Parcel E
10 development and, B, must existing
11 development of other parcels in the
12 Overlay District be taken into account,
13 and my motion would be that in response
14 to the judge's question to what effect
15 does -- on Parcel E development is the
16 PD-2 Overlay District have that applies
17 and must the existing development of
18 other parcels in the Overlay District

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19 be taken into account for any
20 development of Parcel E and I would
21 submit, yes, so, I think it applies and
22 we must take it into account. I
23 guess --

24 MR. FINGERHUT: You're still
25 making -- sorry, go ahead.

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1 MR. CUTRER: Then I would say that
2 because Parcel F is a legally
3 nonconforming development that PD-2
4 overlay is, in fact, complied with.
5 Parcel F complies because it's legally
6 nonconforming.

7 Parcel A and C comply because they
8 are within their -- at the limit of the
9 zoning and Parcel E would comply
10 because it's proposed for less
11 development and permitted under zoning
12 district.

13 MR. FINGERHUT: Do we have a
14 motion? I won't ask you to repeat that
15 for the moment. Is there a second?

16 MR. WHITES: I'll second that.

17 MR. FINGERHUT: Any discussion?

18 MR. ROBERT JOHNSON: Yes.

19 MR. CUTRER: Let me just say what
20 I'm trying to do with that motion as
21 convoluted as it was is say, yes, it's
22 obvious that this applies and we need
23 to apply it and in the application of
24 it you have to recognize that Parcel F

25 is legally nonconforming, therefore,
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1 the whole development would comply --
2 less than 8,000.

3 MR. ROBERT JOHNSON: I'm agreeing
4 with what you're saying right now but I
5 think it should be two motions.

6 I think you should make the first
7 part of the answer to these two parts
8 of the -- C, and then I think we ought
9 to make -- introduce a second motion
10 that addresses how we're taking it into
11 consideration.

12 MR. CUTRER: So you're asking me
13 to withdraw the motion?

14 MR. ROBERT JOHNSON: I'm asking
15 you to modify your motion, withdraw it
16 and restate it answering just the two
17 items -- the two halves of Question C
18 from the judge.

19 MR. CUTRER: I agree with what I
20 said here --

21 MR. ROBERT JOHNSON: Doesn't his
22 approach answer those two questions? I
23 mean you can't get to the second part
24 of Judge Duke's question without

25 understanding what the methodology is,

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1 either. That's what we're talking
2 about, the methodology.

3 MR. WALCZAK: For one thing, I
4 have to speak against this because the
5 judge didn't ask us our opinion on Lot
6 F. He didn't ask for an opinion on
7 that so why is that part of the motion?
8 That's where I'm coming from.

9 MR. CUTRER: Well, ultimately
10 we've got to decide -- we're getting
11 kind of -- answer the judge and
12 ultimately we've got to decide --

13 MR. FINGERHUT: Right. That will
14 be --

15 MR. WHITE: It does get back to
16 his question with respect to does it
17 have an effect on the other parcels?

18 MR. HULBERT: Mr. Chairman, may I?

19 MR. FINGERHUT: Yes.

20 MR. HULBERT: The judge referred
21 back for a rehearing and ask that you
22 have particular focus on these three
23 questions that he had from the first

24 hearing if that helps.

25 MR. FINGERHUT: Absolutely. We
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1 have to answer these three questions
2 regardless of whatever else we do, we
3 have to answer these three.

4 MR. WALCZAK: Do we -- can we take
5 part of it? It says, If Parcel E is
6 subject, if Parcel E is subject to,
7 okay, yes, it is subject to.

8 MR. FINGERHUT: We decided that.

9 MR. WALCZAK: All right. What
10 effect does that have on the
11 development of Parcel E? That's a
12 second issue, what effect does it have.
13 He said he wants an answer on that and
14 then, 'And must the existing
15 developments of the other parcels
16 within -- be taken into account in
17 connection with the development of

18 Parcel E, so there's really three
19 questions in one.

20 MR. FINGERHUT: Yes.

21 MR. WALCZAK: So why can't we
22 address each one accordingly.

23 MR. FINGERHUT: That's -- as long
24 as we do it with clarity, it's
25 absolutely fine, correct.

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1 MR. WALCZAK: That's -- yeah. But
2 it's --

3 MR. FINGERHUT: We want to make a
4 good record for all of these folks who
5 have to live with this after today, but
6 yes, so -- okay, what effect does that
7 have on the development of Parcel E?
8 There are six of us here and I think
9 three of us would say is that answer is
10 none and I think the other three would

11 have a different response to that, so
12 I'm not -- I would just ask for I guess
13 a motion on that and then for the next
14 question, again, and must the existing
15 developments on the other parcels be
16 taken into account?

17 UNIDENTIFIED SPEAKER: Yes.

18 MR. FINGERHUT: Well, I hear three
19 of us I think said yes and the other
20 three think, no, but that doesn't
21 answer the questions and then we can
22 discuss appeal but I think --

23 MR. UNIDENTIFIED SPEAKER: I heard
24 Jerry say yes to 3, Number 3.

25 MR. FINGERHUT: Well then --
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1 MR. CUTRER: We have before us a
2 motion and a second and a suggestion
3 that it might be withdrawn and re --

4 MR. WHITE: I think we're all a

5 lot closer than we think. I don't
6 think that there's two very separate
7 opinions it's just in the way we define
8 the third question.

9 MR. FINGERHUT: Okay.

10 MR. WHITE: So I withdraw. Jerry,
11 you withdraw?

12 MR. CUTRER: I will. Is that a
13 proper part of the -- way to do it?

14 MR. WALCZAK: Yes. So you will
15 consent to withdraw and restate it and
16 bifurcate it into two motions because
17 we want three.

18 MR. ROBERT JOHNSON: Can we
19 discuss this more?

20 UNIDENTIFIED SPEAKER: Sure.

21 UNIDENTIFIED SPEAKER: Let me make
22 sure.

23 UNIDENTIFIED SPEAKER: So your
24 motion --

25 MR. CUTRER: I'm agreeing to
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1 withdraw my motion. Tell us how to do
2 it.

3 MR. WALCZAK: That -- you've just
4 done it because you both withdrew and
5 he seconded it. Now you can restate it
6 as simple or complex as you want.

7 MR. ROBERT JOHNSON: And we
8 discuss it before --

9 MR. WALCZAK: You always have to
10 discuss a motion before you vote.

11 MR. ROBERT JOHNSON: Here's my
12 point. Again -- well, no, I don't want
13 to make a motion. I see this as three
14 different questions and we may agree on
15 -- we may all agree on the first part
16 of it, none of us may agree on the
17 second part and then there's a --
18 there's three parts and by just
19 saying --

20 MR. WALCZAK: -- three motions.

21 MR. ROBERT JOHNSON: I agree.

22 MR. WALCZAK: For each one of

23 those things so I'll make the first
24 motion to say, yes, I move that Parcel

25 E is, in fact, subject to the PD-2
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1 Overlay District.

2 MR. FINGERHUT: We did vote on
3 that.

4 MR. WALCZAK: We did vote on that?

5 MR. FINGERHUT: We're on C.

6 MR. WALCZAK: Yeah, that's not
7 what it says. No, I'm reading C. If
8 Parcel E is subject to the --

9 UNIDENTIFIED SPEAKER: That comes
10 from B.

11 MR. WALCZAK: All right. So we
12 don't need that so we really only need
13 two motions.

14 MR. FINGERHUT: Right. What
15 effect --

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16 MR. WALCZAK: All right. So --

17 UNIDENTIFIED SPEAKER: What effect
18 does it have on Parcel E?

19 MR. CUTRER: In response to the
20 judge's question of If Parcel E is
21 subject to the LMO's PD-2 Overlay
22 District, what effect on Parcel E
23 development does this have?

24 MS. LAUDERMILCH: I will move that
25 because we've determined Parcel E is
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1 subject to the LMO's PD-2 Overlay
2 District we need to take into
3 consideration the existence of the PD-2
4 Overlay District and it's regulation as
5 we consider development for Parcel E.

6 MR. CUTRER: Second.

7 MR. FINGERHUT: Any further
8 comments on that motion?

9 Teresa, will you please call the

10 roll.

11 MS. HALEY: Mr. Walczak?

12 MR. WALCZAK: For the motion.

13 MS. HALEY: Mr. Johnson?

14 MR. ROBERT JOHNSON: For the

15 motion.

16 MS. HALEY: Mr. Fingerhut?

17 MR. FINGERHUT: For the motion.

18 MS. HALEY: Mr. Cutrer?

19 MR. CUTRER: For the motion.

20 MS. HALEY: Mr. White?

21 MR. WHITE: For the motion.

22 MS. HALEY: Ms. Laudermilch?

23 MS. LAUDERMILCH: For the motion.

24 MR. FINGERHUT: Thank you. Okay.

25 Now, the PD Overlay District, it
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1 has to be -- overlay regulations must

2 be considered in the development of

3 Parcel E, that's what we voted on.

4 Now, must the existing development
5 on the other parcels within the PD-2
6 Overlay District be taken into account
7 in connection with any proposed
8 development of Parcel E?

9 MR. WALCZAK: We all agree that --
10 we just did. We just did that.

11 MR. FINGERHUT: I realize the last
12 clause of that question is basically
13 asking the same thing using more words.

14 MS. LAUDERMILCH: Yes.

15 MR. ROBERT JOHNSON: I'd like to
16 try to make a motion.

17 Because Parcel F is grandfathered,
18 it is assumed -- because Parcel F is
19 grandfathered a square -- the density
20 level is a legal nonconforming density,
21 that's Parcel F.

22 Moving to Parcel A, C and that
23 being the hotel site of 2.6 acres at
24 it's maximum of 91 units it is in
25 accordance with the LMO.

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1 The remaining -- the only
2 remaining property that needs to be
3 addressed is Parcel E that assuming F
4 and A, C, Parcels A, C meet the density
5 level the assumption is under the --
6 the belief is under the current LMO the
7 Parcel E would have some -- would have
8 density rights, either they could put
9 8,000 square feet of commercial, they
10 could put whatever hotel rooms it would
11 support, they could put whatever condos
12 it would support, so my belief is that
13 this property meets the LMO
14 requirements.

15 MR. FINGERHUT: Right. But we
16 have to answer -- we've literally got
17 to direct answer what he's asking
18 about. What he's saying, must the
19 existing development of other parcel be
20 taken into account --

21 MR. ROBERT JOHNSON: I just took
22 every one of them into account.

23 MR. FINGERHUT: So the answer to
24 the question is yes.

25 MR. CUTRER: The motion is how do
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1 we take that into account?

2 MR. FINGERHUT: Well, that's after
3 we -- the answer is yes.

4 MR. WALCZAK: Why don't we just
5 say that we move that the existing
6 development of other parcels must be
7 taken into account.

8 MS. LAUDERMILCH: Yes --

9 MR. ROBERT JOHNSON: I've got one
10 objection to it being one total and
11 then when you made your --

12 UNIDENTIFIED SPEAKER: You
13 discussed the motion when first you
14 should ask is there a second to the

15 motion, if it doesn't then you have
16 another option.

17 MR. FINGERHUT: I'm not sure I
18 would restate that as a motion. I'm
19 not --

20 MR. WALCZAK: I'll withdraw.

21 MR. CUTRER: I have a -- did we
22 not just vote in the affirmative the
23 answer to the judge's question that,
24 what effect does that have on the

25 development of Parcel E and must the
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1 existing development on the other
2 parcels within that PD-2 Overlay
3 District be taken into account?

4 MR. FINGERHUT: Well, we broke it
5 into two questions. The first clause
6 of it --

7 MR. WALCZAK: The next motion

8 should be this, if you don't mind, I
9 would move that the existing
10 development on the other parcels within
11 the district must be taken into account
12 with any proposed development per
13 Parcel E.

14 MR. CUTRER: Second.

15 MR. FINGERHUT: Any discussion on
16 that point? Okay. Teresa, please call
17 the roll.

18 MR. CUTRER: Second.

19 MS. HALEY: Mr. Walczak?

20 MR. WALCZAK: For the motion.

21 MS. HALEY: Mr. Johnson?

22 MR. ROBERT JOHNSON: For the
23 motion.

24 MS. HALEY: Mr. Fingerhut?

25 MR. FINGERHUT: For the motion.

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1 MS. HALEY: Mr. Cutrer?

2 MR. CUTRER: For the motion.

3 MS. HALEY: Mr. White?

4 MR. WHITE: For the motion.

5 MS. HALEY: Ms. Laudermilch?

6 MS. LAUDERMILCH: For the motion.

7 MR. FINGERHUT: Excellent. Now we
8 have to decide the appeal.

9 MR. CUTRER: Now, when we decide
10 on the appeal it's important that our
11 motion, whatever it is, state findings
12 of fact and conclusions of law. We
13 can't just --

14 MR. FINGERHUT: I would agree.

15 MR. CUTRER: That was one of our
16 criticisms of our prior action in
17 November that we didn't --

18 MR. WALCZAK: Then I would suggest
19 that we allow our lawyer to word it.

20 MR. WHITE: Oh I think Jerry's
21 perfectly qualified to make a motion.
22 Perhaps not me but I think Jerry can do
23 it quite well.

24 MR. FINGERHUT: There isn't a
25 motion. I would be happy to make one.
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1 MR. CUTRER: I move -- I offer the
2 following motion, that the Board of
3 Zoning Appeals uphold the
4 determination -- I offer the following
5 motion;

6 I move that the Board of Zoning
7 Appeals uphold the determination by the
8 Town staff and deny the appeal of the
9 appellant based on the following
10 findings of fact:

11 That Parcel E is in a PD-2 Overlay
12 District established by the LMO.

13 Because Parcel E is in a PD-2
14 Overlay District Parcel E is subject to
15 the LMO's PD-2 district regulations and
16 that the development of Parcel E is
17 governed by the PD-2 Overlay District
18 regulations and the existing
19 development on the other parcels within

20 that PD-2 Overlay District must be
21 taken into account with connection or
22 in connection with any proposed
23 development of Parcel E.

24 The further finding of fact, that
25 the property is composed of three
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1 separate significant parcels and one
2 not significant, that one being the
3 road right-of-way.

4 There is a hotel property, a
5 Spinnaker property and a proposed
6 welcome center property.

7 The hotel property conforms to the
8 current LMO as well as the PD-2 Overlay
9 District.

10 The Spinnaker property, Parcel F
11 complies with the current LMO as well
12 as the PD-2 Overlay District because it

BZA MEETING 8-27-2018.txt

13 is a legally conforming development,
14 legally nonconforming development with
15 respect to density.

16 And that Parcel E, if developed to
17 7,500 square feet would also comply
18 with both the LMO RD District and the
19 PD-2 Overlay District because it would
20 be less than the allowance of 8,000
21 square feet.

22 And further, that failure to
23 sustain the staff's determination
24 would, pursuant to the Lucas case,

25 cause all economic utility to be zoned
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1 out of existence and that would result
2 in a taking which we should not do.

3 That's my motion.

4 MR. ROBERT JOHNSON: I second. I
5 second the motion.

6 MR. FINGERHUT: Any discussion on

7 the motion before we vote? Teresa,
8 please call the roll.

9 MS. HALEY: Mr. Walczak?

10 MR. WALCZAK: Against the motion.

11 MS. HALEY: Mr. Johnson?

12 MR. ROBERT JOHNSON: In favor of
13 the motion.

14 MS. HALEY: Mr. Fingerhut?

15 MR. FINGERHUT: Against the
16 motion.

17 MS. HALEY: Mr. Cutrer?

18 MR. CUTRER: For the motion.

19 MS. HALEY: Mr. White?

20 MR. WHITE: For the motion.

21 MS. HALEY: Ms. Laudermilch?

22 MS. LAUDERMILCH: Against the
23 motion.

24 MR. CUTRER: Okay. Can we go home
25 now?

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1 MR. FINGERHUT: Well, let's ask a
2 question, Brian, some thoughts?

3 Three to three means a tie which
4 means the decision stays the way it is
5 but the question where do we go from
6 here? Do we try to work through this
7 or are we done?

8 MR. HULBERT: I would ask that you
9 ask the parties where their thoughts --
10 on what occurred on that.

11 MR. FINGERHUT: Now that we've
12 closed the argument we ask the parties?

13 MR. HULBERT: You never know -- if
14 you want to continue on, is there a
15 legal need to go beyond what you just
16 did? I ask that you ask each side what
17 their position is.

18 MR. FINGERHUT: I'm curious as to
19 whether or not we can -- from you,
20 whether or not we can go on or does
21 this conclude our business?

22 MR. JOHNSON: It does.

23 MR. HULBERT: Well, the answer is
24 the appeal if you're asking that.

25 The LMO determination is upheld.
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1 It takes a majority to overrule it and
2 you've answered the judge's questions
3 and those motions have passed so it's
4 up to the Board if there's something
5 further to consider and, of course,
6 anybody that voted for the motion could
7 have a change of opinion and ask for a
8 motion to reconsider, things like that,
9 but it --

10 MR. FINGERHUT: Right, right.

11 MR. ROBERT JOHNSON: How about a
12 motion to adjourn? Can it be done
13 while either people --

14 MR. HULBERT: If there's
15 additional business it must --

16 MR. ROBERT JOHNSON: Okay. My
17 question is, can we make a motion to --

BZA MEETING 8-27-2018.txt

18 MR. HULBERT: If there's no
19 further motions. You don't need a
20 further motion if you don't want to do
21 anything else.

22 MR. ROBERT JOHNSON: Okay, all
23 right.

24 MR. FINGERHUT: Anybody interested
25 in reconsidering their position on
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1 affirmative?
2 Okay. Hearing no interest in
3 doing so at 6:20 then we move on to the
4 next item on the agenda and this appeal
5 is closed.

6 (Whereupon, the hearing of was
7 concluded at approximately
8 6:19 p.m.)

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C E R T I F I C A T E

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STATE OF GEORGIA:

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CHATHAM COUNTY:

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I, Kyle J. Saniga, 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.

Kyle J. Saniga, CCR

Notary Public, B-2038

Savannah, Georgia
COASTAL COURT REPORTING & VIDEO SERVICES
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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

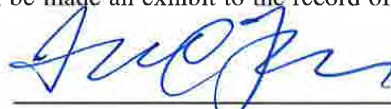
In her Memorandum of August 1, 2018, Nicole Dixon “interprets” the LMO in a manner to say that the average density requirement of LMO Section 16-3-106.G.4 simply does not apply to Parcel E. Because that position is such a tortured interpretation of the LMO--basically amounting to the disregarding of 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

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

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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) (initials) ~~PERSON~~ 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 		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 PROPOSED

Uses	PUD AS APPROVED			Approved 5/6/87 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 RD-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 ⁸ /ac
5262 SF COMM	15.1	348.48 SF/ac
19.8	15.1	13.113 UNIT/ac

~~57000 SF/ac~~



1	State of South Carolina	)	Court of Common Pleas
		)	14th Judicial Circuit
2	County of Beaufort	)	No. 2016-CP-07-02712
3			
	Beachwalk Hotel &	)	
4	Condominiums Association,	)	
	Inc. and Beachwalk Hilton	)	
5	Head, LLC,	)	
		)	
6		)	
	Appellants/Petitioners,	)	
7		)	HEARING
	vs.	)	
8		)	March 12, 2019
	The Town of Hilton Head	)	
9	Island and/or The Town of	)	
	Hilton Head Island Board	)	
10	of Zoning Appeals, and SDC	)	
	Properties, Inc.,	)	
11		)	
	Respondents/Defendants.	)	
12	_____	)	

13

14 Hearing reported by Deborah S. Thomas,
15 Certified Verbatim Reporter and Notary Public in and
16 for the State of South Carolina; said hearing held
17 before Honorable Marvin H. Dukes, III, Beaufort
18 County Master in Equity and Special Circuit Court
19 Judge in accordance with the South Carolina Rules of
20 Civil Procedure, at the Beaufort County Courthouse,
21 102 Ribaut Road, Room 212, Beaufort, South Carolina
22 on March 12, 2019, at the hour of 10:01 a.m.

23

DEBORAH S. THOMAS, CVRM
80 Plymouth Lane
Bluffton, South Carolina 29909
(803) 206-7390

24

25

↑

2

1

Appearances

2

Representing the Plaintiffs:

3

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

4

5

6

7

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

8

9

10

Representing the Defendants SDC Properties, Inc.:

11

Barry L. Johnson, Esquire
Johnson & Davis, PA
10 Pinckney Colony Road
Okatie, South Carolina 29909
barry@jd-pa.com

12

13

14

15

Representing the Defendant Town of Hilton Head Island and/or The Town of Hilton Head Island Board of Zoning Appeals:

16

17

Gregory M. Alford, Esquire
Alford Law Firm, LLC
Post Office Box 8008
Hilton Head Island, South Carolina 29938
gregg@alfordlawsc.com

18

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CONTENTS

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Exhibit Index

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Certificate of Reporter

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Word Index

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EXHIBIT INDEX

9

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Exhibits:

Marked at Page

11

(Exhibits retained by Clerk of Court.)

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None Proffered

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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 morning. We're
5 here in 2016-CP-07-02712. This is Beachwalk Hotel,
6 et al versus Town of Hilton Head, et al. This is a
7 zoning issue that I heard almost a year ago, and
8 it's back for some clarification. The zoning board,
9 they have apparently issued a response to that and
10 now we are here on dueling summary judgment motions.
11 The first being SDC Properties' summary judgment
12 motion filed October 1st, 2018. The second being

13 Beachwalk's summary judgment motion filed
14 10/24/2018.

15 My understanding from the parties is
16 there's no issue or dispute of the fact. This is
17 strictly a legal question. And, obviously, please
18 correct me if that's not accurate. That's my
19 understanding as we sit here right now.

20 So, Mr. Taylor, I think yours is first?

21 MR. JOHNSON: No, mine's first.

22 JUDGE DUKES: Oh, yours is first.

23 Okay. Sorry. Go ahead, Mr. Johnson.

24 MR. JOHNSON: Barry Johnson for the
25 record. Thank you, Your Honor.

↑

5

1 I want to reintroduce to the court my son
2 Lamar Johnson. He's finishing law school. He's
3 been here with me times before, but he's on spring
4 break now so we decided to put him to work.

5 JUDGE DUKES: What a terrible way to
6 spend spring break.

7 MR. JOHNSON: So he's joining me and
8 he's done a little bit of background work for me on

9 this matter.

10 JUDGE DUKES: We'll get you out of
11 here in time to go to the beach. That's where I
12 would want to go.

13 MR. JOHNSON: I would agree with the
14 characterization that the motions involved, they're
15 set up as legal -- as summary judgment motions,
16 essentially the determination of legal issues. But
17 there are some facts that relate to those legal
18 issues that possibly may be contested. And I just
19 want to make that caveat.

20 In addition, Your Honor will note that we
21 filed a memorandum literally yesterday afternoon in
22 support of our motion. I apologize to the court and
23 counsel for it being a little late in getting filed.
24 When I was last before you, I think February 4th,
25 we had a hearing and then overnight I came down with

↑

6

1 the flu. And I was pretty much incapacitated except
2 occasionally for a few hours a day for about a
3 month. So I got way behind on everything. And I
4 apologize for that.

5 And, secondly, on Page 5 of our memorandum
6 filed yesterday, there's a reference to a Worth
7 case. And we've got a typographical issue about
8 that that we discovered subsequent to this hearing.
9 I probably would want to submit an addendum to this
10 memorandum just to clarify that citation which I
11 think is -- there's something missing there that we
12 were not able to straighten out last night.

13 JUDGE DUKES: I think -- I don't have
14 that memo.

15 MR. JOHNSON: It was -- it was -- it
16 went on record at 8:27 this morning. We put it in
17 yesterday. But I have a copy of it as filed. If
18 Your Honor would like for me to pass that up.

19 JUDGE DUKES: That would be great if
20 I need to reference it just because I think Heather
21 puts these together the night before, so it doesn't
22 capture the stuff -- thank you so much.

23 MR. JOHNSON: Just on Page 5 kind of
24 in the middle of the page is the citation to Worth
25 then. If you would just note that. With Your

1 Honor's permission, I would like to straighten that
2 out with some supplemental document.

3 JUDGE DUKES: Page 5? I don't even
4 see it. Is it here at the bottom? Oh, I see it in
5 the middle, sort of two-thirds of the way down. And
6 what is the cite? I'll just cross it out here.

7 MR. JOHNSON: It's basically that
8 paragraph that it's at the end of. It begins with
9 after establishing constitutional standing. The law
10 that's set there is correct, but we've got an
11 incorrect citation reference there. And again as I
12 say, I apologize for that. We'll sort that out and
13 supplement it after the hearing which I suspect Your
14 Honor will take under advisement. But I'm not --
15 certainly don't know.

16 JUDGE DUKES: Probably. Okay. No
17 worries.

18 MR. JOHNSON: We -- just to go over a
19 little bit of the background, and there's a lot of
20 background. I'm not trying to explain everything
21 that's gone under the bridge in this case, but my
22 client SDC Properties, Inc. owns some property along
23 Pope Avenue that was -- it bought. I forget the
24 date, but close to 20 years ago. And several years

25 ago, it filed an application to build a

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8

1 7,500-foot -- square foot commercial building and a
2 welcome center for its customers -- for customers of
3 a related company.

4 SDC Properties, Inc. is connected to
5 Spinnaker Resorts. And they're in the timeshare
6 business. The Town LMO official issued -- excuse
7 me. The senior planner of the Town, Nicole Dixon,
8 issued a determination letter in August of 2016,
9 saying that this proposed development of this site
10 was permitted under the Town's LMO requirements.

11 Beachwalk is the adjacent or an adjacent
12 property. It is an out-of-business hotel or
13 condominium organization, boarded up, not doing
14 anything throughout all relevant times here. And
15 they have initiated all these proceedings that have
16 been going on for several years to contest that
17 decision by the Town's LMO senior planner.

18 And so they appealed it to the board of
19 zoning appeals which issued -- sort of we'll call
20 that Round 1 with the BZA -- issued a decision

21 upholding determination by the Town senior planner.

22 The Appellants then appealed that here.

23 You conducted hearings and issued an order in April

24 of 2018 directing that the BZA consider three

25 questions that you identified. So I went back to

↑

9

1 the BZA on remand.

2 The BZA held a hearing last August, I
3 think it was, and they issued -- they made some
4 decisions and extensive discussion with counsel and
5 some witnesses and review of the record and they
6 made decisions by motion and votes to rule on those
7 three questions.

8 They had some vote on whether or not to --
9 based on those answers to uphold or not uphold the
10 decision of the senior planner. They split equally
11 on that. And so they did not go one way or the
12 other, except the prior decision remains the
13 decision down below which was in Round 1 the BZA had
14 upheld the decision of the senior planner.

15 In the course of that hearing as we have
16 outlined in the transcript at great length -- or

17 from the transcript at great length in our
18 memorandum beginning at Page 8 of our memorandum and
19 continuing to Page 24, excerpts from the
20 testimony -- or excuse me -- excerpts from the
21 transcript, and based upon that dialogue with
22 counsel and the board members of the BZA on Round 2,
23 we at that Round 2 BZA meeting moved to dismiss the
24 appeal on the proposition that the Appellant's lack
25 standing; and, therefore, don't have a dog in this

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10

1 fight.

2 The Board decided it was not within their
3 purview to make that kind of legal decision, so they
4 declined to do that. So subsequent to that hearing,
5 I filed the motion that brings us here for this
6 discussion today. That is a motion. It's styled as
7 a summary judgment motion. There are several
8 procedural and substantive law principles on which
9 the same thing can be argued. And we mentioned some
10 of them in here.

11 But essentially we're saying that the
12 Appellant's lack standing to bring or maintain the

13 case. Our memorandum goes into all that in a fair
14 amount of detail.

15 There are, in terms of an overview, two
16 ways to look at lack of standing. After I get
17 through that, then we'll talk a little bit about the
18 requirements for standing and then the specifics of
19 this situation.

20 Lack of standing under the case law from
21 South Carolina to the U.S. Supreme Court results in
22 a decision that the appellant who lacked standing is
23 not entitled to the relief or a remedy.

24 Based on that, the second prong of the
25 standing argument is that when the plaintiff or

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11

1 appellant lacks standing, then the court has nothing
2 over which to exercise subject matter jurisdiction.
3 And so we take the position based on the colloquy at
4 Round 2, the BZA, and also based on the averments of
5 the petition and appeal that the Appellant's lacked
6 standing because they have not alleged nor have they
7 demonstrated a specific or particularized injury,
8 quote/unquote, such as would satisfy the

9 requirements of the Town of Hilton Head's LMO,
10 Section 16-2-103(T)2.B. And therefore, they do not
11 qualify as a, quote, aggrieved party, end of quote,
12 entitled to maintain this appeal under LMO Section
13 16-2-103(T)A. -- excuse me -- (T)2.A.

14 So we ask the court to dismiss the appeal.
15 I believe that if the court dismisses the appeal on
16 this predicate then their pending motion for summary
17 judgment as well as the entire case becomes moot at
18 that point.

19 In the Appellant's second amended notice
20 of appeal and petition, Page 10, Paragraph 4, they
21 lay out their position on this and state, quote, the
22 Appellant's own property adjacent to the proposed
23 Spinnaker Welcome Center and are an aggrieved party
24 in that their personal pecuniary or property rights
25 will be affected by Ms. Dixon's determination

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12

1 letter. And for that, they refer in the body of
2 that paragraph of their pleading to a South Carolina
3 Attorney General's opinion letter 2009, stating that
4 an aggrieved party generally refers to a party where

5 a personal pecuniary or property rights have been
6 adversely affected by another person's actions,
7 court's decree or judgment.

8 We believe that in relying on that
9 Attorney General's opinion, they misperceive
10 applicable law. At a minimum, the South Carolina
11 Attorney General's opinion letter does not take into
12 account specific, quote, provisions of the Hilton
13 Head LMO.

14 I make the comment that the only way to
15 demonstrate the nonexistence of an allegation in a
16 pleading is to actually review the documents. And
17 so I ask the court to consider reference to all of
18 that.

19 They do refer to, in their notice of
20 appeal and petition filed on December 30, 2016, LMO
21 Section 16-2-307(a) -- I can't find the existence of
22 that section. There is nothing in their pleading
23 that provides any detail, any factual allegation of
24 the special or particularized ways in which Ms.
25 Dixon's determination letter and the BZA's Round 1

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13

1 approval of that would impact them.

2 We believe that the record that's been
3 established before the BZA, particularly in Round 2,
4 is complete with demonstration by the Appellants
5 that they do not have and cannot allege or prove a
6 special or particularized injury under the town LMO
7 Section 15-2-103(T)2.A. and 2.B.

8 Okay. A few things about standing. All
9 the way to the U.S. Supreme Court, standing to sue
10 is necessary in order for a court to exercise
11 subject matter jurisdiction. Standing is a
12 threshold jurisdictional issue. South Carolina
13 Rules of Civil Procedure 12(h)(3) says whenever it
14 appears by suggestion of the parties or otherwise
15 that the court lacks jurisdiction of the subject
16 matter, the court shall dismiss the action. In
17 other words the court should do that sua sponte
18 even. Federal Court follows that in the Fourth
19 Circuit as well, that principle.

20 All right. When you are seeking to
21 establish standing under again U.S. Constitution,
22 you have to recite cases in here Flast versus Cohen.
23 You have to establish constitutional standing and
24 then prudential standing. And we discussed that at
25 modest length in brief and the distinction of them.

1 The idea is that constitutionally there must be some
2 kind of case or controversy going on that invokes
3 the jurisdiction of the court.

4 In a very recent case that was filed the
5 end of February this year by the South Carolina
6 Court of Appeals, and I realize the time for all of
7 its appellate process to carry forward has not
8 expired yet because 30 days haven't gone by. It was
9 filed February 27th. A case called Citizens for
10 Quality Rural Living that we cite at the bottom of
11 Page 4, top of Page 5 and elsewhere in our
12 memorandum gets to the same place. They do it under
13 South Carolina Code Section 6-29-1150(c) which is
14 part of the enabling legislation for the whole LMO
15 structure and planning structure and operations of
16 the Town of Hilton Head and all the other local
17 planning authorities in the State.

18 In Citizens for Quality Rural Living, the
19 court says that any party in interest can appeal an
20 action of the staff provided the party meets the
21 standard of a party in interest. In Footnote 6 of

22 that opinion, they rely upon Bank of America versus
23 Draper, Court of Appeals (2013). Defining a real
24 party in interest for purposes of the determination
25 of standing as a, quote, party with a real material

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15

1 or substantial interest in the outcome of the
2 litigation. And for that they rely on Hill versus
3 DHEC (2010) South Carolina Supreme Court.

4 The burden to establish standing is on the
5 party making the claim. They have failed to meet
6 that burden. First, they have not alleged facts
7 sufficient to meet these tests of real party in
8 interest. And they have not provided any evidence.

9 In fact, they have presented no witness in
10 any proceeding on the issue of how they have a real
11 material or substantial interest in the outcome of
12 the litigation. They have not presented any witness
13 to demonstrate that they meet the test of being
14 aggrieved parties or that their personal pecuniary
15 or property rights will be some specific, actual way
16 damaged by the action that they are appealing from.

17 So to meet the burden, the Plaintiff has

18 or the Appellant has to establish standing, first
19 they have to allege it. They have not done that.
20 U.S. Supreme Court in the Lujan case that we have
21 cited in a couple of places in here holds that since
22 the elements of standing are not mere pleading
23 requirements but rather an indispensable part of the
24 plaintiff's case, the plaintiff also bears the
25 burden of establishing each element in the same way

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16

1 as any other matter in which the plaintiff bears the
2 proof -- burden of proof, that is with the manner
3 and degree of evidence required at successive stages
4 of litigation.

5 Citing again from the U.S. Supreme Court,
6 standing may not be inferred argument-ably --
7 argumentatively from averments and pleadings. And
8 also from the U.S. Supreme Court, back in an 1884
9 case, but must affirmatively appear in the record.

10 The plaintiff must establish that they
11 have really an injury in fact that is -- has
12 occurred here or is threatened to occur here. It
13 must be concrete and particularized, either actual

14 or evident. That's the U.S. Supreme Court standard.
15 That's directly analogous to the Town of Hilton Head
16 Island's LMO requirement of a special or
17 particularized injury.

18 In the Citizens for Quality Rural Living
19 case that I just mentioned that was filed February
20 27th, Court of Appeals said the right of appeal
21 does not exist in every case. It can only be
22 claimed under some constitutional or statutory
23 provision conferring such a right. They haven't
24 done that.

25 The South Carolina Court of Appeals in

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17

1 2001 in a Beaufort County case involving Henry
2 Chambers' company, Beaufort Realty, and in a
3 Charleston case that I cite described an aggrieved
4 party as a party that has standing to appeal when
5 the judgment or decree operates on his or her rights
6 of property, bears directly on his or her interest,
7 or imposes on that party a burden or obligation.

8 And said -- and in a 2008 Court of Appeals
9 case that we cite, the Court of Appeals said there's

10 no material distinction in the general principles of
11 standing when juxtaposed to the ability of an
12 aggrieved party to appeal. In order for an injury
13 to be particularized, it must affect the plaintiff
14 in a personal and individual way. U.S. Supreme
15 Court plus South Carolina Court of Appeals (2014)
16 Carnival Corp. versus Historic Ansonborough
17 Neighborhood.

18 In the hearing held on August 27th,
19 2018, Round 2, BZA, the transcript which I think has
20 been filed. I think you all filed the transcript.

21 JUDGE DUKES: Yeah. I think I saw it
22 in here.

23 MR. ALFORD: Yes, sir. The whole
24 thing is filed.

25 MR. JOHNSON: The whole thing is

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18

1 filed? The whole record including the transcript.

2 JUDGE DUKES: That return and
3 questions, Exhibit 4? I think so.

4 MR. ALFORD: I believe that's
5 correct, Your Honor.

6 MR. TAYLOR: Yes, sir.

7 JUDGE DUKES: Anyway -- all right.

8 Yes. Thank you.

9 MR. JOHNSON: I don't want to just
10 read into the record. If we were jury, I would have
11 to. But I would again refer Your Honor to the
12 memorandum we filed at Page 8. If Your Honor could
13 just turn there, we'll start. Just go a little bit
14 and then I'm just going to back off of reading that.
15 But I want it clearly understood that all of that is
16 being referred to in this record of today's
17 proceeding.

18 So, on Page 8, we have the transcript page
19 and line references based on the BZA Round 2
20 transcript. BZA member Cutrer ask of Mr. Williams,
21 quote, your clients are the aggrieved party in this
22 case. How are they aggrieved? How will these
23 parties be injured if this property is developed as
24 proposed?

25 The response is, our clients are owners of

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19

1 property that's located in the Waterside PUD. And

2 should be as such -- there's a typo there -- or
3 bound by all the terms of the Waterside PUD and all
4 the LMO regulations. In trying to figure out what
5 our clients can do with her property, sooner or
6 later, I think everybody knows something's got to be
7 done with the Beachwalk Hotel. I can't tell you
8 when, but I expect sooner something will happen at
9 that point. It's important to understand what the
10 rules are.

11 Nicole. That's Nicole Dixon, the senior
12 planner who issued the 2016 determination that is
13 the foundation of all this appeal. It says Nicole's
14 been through the rules here with the proposed
15 development, the Welcome Center. And we think she
16 got it wrong. So we need to make sure that we
17 understand and protect our clients' interest with
18 respect to what happens in the future on the
19 Beachwalk Hotel property.

20 Now, I can go through all the rest of it.
21 And I'm sure if Your Honor reviews this, you'll see
22 there's nothing that really changes that answer.

23 In the ensuing whatever it is, close to --
24 about 15 pages of testimony we abstracted from that
25 transcript, wanting to know what the rules are is



1 not a specific special or particularized injury or
2 any of the other adjectives that are in the case law
3 from South Carolina to Supreme Court in Washington.
4 Nor is it consistent with the case law -- excuse
5 me -- the statutory requirements both in the
6 enabling legislature in 6-29-1150 and in the Town
7 LMO requirements. At best, they have a conjecture
8 that sooner or later something is going to be done
9 with the hotel. And they want to know to do with it
10 then.

11 Well, this is the first time in this case
12 that's been going on for a couple years at that
13 point that we've had any effort by them to meet
14 their burden of proving as well as pleading
15 standing. We submit that predicate that they argue
16 here.

17 And again, that's an argument of lawyers.
18 It's not even based on a witness' testimony. It's
19 not based on evidence in the record. But I suppose
20 since it is a statement about what they think is the
21 basis for standing, and you'll see as you look

22 through this that the issue of standing gets more
23 and more drawn out as a specific issue of address to
24 counsel in this hearing in these excerpted
25 transcript sections, that it's binding on their

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21

1 clients.

2 And that's what's in the record to the
3 extent that we have anything in the record of this
4 whole case on the issue of standing is they want to
5 know what the rules are. They want to know what
6 they can possibly do with this property down the
7 road.

8 Based on that colloquy -- as I said, if we
9 were jury, I'd have to stand here and read it all
10 out to the jury. And thankfully we're not. I found
11 some black humor in a Federal 2nd case in the First
12 Circuit. In *Re Dine Host, Inc.* where -- and the
13 court said, quote, as surely as strawberries do not
14 grow in the sea, standing is not taken root in the
15 wilderness of this record. Like a fish out of water
16 or in the wood, appellant has no purchase in his own
17 right sufficient to permit him to prosecute this

18 appeal, end of quote.

19 So at that hearing, it was BZA Round 2, I
20 moved to dismiss it for lack of standing. They
21 wouldn't do that so I've renewed that motion here
22 today. And I ask the court to grant our motion to
23 dismiss this case for lack of standing. We've cited
24 in the brief 12(h)(3) from the civil procedure
25 rules, all the case law, all the statutory law

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22

1 including at the local level. I did read -- I don't
2 think I cited it, but I did read a case where a
3 standing issue was raised on summary judgment motion
4 down the road. If that's important, we'll go back
5 and find it. We read a lot of law to get to where
6 we are here. We'll go back and find that case and
7 submit it to the court as well.

8 So I don't think the procedure issue of
9 how we're here matters so much as the substantive
10 issue, particularly given citation to 12(h)(3) and
11 case law and statutory requirements. And I don't
12 think a mere bald embracement of the language in the
13 2009 Attorney General's opinions, which are only

14 advisory, gets in the way of the court opinions from
15 the Court of Appeals, the South Carolina Supreme
16 Court, 4th Circuit, U.S. Supreme Court or the
17 statute -- statutes.

18 And so, as I said earlier, I think,
19 unfortunately, counsel misperceives the applicable
20 law. And this motion should be granted by the
21 court. And we present this very seriously.

22 JUDGE DUKES: Thank you very much.
23 Who would like to go next.

24 MR. TAYLOR: Your Honor, since the
25 Town joined in the motion at the BZA level, I think

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23

1 it would be appropriate to have the Town go ahead
2 and argue next.

3 MR. ALFORD: Your Honor, for brevity,
4 if you read that new opinion out of the Court of
5 Appeals, they talk about that they reversed the
6 decision saying there's no standing because they say
7 these guys are adjacent property owners and they've
8 got standing.

9 But the reason that -- but that you're

10 dealing with a different code section. Okay?
11 Because it's -- you've got to be careful here. I
12 know I'm not good with details always, but this
13 statue was written differently. In other words, the
14 code they appealed under was written differently
15 than our LMO.

16 Our LMO talks about a particularized harm.
17 In other words, to have standing, you don't just --
18 a neighbor -- you're not -- you don't automatically
19 get standing to raise a claim just because you're
20 next door. You've got to have a particularized harm
21 or state. At least make a claim for a
22 particularized injury.

23 And it's interesting to me because of what
24 they talk about in this case is that -- is that
25 people stood up and said, hey, we live next door.

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24

1 We're worried about traffic. There's traffic
2 counts. There's problems of that nature which it
3 makes sense to me then because you have a espoused
4 particularized interest.

5 And so the Court of Appeals sent it back

6 saying, hey, these guys -- under the way this code
7 section is written -- because they got kind of
8 technical about appellant standing. And it didn't
9 limit the class of people to just adjacent property
10 owners. Ours doesn't either, frankly. It used to.
11 It used to be a spatial requirement, but the LMO has
12 been changed.

13 Having said all that, I still don't,
14 respectfully, think they've built the record to
15 establish standing because they have never espoused
16 any, that I'm aware of -- and I'm open to, you know,
17 them -- they're going to argue differently, I'm
18 sure. But I've never found in this record and I've
19 never been able to figure out why they brought this
20 case because if they -- and when I say they -- I
21 hate pronouns. If Beachwalk prevails which,
22 respectfully, I don't think they should because of
23 the standard and the record, but just presuming for
24 a moment that they failed, they don't -- they don't
25 gain anything.

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25

1 They can't use that property. They can't

2 -- in other words, nobody can, right, because that's
3 the argument here is there's this piece of property
4 out there located within this PUD which
5 Mr. Johnson's client claims and the Town agreed with
6 that there was some density there for them to use to
7 build this -- I think, the Welcome Center type
8 facility. But there was this density there for them
9 to use within this remarkably unclear planned unit
10 development type thing within the Town. And that's
11 a historical issue of how it came to be.

12 And so I've never heard espoused from them
13 or I've never seen one piece of evidence, I've never
14 heard even the allegation, we don't want this
15 because it's going to create more traffic. We don't
16 want this because it's going to cut down trees that
17 we need. We don't want this because it's going to
18 affect pervious/impervious ratios. There hasn't
19 been any of that. It's just been, we're next door
20 and there's no density.

21 Presume that their correct there's no
22 density. Well, if there is density, they're not
23 hurt by it because by their own argument they're not
24 ever going to be able to use it because they've
25 argued there isn't any.

1 I mean, I guess that's my problem with
2 their standing. Yeah, you're a neighboring property
3 owner. Okay. People generally think you have
4 standing. But if you're just a neighboring property
5 owner and you're not alleging any specific
6 particularized harm or injury, I don't think you
7 have standing the way that the code is written. And
8 I respectfully have not heard anything in the
9 record. And I was there for the whole painful
10 thing. Although, my memory's not great. But I
11 really don't recall a witness coming up and saying,
12 hey, it's going to put too much traffic on the road.
13 Or again, the impervious whatever. Whatever
14 deleterious impact it's going to have on their land.

15 So I would respectfully say that my take
16 is slightly different on the standing issue with
17 respect -- I mean, I'm not disagreeing with
18 Mr. Johnson's analysis. I'm simply saying my
19 take comes from a different angle, is that -- is
20 that in our code you've got to have some injury.
21 And I haven't heard any allegation of it and I don't
22 think the record has it.

23 And I see Mr. Johnson hopping around. I
24 might have made him mad with something I said. If I
25 did, I'm sorry. And I'm sure I'll be corrected.

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27

1 But that's my -- if that's what you want
2 to talk about as standing, you know me, I'm not real
3 smart. It's kind of simple to me. You're either
4 hurt or you're not. And I hadn't heard it. Thank
5 you.

6 JUDGE DUKES: Thank you.

7 MR. JOHNSON: If I could be heard
8 briefly, it might complete this side of the table
9 before we go to that side of the table. With
10 respect to Mr. Alford's discussion about neighbors,
11 again, in Footnote 6 of Quality Rural -- what's it
12 called?

13 MR. ALFORD: Citizens for Quality
14 Rural --

15 MR. JOHNSON: Citizens for Quality
16 Rural Living. Footnote 6 is pretty important in
17 that opinion. I cited it earlier for a couple of
18 cases about standing. The last sentence of Footnote

19 6 of that holding says, in fact, developer has
20 admitted -- excuse me. Second to last sentence,
21 notably the parties agree that appellant had
22 standing to appear before the commission during its
23 August 2016 meeting. Well, obviously, if they had
24 standing to appear before the commission then they
25 had standing to appeal the decision of the

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1 commission.

2 And I believe if I could take one minute
3 further to just make sure I say this accurately -- I
4 won't take anymore time looking for that, Your
5 Honor, at this point.

6 MR. ALFORD: Your Honor, I think I
7 can pick up the point just a little bit more if I
8 could is that nobody ever agreed in that the lower
9 tribunal before the BZA that they had standing.

10 MR. JOHNSON: Right.

11 MR. ALFORD: And I think that might
12 have been what Mr. Johnson was looking for.

13 MR. JOHNSON: That's right.

14 MR. ALFORD: Nobody ever agreed they

15 had standing. In fact, the BZA had concerns about
16 that. What's your harm? In fact, I'm not --
17 obviously, my mind is unable to comprehend the
18 thinkings of people smarter than me, but I never
19 figured out why they brought this case because --
20 and perhaps had that motive been disclosed before
21 the BZA then I wouldn't be able to have this
22 conversation with you about them not expressing a
23 particularized harm of any kind or an injury they're
24 going to suffer because I hadn't heard it.

25 And frankly, I haven't been able to figure

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1 it out other than we just don't want you to do it.
2 Well, that's not a harm. You know, it's not
3 particularized. And so that's -- I guess the
4 distinction that may be -- the case definitely, in
5 my mind, the new case came out correctly because
6 they admitted they had standing in the lower
7 tribunal. And then the standard to allow you to
8 appeal, a different code section, didn't limit it to
9 just property owners. And then I think that's where
10 he's going with that Footnote 6 conversation which I

11 think is a correct one.

12 But anyway, that's my issue on the
13 standing. I never heard it. Never heard one.

14 JUDGE DUKES: Thank you so much.
15 Mr. Taylor happy to hear from you, sir.

16 MR. TAYLOR: Your Honor, Tom Taylor
17 and Chet Williams on behalf of the
18 Appellants/Petitioners Beachwalk Hotel and
19 Condominium Association, Inc and Beachwalk Hilton
20 Head, LLC.

21 Your Honor, one of -- before I start, one
22 of the most interesting things and I think the most
23 important factual and legal issue that the court
24 needs to be reminded of at this point that we
25 haven't heard in 45 minutes of arguing is that we

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1 are here because when the developer filed their
2 application and when Nicole Dixon reviewed their
3 application initially, the court will remember that
4 neither of them were aware of the fact that this
5 property, Parcel E, was in what is known as a PD-2
6 Overlay District.

7 They both made their decisions. The
8 developer's initial person that did the planning and
9 Ms. Dixon premised upon the fact that they were
10 looking at the wrong zoning classification. They
11 were looking at an RD Resort Development District.

12 The PD-2 Overlay District is the crux of
13 the legal issue as to why we're here, Your Honor.
14 And to remind you very briefly it's because that
15 under the PD-2 Overlay requirements an applicant has
16 to meet certain density standards that are
17 formulated by a review of the available density over
18 all the properties included in the overlay district.
19 And it is admitted by the Town on the record that
20 if, in fact, the PD-2 Overlay District applies then
21 the Parcel E development is improper.

22 That's the exact reason the court sent
23 this back down was to answer those three questions
24 which I'll get to in a few minutes. But the
25 important issue here is the particularized injury

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1 that my clients have, Your Honor, is that if, in
2 fact, this zoning is now read to say the PD-2

3 doesn't matter, go ahead and build, then what's
4 going to happen when we file for redevelopment
5 because what's good for the goose, as Mr. Alford
6 loves to say in arguments, is good for the gander.

7 MR. ALFORD: Mr. Alford took --

8 MR. TAYLOR: We --

9 MR. ALFORD: -- a beating on that
10 yesterday by the way.

11 MR. TAYLOR: We have -- we have a
12 particularized injury literally imminently if the
13 Town finds that the PD-2 Overlay District is not
14 applicable. Then -- and they give the remaining
15 density, if any there be, on this whole parcel to
16 Parcel E. Then we will be unable when we make our
17 application to have any increased density
18 whatsoever.

19 So there is an absolutely particularized
20 injury imminent to us. We simply -- and the arguing
21 standing is always great because you get to talk
22 about Supreme Court decisions and all this and it
23 sounds really good. But the fact of the matter is,
24 if you look at the two-step analysis, one, have we
25 pled it? There's no question we pled it, Your

1 Honor. If you look at what was cited by Barry, the
2 second amended notice of appeal and petition,
3 Page 10, it is pled that we own property adjacent to
4 the proposed Welcome Center and are and aggrieved
5 party in that their personal pecuniary or property
6 rights will be affected by Ms. Dixon's determination
7 letter.

8 And then there is a reference, see e.g.,
9 which, of course, means among others, the South
10 Carolina Attorney General's opinion letter dated
11 February 17th, 2009. There is the pleading. It
12 was accurately pled.

13 And very interesting, Your Honor, is this
14 point. There was a full-blown hearing on this
15 matter before Mr. Johnson's clients were added as a
16 party. However, Mr. Johnson was allowed to speak,
17 was invited by the BZA at that point to present any
18 input from SDC Properties at that hearing. That
19 transcript of record has been filed.

20 Neither Mr. Johnson, on behalf of SDC
21 Properties, nor Mr. Alford, on behalf of the Town,
22 ever raised the issue of standing at that point. I

23 am fully aware of the fact that it can be raised at
24 any time, but let's not presume that there's been
25 this two-year run of people asking us about standing

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1 and us never responding. That's quantumly not the
2 case.

3 What happened was in the August 2018
4 hearing, one BZA member with a particularly spoken
5 onus for the Beachwalk project began to question
6 this. And like I said at that point time, like
7 sharks to blood in the water, suddenly the issue of
8 standing became -- was being raised. It'd never
9 been raised before, had never been any type of
10 motion raised, and then Mr. Johnson and Greg very
11 talentedly argued about the standing. Almost --

12 JUDGE DUKES: Can I do this. I hate
13 to do this, but I've been waiting. Let me -- can we
14 take a quick break?

15 MR. TAYLOR: Of coarse, sir.

16 (BREAK TAKEN)

17 JUDGE DUKES: Back on the record. My
18 apologizes. I had to take a quick phone call. So,

19 Mr. Taylor, please continue. And according to Mr.

20 Alford, you were speaking --

21 MR. TAYLOR: Eloquent.

22 JUDGE DUKES: -- about how eloquent

23 he was.

24 MR. TAYLOR: Yes, sir.

25 JUDGE DUKES: So, please continue.

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1 MR. TAYLOR: Judge, we left a moment
2 ago with me discussing about how this issue of
3 standing was for the first time raised in August of
4 2018. And it's, Judge, I think, very important to
5 note at this point that while Mr. Johnson indicated
6 that the Board indicated the BZA that it felt like
7 it was not within their purview to make a decision,
8 that is actually inaccurate. And it's important at
9 this moment that I go ahead and clear that up.

10 Judge, attached to my amended memorandum
11 in opposition to SDC's Property for motion for
12 summary judgment as Exhibit 1, you will find the
13 Board of Zoning Appeals notice of action dated
14 August 30th. And I'm going to talk about this in

15 detail a little bit later on another matter.

16 But importantly you'll see at the bottom
17 of the first page, BZA action, at their meeting of
18 August 27th, 2018, the following action was taken by
19 the Board in connection with appeal -- with appeal
20 number so-and-so. Motion to dismiss for lack of
21 standing by Mr. Barry Johnson and the Town. Board
22 member Mr. Walczak moved to deny councils motion to
23 dismiss for lack of standing. Mr. White seconded.
24 The motion passed with a vote of six to nothing.

25 Now, Your Honor, that's critically

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1 important on a number of areas. First of which, it
2 was not appealed, which I'll talk about in a few
3 minutes, but mostly to Mr. Johnson's argument that
4 the BZA did not make such a decision. They did in
5 fact make an absolute decision on the motion to
6 dismiss. They rejected it by a vote of six to
7 nothing. That at that point in time was a finding
8 of law by the BZA which they had absolute right to
9 do and they committed it to a notice of action that
10 then was on appeal as we'll get to in a few minutes.

11 But the Board did take action on it. It was
12 discussed and the motion was made and, again, it
13 failed six to nothing.

14 Now, Your Honor, I want to go back to the
15 issue of whether or not there has ever been
16 initially standing. And I want to provide the court
17 with a few things.

18 First, as you'll find in Exhibit 1 to the
19 initial transcript of the package of appeal. Nicole
20 Dixon's letter dated August 23rd --

21 MR. JOHNSON: Excuse me, Tom. Which
22 transcript? Round 1 or Round 2?

23 MR. TAYLOR: Round 1. The initial
24 filing, Exhibit 1, Nicole Dixon's letter of August
25 23rd, 2016, to Mr. Williams which we refer to as the

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1 determination letter, Your Honor. This is where
2 Nicole Dixon mistakenly, because she is unaware that
3 the parcel is in a PD-2 Overlay District, tells
4 Mr. Williams that it is, in fact, a permissible
5 development. And then she says on the last page,
6 should you wish to appeal this determination to the

7 Board of Zoning Appeals, please file an appeal
8 application within 14 calendar days of receipt of
9 this determination.

10 So we have a staff member who is in the
11 position of making the decision or has been given
12 that by the LMO official, who then invites
13 Mr. Williams to make an appeal of her determination.
14 And that is part of the record.

15 Secondly, Your Honor, I want to point out
16 that while the Town of Hilton Head in the LMO
17 requires the particularized injury that we've talked
18 about for purposes of an initial appeal to the BZA.
19 The court is well aware that the South Carolina
20 legislature in South Carolina Code 6-29-820 provides
21 that a person who may have a substantial interest in
22 any decision of the BZA may appeal from a decision
23 of the Board to the Circuit Court in and for the
24 County by filing with the clerk of court a petition.

25 And this court has recently ruled in

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1 another matter that you don't even have to be an
2 initial participant in the appeal to the BZA in

3 order to appeal to the Circuit Court. And that is
4 what we are exactly doing. There is no question
5 that our clients have a substantial interest in this
6 decision because as we've talked about, they are an
7 adjacent property owner. They will be impacted
8 almost assuredly by any decision that the Town makes
9 about density insofar as their ability to ever
10 redevelop their land.

11 Now, Your Honor, to specifically address,
12 and I have done this in my brief which, Judge --

13 JUDGE DUKES: Now, let me -- let me
14 -- I hate to interrupt again.

15 MR. TAYLOR: No. Please.

16 JUDGE DUKES: Sorry. But that was
17 sort of the question I wanted posed to the Board now
18 that I'm -- was looking at all of this. Was -- how
19 does that affect the Appellant?

20 And when I read Question 3 -- maybe it
21 says it in here somewhere. But it -- the answer to
22 Question 3 seems to indicate that, no, it doesn't
23 really affect the Appellant. That the question is
24 really do they have the density left to build
25 something on their property?

1 And the appeal is -- the Appellant's
2 opinion is, no, they don't have any room to build
3 anything on their property. But it seems like
4 somewhere in one of these answers is, but that
5 doesn't matter to the Appellant anyway whether they
6 have density on their property to continue to build
7 this Welcome Center. Is that -- is that not what
8 this says?

9 MR. ALFORD: That's how I read it.

10 JUDGE DUKES: You all have studied
11 it. I'm just, honestly, seeing these responses for
12 the first time. But I'm still trying to figure out
13 --

14 MR. WILLIAMS: Well, if I may, Your
15 Honor. The answer to that third question was at the
16 heart of Nicole Dixon's determination. She said,
17 no, you don't have to take into account the LMO's
18 average density requirement for a PD-2 Overlay
19 District when looking at the proposed develop on
20 Parcel E.

21 The Board said, no, you do have to take
22 that into consideration. And when you do take the
23 average density requirements into consideration, it

24 means there's no density left there. The potential
25 problem that has for Beachwalk is that upon the

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1 redevelopment of the Beachwalk property, if the
2 situation has gone from bad to worse with respect to
3 density, that may have a material adverse impact on
4 Beachwalk's ability to redevelop their property.

5 JUDGE DUKES: Now, that might go to
6 the standing issue, I suppose, maybe. But --

7 MR. TAYLOR: But that -- but that's
8 the substantive issue in the determination, also.
9 That -- the BZA has said in the answer to the
10 questions, Parcel E is in a PD-2 Overlay District.
11 The requirements of the PD-2 Overlay District apply
12 to Parcel E. And, yes, you have to take into
13 account the average density requirements of the PD-2
14 Overlay District when looking at the development
15 potential of Parcel E.

16 That's the -- that's the substitute issue
17 here.

18 JUDGE DUKES: But, I mean, if they
19 considered that, based on everything that was in

20 front of the Board, it seems like I fall under one
21 of those any evidence sort of traps that limit us at
22 this appeal.

23 So if they didn't consider it, then it --
24 the reason it was sent back was to make sure it was
25 considered. But now you're saying they considered

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1 it, but they got it wrong based on whatever evidence
2 was in front of them. Not that they didn't
3 consider.

4 MR. WILLIAMS: They got it wrong the
5 first time. But the second time around they didn't
6 take any action on that issue. They answered the
7 three questions, unanimously. But --

8 JUDGE DUKES: But there's -- at this
9 point there's no question but that they considered
10 it because they --

11 MR. WILLIAMS: Correct.

12 JUDGE DUKES: -- arguably considered
13 it the first time. I wasn't necessarily there, so
14 we sent it back. And now they've considered it,
15 debated it and come up with for better, for worse

16 with a decision.

17 MR. WILLIAMS: First time around they
18 considered it. And they said, yes, Nicole is
19 correct. You don't have to take it into
20 consideration.

21 Second time around when they answered the
22 question they said, yes, you do have to take it into
23 consideration. And that -- and even with any
24 evidence, if it's wrong, is a matter of -- if the
25 decision is wrong as a matter of law, it doesn't

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1 matter how much evidence there is supporting the
2 decision. If it's wrong as a matter of law, it
3 needs to be reversed.

4 And the Board of Zoning Appeals has now
5 said, yes, Nicole, that's wrong as a matter of law.
6 You do have to take into account the average density
7 requirements of the PD-2 Overlay District when
8 looking at the development potential of Parcel E.

9 And Nicole has admitted on the record that
10 if that is in fact what she has to do then there is
11 no density left for the development of Parcel E.

12 JUDGE DUKES: But I guess what I'm
13 troubled by or thinking about -- and I know you have
14 a lot more argument, Tom, and I'm not cutting you
15 off. I'm just trying to figure this out before
16 moving further. And, Greg, I know you want to say
17 something. But it sounds like at least in Round 2
18 they knew all of that and made a decision based on
19 that knowledge.

20 MR. WILLIAMS: No. They --

21 MR. TAYLOR: No, they did not.

22 MR. WILLIAMS: But they didn't make
23 substantive decision in Round 2.

24 MR. ALFORD: But respectfully if I
25 may. Respectfully they did because the substantive

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1 decision they made after reviewing the court's
2 questions was not to change the determination.

3 MR. WILLIAMS: No. Respectfully, a
4 tie vote is no action at all. The codes require
5 that the Board, is under the appeals, take action by
6 a majority vote. So anything other than a majority
7 vote is no action whatsoever by the Board.

8 MR. ALFORD: But it means what it
9 practically means.

10 MR. JOHNSON: It's means Round 1
11 stands.

12 JUDGE DUKES: Greg, you would quote
13 the great Canadian Dan Rush when they said, if you
14 choose not to decide, you still have made a choice.

15 MR. ALFORD: You still have made a
16 choice.

17 JUDGE DUKES: But I don't know.

18 MR. ALFORD: I would. And I would
19 roll the bones. But I think -- I think now I kind
20 of understand you're asking them that question, did
21 you think about this. And maybe I didn't. But I
22 do. And I think I do understand what Mr. Williams
23 is saying.

24 But by the same token, they looked at
25 those questions. And after they got finished with

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1 those questions, it was, okay, after going through
2 these three questions, does Round 1 stand or not?
3 And I -- that's my interpretation. Now, Tom,

4 apparently wants --

5 JUDGE DUKES: Well, anyway --

6 MR. ALFORD: But it's his turn, so
7 I'll back off.

8 JUDGE DUKES: And I apologize once
9 again for the interruption, Tom. So please go
10 ahead. I was just trying to figure that out as I
11 read this things.

12 MR. TAYLOR: Well, Judge, I intend to
13 address that pretty subsequently at my motion for
14 summary judgment. And what I was trying to do here
15 was respond to Mr. Johnson's, and I will.

16 Basically, Your Honor, I just pointed out
17 again that the legislature -- legislative
18 requirements which may lessen somewhat what the Town
19 of Hilton Head has at the initial one to require
20 some special or particularized injury, although, as
21 you will see in a few minutes, the Town of Hilton
22 Head actually does not on it's own current standing
23 forms and website.

24 But the legislature has decided that
25 anyone with a substantial interest under the

1 6-29-820, any person who has a substantial interest
2 may appeal the decision of the BZA to the Circuit
3 Court. And certainly, that is where we are today.
4 But, Judge, to address any kind of bullet points
5 which I have set forth in my brief.

6 First and foremost, we believe that
7 Mr. Johnson and his clients and the Town, in fact,
8 are estopped to argue this whatsoever at this point
9 because the August 27th decision -- actually it
10 was dated August 30th -- final decision that was
11 issued by the Board, the BZA Board, the notice of
12 action, was never appealed by either of them. And
13 there is clearly a definitive finding of law in the
14 rejection of the motion to dismiss. Having not
15 appealed that, it is -- basically, it is the law of
16 the case and cannot be appealed to the Circuit
17 Court. We believe they've waived any right to that
18 whatsoever.

19 Secondly, the notice of action dated that
20 date was -- excuse me, Judge. I lost my page.

21 MR. ALFORD: There's too many pages.

22 MR. TAYLOR: First, Judge, and then
23 preserved in that argument that they have waived it

24 by failing to adequately appeal the notice of
25 action. And I don't think there's any dispute that

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1 they both failed to do that. Then we would contend
2 and a multi-part response is that first we have the
3 right as an aggrieved person with a substantial
4 interest in it to file the appeal. The review of
5 the record on appeal confirms that we did in fact
6 make that argument at our initial appeal as we
7 talked about earlier from Nicole Dixon's letter.

8 Your Honor, secondly, we'd point out as is
9 attached as Exhibit 2 to the brief that the Town of
10 Hilton Head as of March 9th when this was filed on
11 their website as part of their appeals submittal
12 requirements, and it's Exhibit 2 to the brief as
13 part of their appeal submittal requirements,
14 specifically provides that any property owner
15 within -- that an aggrieved person is defined by the
16 town of Hilton Head as any property owner within
17 350 feet of the property for which a decision or
18 determination has been rendered.

19 On its face, the Appellants are property

20 owners or review of the record confirms that the
21 original appeal application filed by the Appellants
22 did include the two-page attachment to the
23 application form which is attached as Exhibit 2.
24 And that Nicole Dixon's November 14th, 2016,
25 memorandum to the BZA on the Spinnaker Welcome

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1 Center includes the two-page attachment to the
2 appeal application as part of her Exhibit A.

3 Therefore, the Town's definition of an
4 aggrieved party is in the formal record of this
5 appeal and is before this court, presently. The
6 Town itself defines us as an adjacent property owner
7 as an aggrieved person in their own formal
8 documentation that is available right now, I assume,
9 if you look on the website.

10 Your Honor, next we -- the original
11 narrative attached to the appeal to BZA alleges that
12 both the Petitioners have standing to sue because
13 they are owners of land that is contiguous with
14 Parcel E. They are owners of property subject to
15 the Waterside PUD covenants, as is the owner of

16 Parcel E. And they are both owners of property and
17 have rights in and to the properties comprising the
18 watershed, the Waterside PUD tract, under the Town
19 approved 1987 master plan for the Waterside PUD.

20 Thus, we further have standing pursuant to
21 South Carolina Code Annotated 6-29-800(b) to be here
22 and to have the standing in front of this court.

23 Next, Your Honor, we urge that the court
24 take judicial notice of the fact that the assignment
25 of declarant rights that was given to the

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1 Appellant/Petitioner Beachwalk Hilton Head, and you
2 will see that attached as Exhibit 3 to the brief,
3 shows that we have further standing. That, on
4 August 11th, 2016, Pope Avenue Associates assigned
5 those rights of the declarant under that certain
6 declaration of covenants, conditions and
7 restrictions. And a copy of that which is filed of
8 -- in Record Book 3505 at Page 3332 has been
9 supplied to the court with my brief.

10 And then, Your Honor, as to the
11 particularized injury that we've talked about today,

12 I remind the court again that our main argument is
13 that there is not available density left in the
14 Waterside PD-2 Overlay District for the development
15 of the Spinnaker Welcome Center. We contend that
16 even without the development of the Welcome Center
17 that the overall density of the district already
18 exceeds the maximum density permitted under the LMO.

19 The PD-2 average density requirements is a
20 limitation that affects all owners of property
21 within the PD-2 Overlay District, not just SDC
22 Properties as the owner of Parcel E but also the
23 Appellants.

24 Thus, because the overall Waterside PD-2
25 Overlay District is already nonconforming with the

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1 LMO's maximum density limitation, allowing the
2 development of the Spinnaker Welcome Center will
3 increase that nonconformity and that presents the
4 absolute potential for a material adverse impact on
5 the Appellants, if and when, the Beachwalk Hotel
6 tract is redeveloped.

7 And this is exactly the sort of

8 particularized injury to which the Appellants will
9 be subject if the Welcome Center redevelopment is
10 allowed to proceed.

11 Your Honor, I would remind the court again
12 that this is a motion for summary judgment. There
13 is no other motion pending before the court. There
14 is not a separate motion to dismiss or anything of
15 that. This is a motion for summary judgment
16 premised upon the fact that, accordingly, the Board,
17 the BZA failed to embrace the motion to dismiss at
18 the BZA level. And thus, somehow Mr. Johnson's
19 clients wish to have this court now on a summary
20 judgment level evaluation dismiss it here with the
21 record that's in front of them. And that would be
22 improper.

23 Your Honor, I would like to see if my
24 co-counsel has any other to put on this.

25 MR. WILLIAMS: On the issue of

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1 standing.

2 MR. TAYLOR: Yes, on the issue of
3 standing. Nothing further, Judge.

4 MR. ALFORD: Your Honor, I'm sorry.

5 I don't mean to drag it on. I might need -- I mean,
6 I'm often wrong, rarely in doubt. But it seems like
7 standing even if they -- I respectfully don't buy
8 that it's a quote/unquote law of the case and it was
9 decided below and not appealed.

10 My understanding of standing is it's right
11 up there with -- it's essentially a subject matter
12 jurisdiction concept is that you, Your Honor, could
13 raise it sua sponte. And so I'm not -- I'm not
14 going to argue anymore the merits. You know, we've
15 made our arguments on that. But I thought,
16 procedurally -- I mean, you can't -- a mistake below
17 that's not appealed regarding standing doesn't
18 therefore manufacture standing, if that makes any
19 sense.

20 I think someone told me that about a lis
21 pendens or something. I don't know.

22 JUDGE DUKES: It does make sense.
23 But, I mean, let me make sure I understand. The
24 properties are next door neighbors to one another --

25 MR. ALFORD: Yes.

1 JUDGE DUKES: -- is that accurate?

2 MR. TAYLOR: They're contiguous, Your
3 Honor.

4 JUDGE DUKES: And they're in the same
5 PUD and they're in the same overlay --

6 MR. ALFORD: Yes.

7 JUDGE DUKES: -- and they're in the
8 same this and same that. So, I mean, I sort of tend
9 to err on the side of caution to create standing
10 rather than do away with standing. Maybe that's my
11 error. But I mean, at least, my thought has always
12 been, if my next door neighbor is doing something
13 that I could potentially -- is aggrieved -- could be
14 aggrieved by then maybe I've got standing.

15 But anyway, it's not a ruling but just my
16 thoughts.

17 MR. ALFORD: And I understand that,
18 Your Honor. I think our difficulty on this side of
19 the table is that never was it espoused in those
20 proceedings below what that harm was because of the
21 -- Mr. Johnson did a nice job of putting in the
22 record that the back -- the back-and-forth between
23 Mr. Williams and the Board, the BZA about, I'm
24 trying to figure out how you're hurt here. Tell me.

25 We just want to know the rules.

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1 JUDGE DUKES: Well, and of course, I
2 think I remember the argument from whenever we were
3 here. Mr. Taylor, I think, saying more or less what
4 he said a minute ago which is here's our concern.
5 There's a certain amount of density. There's a
6 certain amount of pie available in this PUD or in
7 this overlay or whatever it is. If you guys take a
8 bigger slice, when we go back for our piece of the
9 pie, it might not be there. And to put it in simple
10 food terms that I like to --

11 MR. ALFORD: I like food terms, Your
12 Honor. But I'll say that I -- and I guess I
13 completely understand that sitting at this table,
14 but I'm not sure that was the record developed
15 below. And I'll leave it there.

16 MR. WILLIAMS: And if I may. They
17 made those arguments before the Board and the Board
18 unanimously did not grant their motion to dismiss.
19 The Board is authorized to make finding of fact and
20 conclusions of law and that is clearly a conclusion

21 of law that standing is there.

22 MR. JOHNSON: Could I respond
23 briefly, Your Honor?

24 JUDGE DUKES: Yes, sir, please.

25 MR. JOHNSON: As to the issue of

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1 predicate for the Board's decision, Page 211 of the
2 transcript at Line 4, the chairman said, I'd like to
3 hear a motion from a Board member on the question of
4 counsel's motion to dismiss. Mr. Walczak said,
5 well, as I've said earlier, you know, I was sent
6 here -- it was sent here to us to make a decision.
7 And I don't think we should summarily dismiss it as
8 they suggest. So whatever motion is for that, I so
9 move.

10 The predicate of the motion to deny our
11 motion to dismiss was that they were supposed to
12 answer three questions. And that's what they were
13 supposed to do. And they should not refuse to do
14 that on our argument. And so, I think the record is
15 clear because the motion was seconded and they went
16 on and voted that way on the predicate that that was

17 not part of their portfolio of tasks on that day.
18 And if they granted my motion, then they couldn't do
19 the things you ordered them to do. I don't think
20 that's anything but them saying, hey, that's not
21 part of our task.

22 The point that Mr. Alford just made bears
23 some recitation. Since we filed this motion, these
24 guys have wheeled around, and you mentioned
25 something that may have been said. I don't remember

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1 particularly that way at the first hearing -- I
2 don't disagree with Your Honor -- first hearing
3 before you. But that hearing resulted in an order
4 in April. We were before the Board in August of
5 last year and none of that business about losing
6 density came up. The point was we just want to know
7 what the rules were -- rules are. That's it. That
8 is not a particularized injury. And on our motion,
9 I respectfully think the court has to decide the
10 motion on the basis of what's in the record, not on
11 the basis of counsel's arguments purporting to
12 change their position after they made the record

13 themselves. Particularly when they never produced a
14 witness to meet their burden of proof on standing.

15 And I understand standing motion is early,
16 very serious, very dramatic thing. Their damages
17 that they think they might have in mind are just
18 speculative, as well as not being based on anything
19 in the record that's before this court. And so I
20 think their records -- their arguments should simply
21 be disregarded by the court.

22 JUDGE DUKES: Thank you so much.
23 Let's see. So now you've got your summary judgment
24 motion, right? Or did you want to respond to that
25 part?

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1 MR. TAYLOR: I did. And I think it's
2 appropriate for me to have the last word --

3 JUDGE DUKES: Sure.

4 MR. TAYLOR: -- Since it's a motion
5 against us, Your Honor.

6 JUDGE DUKES: Well, I've lost track
7 of whose motion it is at this point.

8 MR. TAYLOR: Your Honor, I just -- I

9 just want to point out that this is not an issue of
10 damages. And the question of speculative damages at
11 this -- at this juncture is not really appropriate
12 for the court's consideration because this was an
13 appeal to the BZA based upon Mr. Williams -- the
14 letter that was written to Mr. Williams telling him
15 it's a determination letter and inviting him to
16 appeal it.

17 We don't have to prove any particular
18 damages or whether they're speculative or not. All
19 we have to do is prove standing which I think
20 clearly we have pled and we have shown certainly
21 sufficiently to pass any type of summary judgment.

22 And, Your Honor, that's all I have to say
23 about that.

24 JUDGE DUKES: Thank you so much. Are
25 you ready to launch into your --

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1 MR. TAYLOR: I am. And it will be
2 much briefer.

3 JUDGE DUKES: All right. Well, have
4 at it then.

5 MR. ALFORD: Start the watches.

6 MR. HULBERT: I'm timing you.

7 MR. ALFORD: Yeah, let them see this.

8 MR. TAYLOR: Your Honor, on April
9 20th, 2018, this court entered an order that
10 basically says substantively and importantly,
11 despite extensive presentations and questioning at
12 the hearing before the BZA on November 28th, 2016,
13 I find the record is unclear as to certain issues
14 that I believe are important for appropriate
15 judicial review of this appeal including the basis
16 for the BZA's decision.

17 Thus, I determined that the certified
18 record of the proceedings before the BZA and
19 application for appeal, APL 001673-2016, is
20 insufficient for review. And I hereby remand this
21 matter to the BZA for a rehearing and direct the BZA
22 to specifically focus upon and answer the following
23 questions for the courts further consideration.

24 And, Your Honor, I'm now for purposes of
25 the argument going to incorporate the notice of

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1 action earlier referred to dated August 30th,
2 2016, by the BZA which is a part of the record. The
3 courts first question, A, is Parcel E in PD-2
4 Overlay District is in -- pardon me. Is Parcel E in
5 a PD-2 Overlay District established by the LMO?

6 The BZA's answer to that question reads,
7 Judge Dukes' Question A on remand order is Parcel E
8 in a PD-2 Overlay District established by the LMO?
9 Mr. Johnson made a motion to affirm that Parcel E is
10 in a PD-2 Overlay District as established by the
11 LMO. Mr. Walczak seconded it. The motion passed
12 with a vote of 6-0-0. So, Your Honor, the answer to
13 Question 1 was, yes.

14 The court's Question 2. If Parcel E is in
15 a PD-2 Overlay District, is Parcel E subject to the
16 LMO PD-2 Overlay District regulations. The Board's
17 notice of action states, Judge Dukes' Question B in
18 remand order, if Parcel E is in a PD-2 Overlay
19 District, is Parcel E subject to the LMO's PD-2
20 Overlay District regulation?

21 The answer. Ms. Laudermilt made a motion
22 that Parcel E is subject to the LMO's PD-2 Overlay
23 District regulations. Mr. Johnson seconded. The
24 motion passed with a vote of 6-0-0. So the answer

25 to the Question 2, Your Honor, by the BZA is, yes.

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

8 Once again, Your Honor, referring to the
9 notice of action, I will not read the entire
10 question in, again. But I will say that on Page 2,
11 Judge Dukes' Question C is written. Well, I think
12 we should, Judge, for the record because it says,
13 Judge Dukes' Question C in remand order Part 1, if
14 Parcel E is subject to the LMO's PD-2 Overlay
15 District regulations, what effect does that have on
16 development of Parcel E?

17 And in response, the BZA said, Ms.
18 Laudermilt moved that because we've determined that
19 Parcel E is subject to the LMO's PD-2 Overlay
20 District, we need to take into consideration the

21 existence of the PD-2 Overlay District and its
22 regulations as we consider development of Parcel E.
23 Mr. Walczak seconded and the motion passed 6-0-0.
24 So the BZA answered the first part of your question,
25 yes, of the BZA should take into consideration the

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1 existence of the PD-2 Overlay District and its
2 regulations as we consider development of Parcel E.
3 And then the last portion of the relevant
4 part of the Board's action is Judge Dukes' Question
5 C on remand order, Part 2. Must the existing
6 development on the other parcels within the PD-2
7 Overlay District be taken into account in connection
8 with any proposed development on Parcel E?

9 And the answer of the BZA is Mr. Walczak
10 move that the existing development on the other
11 parcels within the PD-2 Overlay District must be
12 taken into account with any proposed development of
13 Parcel E. Vice Chairman Cutrer seconded. The
14 motion passed with a vote of 6-0-0.

15 Your Honor, the BZA did what you asked
16 them to do. They answered the three questions. And

17 each answer is directly and specifically in line
18 with the arguments the appellants made. Must the
19 PD-2 Overlay Standards be taken into affect on all
20 the parcels? Yes. And if so, what do we do with
21 it? And the answer is we take it into account.

22 Your Honor, there is undisputed testimony
23 and you'll recall in the transcript that Nicole
24 Dixon testified that if, in fact, the requirements
25 of the density of the PD-2 Overlay District are

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1 applied, then the Welcome Center does not fit within
2 the parameters of the requirements of the Town of
3 Hilton Head. That is the crux of the issue. And
4 the BZA has answered it, yes.

5 What I think is vitally important, Your
6 Honor, is to remember that the BZA and this court
7 did not take under advisement a complete
8 reconsideration of this. The court could have sent
9 this back down and simply said reconsider it again,
10 but you didn't. The court sent down and said, I
11 need an answer to these three questions and they
12 have given it. And the answer is in the affirmative

13 as to every question.

14 That being said, Your Honor, under the
15 undisputed, un-appealed notice of action and the
16 answers that are therein, there is no genuine issue
17 as to any material fact continuing in this case.
18 And the appellants are entitled to an order of
19 judgment as a matter of law under our summary
20 judgment statute because the questions have been
21 answered and the court, I believe, clearly now knows
22 that the BZA should have considered that and they
23 simply made a mistake. And that's what they have
24 acknowledged by the answers to questions. And we
25 believe that clearly as a matter of law at this

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1 point, we are entitled to an overturning of the
2 BZA's initial action.

3 Again, Your Honor, keeping in mind that
4 this was not a rehearing order to reconsider this.
5 And the BZA did not take the step further of taking
6 those answers that they found and applying them to
7 the evidence. They assumed this court was going to
8 do that and that they had only been asked to answer

9 the questions brought to their attention.

10 And, Your Honor -- Chet, anything else?

11 MR. WILLIAMS: Yeah, Your Honor, I'd
12 point out that prior to the August 2018 hearing, the
13 Town submitted a memorandum to the Board of Zoning
14 Appeals addressing their view of the correct answer
15 to the three questions the court had posed back at
16 the BZA.

17 They agreed with us on the first two.
18 Parcel E is in a PD-2 Overlay District and the PD-2
19 Overlay District regulations are applicable to
20 development of Parcel E.

21 They don't agree -- they did not agree
22 with us on the third issue, do you have to take into
23 consideration the other development within the PD-2
24 Overlay District when reviewing the development
25 potential of Parcel E. And in that memorandum which

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1 is Exhibit A to the Appellants/Petitioners return to
2 the court's (inaudible). They say flat out the PD-2
3 Overlay District regulations do not have any effect
4 on the development of Parcel E, nor does the

5 existing development with the PD-2 have to be taken
6 into account with any proposed development of Parcel
7 E.

8 The Board of Zoning Appeals answered that
9 question directly opposite the Town's position. The
10 fact of the matter is is that the Town wants to
11 interpret the LMO so that one and only one section
12 of the PD-2 Overlay regulations is not applicable to
13 Parcel E. Everything else is but the average
14 density requirements of the PD-2 Overlay District
15 isn't applicable to the development of Parcel E.

16 And the best Nicole Dixon could offer and
17 the Town could offer at the hearing was, well,
18 that's how we interpret the code. Well
19 interpretation is okay if it's unclear, but there is
20 no ambiguity there. If the regulations are
21 applicable, the regulations are applicable. And if
22 the regulations include the average density
23 requirements then that regulation is applicable.
24 And Nicole Dixon did in the record that if she has
25 to apply the average density regulations for the

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1 PD-2 Overlay District to the development of Parcel
2 E, then there is no density available for the
3 development of Parcel E.

4 Whether or not there's any evidence to
5 support the BZA's decision is irrelevant if they've
6 made a mistake of law. And clearly the whole basis
7 of the Town's position was they had the law wrong.
8 And that's the crux of the substantive matter before
9 us.

10 MR. TAYLOR: Your Honor, thank you.

11 JUDGE DUKES: All right. Thank you
12 so much. Happy to hear from whoever is responding.

13 MR. JOHNSON: Your Honor, I'll try
14 not to replot old ground. I will note that your
15 Question Number 3, or called C in your order of
16 April of last year, is a multipart question. If
17 Parcel E is subject to the LMO's PD-2 Overlay
18 District regulations, what effect does that have on
19 the development of Parcel E? That's part one.

20 Part two and must the existing development
21 on the other parcels within that PD-2 Overlay
22 District be taken into account in connection with
23 any proposed development of Parcel E?

24 It's my impression that the Town's notice
25 of action taken on the portion of Question 3

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1 concerning, quote, what effect does that have on the
2 development of Parcel E? Their answer is we need to
3 take into consideration the existence of the PD-2
4 Overlay District and its regulations as we consider
5 development for Parcel E. And they voted 6-0 for
6 that.

7 The reality is that begs the question. It
8 does not answer the question of what effect does
9 that have on the development of Parcel E? To
10 paraphrase an old song, is you is or is you ain't?
11 Can we --

12 JUDGE DUKES: I've never heard that
13 one before.

14 MR. JOHNSON: It's a great song.

15 MR. ALFORD: It's a musical day here.

16 MR. JOHNSON: It's a blues song. Can
17 we do the development of Parcel E as a Welcome
18 Center as had been approved by Ms. Dixon and the BZA
19 or not? That's the issue of what effect does this
20 has. They don't answer that question. They just
21 say, well, we have to take it all into

22 consideration.

23 So that brings us back to how do we do
24 that? In the transcript of August of 16, Nicole
25 Dixon testified beginning at Page 150 and going on

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1 for some pages. And she talks about these issues
2 particularly. And I don't want to get into the
3 elaboration there, but the point of that is that
4 this overlay requires consistency between the zoning
5 of the underlying district, which in this case is
6 the RD or Resort Development District, this is like
7 right downtown Coligny/Hilton Head, and this overlay
8 district. And that nuance is not resolved by the
9 BZA.

10 And the way they purported to answer
11 question, I'll call it 3-A or Part 1 of 3, Ms. Dixon
12 answered it and explained that under the RD
13 Zoning -- and I don't remember if it's in this place
14 or not. But it's in the record that under the RD
15 Zoning, the underlying zoning, they could do
16 something over 8,000 square feet of commercial on
17 the acreage owned by SDC Properties. So they're

18 doing the 7,500.

19 And so the way they have sorted out this
20 novel and first impression case is how to relate
21 that district to the underlying zoning as required
22 by the code answers the question of what effect does
23 taking all that into consideration have on the
24 development of Parcel E?

25 I'm not unmindful that if I were in their

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1 shoes I would take the position, and perhaps the
2 court would consider it to, that if they don't allow
3 us to do this with the property on the proposition
4 that we can't do anything then the Town's zoning has
5 effectively taken away a hundred percent of the
6 economic utility of the property. And that will
7 precipitate a new lawsuit.

8 And there is substantial case law that
9 indicates that zoning should not be a weapon that
10 removes a hundred percent of the economic utility of
11 property. Lucas case that we all know about is a
12 good example of that.

13 The Town here with its ordinance and its

14 consideration of the Underlying Zoning District, the
15 RD District has made a decision that I think is a
16 reasonable legal decision. The Board -- the BZA for
17 whatever reason when they get into their
18 deliberations, they did not specifically address it.

19 You may want to send it back and have them
20 specifically address it. I hope not because my
21 client's been waiting three years just to exercise
22 their permit to build this property. They might not
23 get done with this until we're in the middle of next
24 recession. And that won't be satisfactory.

25 So they've made a decision. It's a

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1 reasonable interpretation of some nuances of
2 understanding here about the Town ordinance. And
3 they've made it in a way that's consistent with the
4 principle that zoning should not destroy the
5 economic value of the property. And I therefore
6 don't think that it would be appropriate for this
7 court to conclude as a matter of law that that
8 decision of the zoning official was wrong.

9 I think that's all I've got. Just a

10 second. That's all I've got.

11 MR. ALFORD: Your Honor, if I may be
12 heard.

13 JUDGE DUKES: Yes. Please go ahead.

14 MR. ALFORD: Because it's -- you know
15 what? Thanks to Mr. Hulbert I actually remember
16 what this case is about. I mean, thank you, Brian.
17 Mr. Williams talked a lot about Ms. Dixon admitted
18 this and admitted that on the record. But she
19 actually did a really good job of explaining her
20 decision.

21 MR. JOHNSON: Right.

22 MR. ALFORD: And it's in
23 Mr. Johnson's memo on Page 26 at the top.

24 MR. JOHNSON: Right.

25 MR. ALFORD: The conversation

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1 actually begins earlier and I kind of forgot -- I
2 mean, there's just -- it's just --

3 MR. JOHNSON: It's the last page or
4 two of my memorandum.

5 MR. ALFORD: It's a thick record,

6 Your Honor. But if you go to what -- I'd forgotten
7 what happened. This thing was a PD-2 and it had a
8 categorical exemption, which is a grand title. So
9 the guy asks her, at the top of Page 26 in
10 Mr. Johnson's memorandum, his most recent one -- do
11 you have his most recent one? The one file by --
12 Yeah.

13 JUDGE DUKES: My Page 26 doesn't have
14 it.

15 MR. ALFORD: Maybe I'm actually --
16 you know what? I'm in his answer to -- I'm in his
17 document where he talked about replying to the
18 questions. I'm sorry, Your Honor. But let me just
19 read because there's no question --

20 MR. JOHNSON: There is address to
21 some of this, I think.

22 JUDGE DUKES: Oh, I see. It's in
23 page -- it starts on Page 8, maybe. No, that's --

24 MR. ALFORD: Well, no. Your Honor, I
25 apologize. I am looking at a different document

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1 because I had to go back.

2 MR. JOHNSON: It's addressed in my
3 brief at Page 24, 25 and 26, but not in the detail
4 that Greg's about to tell you about.

5 MR. ALFORD: Can I -- can I just read
6 to you?

7 JUDGE DUKES: Yeah, go ahead.

8 MR. ALFORD: So the BZA guy asked
9 her, Mr. Cutrer, so we take the parcel today, how
10 does this application comply with the current LMO
11 and how does it comply with the PD-2 Overlay.

12 Answer, Ms. Dixon, the PD-2 is always
13 going to be there. Now, as far as them being tied
14 to the density that was shown on the original
15 conceptual plan, they don't have to be tied to that.
16 They have to be tied to the current LMO standards.

17 Going back a little -- in the record a
18 little further what she talked about, what happened
19 to this property -- I remember now. It was that
20 this property enjoyed a categorical exemption which
21 set the zoning -- set the density. I'm sorry. The
22 zoning was PD-2. They had this exemption that dealt
23 with how much density can you have and not have.

24 JUDGE DUKES: All that expired.

25 MR. ALFORD: It expired.



1 JUDGE DUKES: Right.

2 MR. ALFORD: So, what happens then
3 when it expires? It expires and Ms. Dixon's
4 determination was, okay, now you have to meet the
5 current LMO standards for that parcel. And that's
6 why I decided it this way. And she actually says to
7 the guy -- I kind of admire her for it -- and if you
8 don't like it, you can reverse it.

9 But, I mean, that's -- I think when you
10 kind of boil this thing down because the history of
11 this parcel I said is somewhat -- the whole PUD --
12 PD-2 thing is torture. But that, I think, is what
13 happened here is that there was this categorical
14 exemption that set density limits.

15 And when that expired, Ms. Dixon says,
16 okay, now I just have to look at this parcel as it
17 sits in this PD-2. They're no longer tied together
18 that way. I find that they have the density. The
19 Board of Zoning Appeals upheld that decision. There
20 was evidence before them to do so.

21 And, respectfully, Your Honor, I -- and I

22 guess I was wondering that driving over here along
23 with why -- anyway -- other things -- is that
24 procedurally speaking, because I was trying to
25 figure out procedurally where we are and juxtaposing

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1 the standard of review that the court is stuck with
2 on a BZA appeal and the summary judgment standard.
3 Where are we in that mess because I respectfully
4 think there's no way you can grant -- respectfully,
5 that you couldn't grant their motion for summary
6 judgment based on the answering of the question.

7 And I think that leaves the court back in
8 the standard of the any evidence standard on the
9 first ruling which was based entirely on this little
10 bit of Ms. Dixon's -- I'm impressed she was able to
11 boil it down -- PD-2 is the zoning. The exemption
12 that set -- that capped that density expired. Now
13 you've got to comply with the current LMO. And I
14 find that you do. Go ahead and build it. And so
15 that was how she explained it to the BZA in the
16 record.

17 And I would tell the court that -- it's --

18 and I guess that's kind of why I was asking a
19 procedural question. Are we -- is this our hearing
20 to decide -- our second hearing to decide the case
21 or is this just a motion hearing.

22 I mean, in other words, I'm -- but leaving
23 all that aside, from my perspective, I would submit
24 to the court that she explained what she did. The
25 BZA said, yes. We agree. There was evidence in

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1 front of them to support that including her
2 testimony which is evidence. And they ruled that
3 way. That's not an error of law.

4 Thank you.

5 JUDGE DUKES: Thank you. Yes, sir.

6 MR. WILLIAMS: The BZA --

7 Mr. Alford -- the BZA ruled that way. And then it
8 came up to you and you said the record is
9 insufficient for review. You sent it back to the
10 BZA for them to answer three questions. But let me
11 get to that in a moment.

12 But Mr. Alford has mischaracterized
13 categorical exemption. And it ties into

14 Mr. Johnson's arguments about a taking. And a
15 takings issue shouldn't be germane at all to this
16 particular decision. It may or may not end up being
17 a regulatory taking.

18 The categorical exemption, though, granted
19 the SDC's predecessor in title and also SDC the
20 right to develop Parcel E in a manner that would
21 exceed what was the then current LMO regulations.
22 And that categorical exemption was valid for several
23 years during which SDC owned the property. SDC
24 elected not to avail itself of the benefits of that
25 categorical exemption which means that those rights

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1 went away.

2 And Mr. Johnson has tried those cases.
3 Mr. Johnson can tell you that the categorical
4 exemption process was a valid process. But that
5 doesn't mean that everything in the PD-2 went away.
6 All it means is that SDC's right to develop Parcel E
7 in a manner that was previously provided for but no
8 it is longer provided for expired. Now they have to
9 comply with the current code regulations.

10 JUDGE DUKES: And you all agree on

11 that, right. I mean --

12 MR. TAYLOR: That's what he said.

13 MR. ALFORD: We agree and then she --

14 I'm sorry.

15 MR. WILLIAMS: So -- but the current

16 code regulations, if we were looking at Parcel E as

17 a standalone parcel in the RD District without the

18 effect of the PD-2 Overlay, then, yes, she could --

19 you could develop this project on there and be in

20 compliance.

21 The code says, however, if you're in a

22 PD-2 Overlay District, PD-2 regulations control over

23 the base zoning regulations. Those are the answers

24 for the first two questions. Is it in a PD-2

25 Overlay District? Yes, it is. Is it subject to the

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1 PD-2 Overlay District regulations? Yes, it is.

2 The third question then is so what effect

3 does it have and do we have to take into account the

4 development of the other parcels. Yes and yes. And

5 therein is the average density regulations. When

6 you take a look at the average density that's
7 currently in existence in the Waterside PD-2 Overlay
8 District, it exceeds the maximum permitted amount
9 for that 15.1 acres in the RD District. That means
10 there's no density left.

11 And unfortunately, SDC didn't avail itself
12 of its ability to develop the property before. But
13 just because it sat on its rights and didn't
14 exercise it, I don't think that rises to the level
15 of the fifth amendment taking assuming that was even
16 germane here.

17 Mr. Johnson was quite skillful at the
18 August 2018 hearing in planting that seed in the
19 minds of a number of the BZA members. That, well,
20 gosh, we shouldn't overrule the Town because it'll
21 make this piece of property worthless. And that's
22 evident from the transcript. That's evident from
23 the notice of action and the motion where
24 Mr. Cutrer, who made that motion, specifically
25 referred to the Lucas case. But that motion failed

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1 on a tie vote.

2 The fact of the matter is that Nicole
3 Dixon has interpreted the LMO to say that even
4 though Parcel E is in a PD-2 Overlay District and
5 it's subject to the PD-2 Overlay District
6 regulations, it's not subject to this one particular
7 PD-2 Overlay District regulation having to do with
8 average density. That is a mistake of law. That is
9 wrong. It doesn't matter how much evidence there is
10 in the record that supports that decision if it's
11 wrong as a matter of law. And that's the heart of
12 the substantive matter here.

13 JUDGE DUKES: All right. And back to
14 the Respondent real quick. I've had an opportunity
15 to read, you know, the subsequent memo and all of
16 that. And you all agree on a lot more than I
17 thought you would. It's really down to, I think you
18 all might agree, I understand there's standing
19 issues that you all have an issue with, Mr. Johnson.

20 But the section of Mr. Dixon's memo that
21 deals with what we're talking about right now, I
22 guess -- let me see if I can find it. Staff does
23 not believe at this point that density needs to be
24 averaged for the PD-2 since this was clearly taken
25 into account when the master plan was created. I



1 mean, is -- that's what you're talking about, right,
2 that that sentence, that finding --

3 MR. WILLIAMS: Correct. She says,
4 no, that the average density regulations of the PD-2
5 Overlay District don't apply to Parcel E. But the
6 BZA in answering the question says that all of the
7 PD-2 Overlay District regulations applied to Parcel
8 E. So you -- those are inherently in conflict.

9 JUDGE DUKES: So focusing on that
10 point, which I know involves probably replowing some
11 ground, but help me with what at least the Appellant
12 believes is a conflict in the memo, the August
13 18th memo on that issue.

14 MR. JOHNSON: What the Appellant
15 believes is a conflict?

16 JUDGE DUKES: I'm sorry. The
17 Respondent.

18 MR. ALFORD: Respondent.

19 JUDGE DUKES: I apologize. I got you
20 all mixed up. Did that yesterday, too.

21 MR. JOHNSON: It's alright. The --
22 again, look at the testimony beginning somewhere

23 around Page 150 in the transcript. It goes on for
24 pages where Nicole discusses all of that, and also
25 in that memorandum. And she's looking at when the

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1 categorical exemption certificate expires then the
2 property is subject to the LMO. It's in the RD
3 District. Under that, this property is entitled to
4 build 8,000-odd square feet of commercial. The
5 approval was done on 7,500 square feet which is what
6 they asked for. She finds that to be consistent
7 with the code.

8 There is a conflict between averaging the
9 density on the whole thing and being able to develop
10 SDC's property consistently with the current LMO.
11 She resolved that conflict the way she did. The BZA
12 upheld it. The BZA did not reverse that in the
13 decision on Round 2 in answering your questions.

14 As I said earlier, they specifically did
15 not answer in Round 2 the question of, quote, what
16 effect, end of quote, does taking all that into
17 consideration half? Nicole Dixon did take all that
18 into consideration and -- so the BZA has not given

19 you any guidance there on that issue. So it's I
20 guess the case on this issue comes down to what you
21 think Nicole did and how she testified about it in
22 Round 2 and how it's reported in her original
23 determination letter and her subsequent memorandum
24 that led to BZA Round 2.

25 JUDGE DUKES: All right.

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1 MR. WILLIAMS: And with respect to
2 that, I mean, the Board did give you the guidance in
3 the second part of the Question 3. They say, yes,
4 the development on the other parcels in the PD-2
5 Overlay District have to be taken into consideration
6 when considering the development potential of Parcel
7 E.

8 MR. JOHNSON: But they don't say how.

9 MR. WILLIAMS: That's it. There's
10 only one regulation of the code that deals with that
11 and that's the average density regulation. It's
12 that -- and one -- they want to pick that one part
13 out and put it aside and pretend like it doesn't
14 exist -- doesn't apply in this situation. And

15 that's just wrong.

16 MR. ALFORD: But respectfully, I
17 don't think that's what she said. If -- however it
18 shakes out she says, I determine under the code they
19 can do this. I think what I'm hearing now is don't
20 use that density because we want to. Well, as long
21 they -- as long -- if -- I'm going to go goose and
22 gander. I'm going to use it myself this time.
23 What's good for the goose is good for the gander.
24 They're trying to hold that density out so they can
25 use it. We got to it first, and that's how it

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1 works. I say we, not me, Mr. Johnson's client. I'm
2 out. In fact way out.

3 But you understand my point, Judge? Is --
4 it seems to me that -- and I guess that's why I was
5 always wondering what are you guys mad about? Why
6 are you doing this appeal? It comes to me now
7 pretty clearly. Well, we want that density.

8 So maybe they should have gotten it
9 together and done their own redevelopment so they
10 could avail themselves to the density before SDC did

11 because the code clearly seems to allow them to do
12 this.

13 I'm done.

14 MR. WILLIAMS: And the problem is
15 there isn't any density left for us to get. Nicole
16 testified that it's already over the maximum
17 permitted density. And that's why there's no
18 development potential left for Parcel E.

19 MR. ALFORD: But that would apply to
20 the whole -- under their theory, Your Honor, that
21 would apply to the whole entire PD-2. See what
22 they're trying to say is, no, there's none on Parcel
23 E. But we believe that there's some over here for
24 us and the rest of the PD-2. It don't work like
25 that if you're going to do the average density deal.

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1 That's the fallacy in their argument.
2 Hypocrisy, Your Honor. Sorry, Judge.

3 JUDGE DUKES: Anything else from
4 anyone on any of this fun and exciting case?

5 MR. ALFORD: God, it's so exciting.

6 JUDGE DUKES: All right. Well, thank

7 you so much. You all have given me a lot to think
8 about. I'll try to let you know something at some
9 point in the near future. I understand everyone's
10 waiting. I'll see what I can do.

11 If there's nothing else, that will
12 conclude the record.

13 (Whereupon, the hearing was concluded
14 at 11:53 a.m.)

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1 Certificate of Reporter

2

3 I, Deborah S. Thomas, Certified Verbatim
Reporter and Notary Public in and for the State of
4 South Carolina, do hereby certify that I reported
the hearing of 2016-CP-07-02712, Beachwalk Hotel &
5 Condominiums Association, Inc., et al v. The Town of
Hilton Head Island, et al, on the 12th day of March,
6 2019, and that the foregoing pages constitute a true
and correct transcription of the said hearing.

7
8 I further certify that I am neither
attorney nor counsel for, nor related to or employed
9 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
said transcript shall be hereafter delivered to
Kathleen McDaniel, Esquire, Burnette Shutt McDaniel,
12 912 Lady Street, Post Office Box 1929, Columbia,
South Carolina 29202.

13

14 In witness whereof, I set my hand and
sealed this 22nd of April, 2020.

15

16

17		_____ Deborah S. Thomas, CVRM and Notary Public for the 18 State of South Carolina
	My Commission expires 2/7/28	

19

20

21

22

23

24

25



1	State of South Carolina	)	Court of Common Pleas
		)	14th Judicial Circuit
2	County of Beaufort	)	No. 2016-CP-07-02712
3			
	Beachwalk Hotel &	)	
4	Condominiums Association,	)	
	Inc. and Beachwalk Hilton	)	
5	Head, LLC,	)	
		)	
6	Appellants/Petitioners,	)	
		)	HEARING
7	vs.	)	
		)	November 25, 2019
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	Respondents/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 25, 2019, at the hour of 11:01 a.m.

22 _____

DEBORAH S. THOMAS, CVRM

2019-11-25 Transcript.txt
23 80 Plymouth Lane
Bluffton, South Carolina 29909
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25

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12	Respondents/Defendants SDC's Exhibit 1 (LMO Excerpt)	9
13	Respondents/Defendants SDC's Exhibit 2 (Hearing Excerpt)	9
14	Respondents/Defendants SDC's Exhibit 3 (LMO Excerpt)	9

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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 Morning. We're
5 here in 2016-CP-07-02712. This is Beachwalk, et al
6 versus Town of Hilton Head, et al. This is
7 Plaintiff's 59(e) motion to alter or amend, filed
8 September 13th, 2019.

9 And, Mr. Taylor, I'm happy to hear from
10 you, sir.

11 MR. TAYLOR: Your Honor, thank you
12 very much. Myself and Chet Williams here on behalf

13 of Beachwalk Condominium Association and Beachwalk
14 Hilton Head. Your Honor, this case has been before
15 the court three times, and it has been well-briefed.
16 And I will not belabor my arguments. I would like
17 to hit three points relatively quickly, Judge.

18 The first is concerning the overall big
19 part of the case which is that, Your Honor, we
20 believe that the facts before the BZA reheard it
21 showed that Nicole Dixon's determination was an
22 error as a matter of law because candidly and
23 straightforwardly, Judge, everybody agrees that the
24 average density regulations of the PD-2 Overlay
25 District are to be applicable. Everybody agrees

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5

1 with that.

2 And I think everybody agrees that if you
3 take those PD-2 average density regs and you
4 incorporate the averaging, mathematically speaking,
5 there is no density left on this Parcel E for the
6 construction.

7 The Town gets around this by simply saying
8 they don't interpret it that you need to it that

9 way. We believe that even before the BZA took it
10 into account on basically a remand from this court
11 that it was an error.

12 But clearly, Your Honor, when the BZA
13 answered the third question of the courts questions
14 as to whether or not the overlay regs are applicable
15 and they said, yes, they must be taken into account
16 when considering it, then by that statement alone,
17 they made a determination that the average density
18 regs had to be put forth. And therefore, there is
19 no density left for the development.

20 Your Honor, we believe that that is an
21 error of law. And we believe the court basically
22 got caught up in looking at a number of things
23 including my point Number 2. And that is to address
24 very briefly, Your Honor, Barry has made a very good
25 argument, and it was very appealable to the Town and

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6

1 to the BZA that somehow this Parcel E was going to
2 be left non-developable. And there was even some
3 mention of a type Lucas claim. And everybody I
4 think especially -- the transcript indicates there

5 was some concern that this really put the Town in a
6 tight spot.

7 But, Your Honor, we suggest that the facts
8 are -- in the record are very clear, that SDC
9 Properties and it's predecessor had not only the
10 opportunity to develop it prior, but the even had a
11 letter from the Town itself that allowed them, under
12 what was known as a categorical exemption, a
13 five-year opportunity to develop it after that. And
14 they chose not to do so.

15 That is a self-inflicted wound for lack of
16 any other word. They chose -- SDC chose not to
17 develop it within the categorical exemption
18 timeframe they were given. Yes, you can literally
19 say now that they are not going to be allowed to
20 develop it. But the fact of the matter is they
21 developed around it. They ate of the density. And
22 they are now barred from doing it. And that is just
23 as plain as you can really do -- as you can really
24 see with the writing and the application of the
25 unquestioned numbers.

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1 The last point, Your Honor, that we wish
2 to make is on -- the order currently contains a
3 conflicting provision that on Page 7 of Paragraph
4 11, it inadvertently states that the
5 Petitioners/Appellant lacks standing when the court
6 previously ruled and so ruled in the order earlier
7 at Page 5, I have determined that the
8 Appellants/Petitioners do have standing.

9 Paragraph 11 of Page 7 should certainly be
10 deleted from the order. And we want to make sure
11 that in the event this is appealed that the question
12 of standing is clear from this court's perspective.

13 Your Honor, if I can talk to my counsel to
14 make sure --

15 JUDGE DUKES: Yeah, go ahead.

16 MR. TAYLOR: Your Honor, we're good.

17 JUDGE DUKES: Okay. All right.

18 Thank you. Yes, sir.

19 MR. JOHNSON: Please the court. For
20 the record, Barry Johnson and Lamar Johnson here for
21 SDC Properties, Incorporated. I appreciate
22 Mr. Taylor's precision and brevity. And I apologize
23 to all that I may not be quite so brief, but I hope
24 to be equally precise.

25 The focal point of all of this is in their

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8

1 arguments which they refined it to their memorandum
2 that was submitted to the court on Friday afternoon
3 and to which I have not had an opportunity to make a
4 full reply. And as I noted to the court on Friday
5 afternoon and to them, we may wish after this
6 hearing to have leave to submit a supplemental
7 opposition.

8 In their motion, they submitted six bases
9 for the motion. And I think what they argued today
10 kind of captures them. The sixth basis they
11 asserted for their motion is the standing issue.
12 And I'll plan to address that a little bit later.

13 The other five I don't think clearly get
14 to the so-called takings issue, but they do get all
15 blend into the first argument that Mr. Taylor made
16 concerning the application of Section
17 16-3-106.G.4(a). We disagree that that is
18 controlling. And we disagree that everybody agrees
19 that that is controlling.

20 I point out to the court and it would

21 simplify things probably for the record down the
22 road if I could make a couple of exhibits to this
23 hearing. Probably number these sequential if it
24 please the court.

25 JUDGE DUKES: All right. Can we just

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9

1 go off the record for a second. Then we'll let
2 Deborah do her thing. Are there going to be any
3 objections to these once you all have an opportunity
4 to look at them?

5 MR. TAYLOR: Their pretty clear,
6 Judge. It's just the ordinance and transcripts, so
7 no.

8 JUDGE DUKES: All right. Let's --

9 MR. ALFORD: None from the Town.

10 JUDGE DUKES: All right. Let's go
11 off for a second.

12 (MARKED DEFENDANT'S EXHIBIT NOS. 1,
13 2, 3 and 4.)

14 JUDGE DUKES: Back on the record. We
15 marked Exhibits 1 through 4. And my understanding
16 is there is no objection to 1 through 4 and happy to

17 hear from you.

18 MR. JOHNSON: Thank you, Your Honor.

19 If it please the court without objection and with
20 Your Honor's approval, we've entered into the record
21 four exhibits which I'll briefly identify. One is a
22 copy of a page from the Town of Hilton Head Island
23 LMO, Land Management Ordinance, that includes
24 Section 16-10-102.B.1.

25 The second exhibit is an excerpt -- a few

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1 pages of excerpts from the remand hearing from
2 before the BZA that was held on August 27th, 2018.
3 The exhibit consists of a couple of cover sheet
4 which related to that particular hearing on the
5 caption thereof.

6 And then we have included Pages 121 and
7 122 and 145 and 146. I have to make sure that Ms.
8 Thomas in that one got the copy that has 145 and 146
9 attached to it.

10 And then the next exhibit is an excerpt
11 from the LMO that contains revisions that were refer
12 to by Mr. Taylor, Section 16-3-106.G.4.(a). And I

13 forgot to give to Ms. Thomas to make it an exhibit
14 although I showed it to counsel one other page which
15 I'd like to mark as Exhibit 5 without objections and
16 court approval which is a copy Exhibit 2 from the
17 remand hearing.

18 JUDGE DUKES: Okay. So that one will
19 be 5 without -- to this hearing without objection,
20 previously stamped as 2.

21 (OFF RECORD DISCUSSION)

22 JUDGE DUKES: Number 5 which is a
23 duplicate shall be deleted. We're back to 1 through
24 4 without objection.

25 MR. JOHNSON: Mr. Taylor noted this

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11

1 case does have a long history and we've been here
2 several times. In a memorandum that we did file
3 last Tuesday the 19th of November, prior to
4 receiving their referendum on Friday the 22nd, we
5 outlined that procedural history over several pages.
6 I just wanted to draw that to the court's attention.

7 It's our view that all issues raised in
8 this motion except the 6th base of the motion which

9 bushes related to the standing issue are addressed
10 appropriately in all the evidence contained in the
11 transcribed testimonies of the BZA hearings and the
12 submissions for those hearings by the Town of Hilton
13 Head Island into the record on appeal and in it's
14 updated record on appeal incident to the BZA remand
15 hearing.

16 Second, for purposes of this hearing
17 today, we incorporate the content of our brief in
18 reply to the court's post-hearings questions filed
19 March 12, 2008.

20 Third, as to all of the issues raised
21 today, we specifically incorporate the order-ending
22 case by Judge Dukes filed September the 11th, 2019.

23 Fourth, we believe that these as submitted
24 establish the requisite elements of fact in the
25 record to justify Ms. Dixon's determination letter

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12

1 and the three BZA hearings already had under the
2 Vulcan principles, a case cited in the memorandum
3 from November 19th.

4 We also believe that the record and the

5 law makes it clear that the decision by Ms. Dixon
6 and the decisions by the BZA were neither arbitrary
7 nor capricious nor any abuse of their respective
8 discretions nor illegal in any way.

9 I would draw Your Honor's attention -- can
10 I had up the exhibits to Your Honor? If I could do
11 that.

12 JUDGE DUKES: Thank you very much. I
13 have 1 through 4.

14 MR. JOHNSON: I'm going to ask Your
15 Honor to take a look at Exhibit 1 and focus on the
16 part that is Subsection B.1. of Section 16-10-102 of
17 the LMO.

18 JUDGE DUKES: Density.

19 MR. JOHNSON: It's in the section of
20 the LMO that's entitled definitions. And it
21 provides a method appropriate to different
22 circumstances by which density is calculated and
23 mandates as Your Honor will read there.

24 In the first sentence it's a measurement
25 of density of the development of a parcel of land

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13

1 calculated by dividing total number of dwelling
2 units by the net acreage of the parcel for
3 residential development by dividing the total number
4 of square feet of gross parcel for hotel development
5 by dividing the total number of square feet of gross
6 floor area by the net acreage of the parcel for the
7 nonresidential development.

8 I'd like to focus on the passage after
9 that which reads, in mixed use developments which
10 the Town Center Planned Unit Development later known
11 as the Waterside Planned Unit Development in which
12 the Beachwalk property is located, permitted as a
13 hotel, in which the Spinnaker -- Waterside by
14 Spinnaker Condominium Timeshare Project is located
15 constituting residential and in which SDC
16 Properties' parcel for commercial are located. But
17 that PUD constitutes a mixed-use development.

18 In mixed-use developments, acreage
19 allocated to residential use shall not be used to
20 calculate non-residential density. Acreage
21 allocated for nonresidential uses shall not be used
22 to calculate residential density. An acreage
23 allocated to hotel use shall not be used to
24 calculate other nonresidential density. And the
25 acreage used for other nonresidential uses shall not

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14

1 be used to calculate hotel density.

2 Where residential and nonresidential uses
3 are combined in a single building, the density of
4 each use within the building shall be calculated
5 separately. In computation of the density results
6 in a fraction, the result shall not be rounded up to
7 the nearest whole number. Section -- Subsection 3
8 right after that gives the definition of a net acre
9 which I mentioned, but I don't think it's terribly
10 material.

11 I would call to the court's attention, and
12 I think it's in what's now marked as Exhibit 2
13 today, excerpts from the transcript. Mr. Alford at
14 Pages 121-122 and Pages 145 and 146 of the BZA
15 remand hearing transcript makes reference to this
16 section and says at 145 and 146 is if you take out
17 the reading of 102.B.1 which we just focused on,
18 density, then you're comparing apples to oranges.
19 And I also think you would render 4(a) which is the
20 one they rely on from 106 G.4(a).

21 MR. WILLIAMS: Correct, G.4(a).

22 MR. JOHNSON: To take -- do their --
23 I'm trying to read what Greg said here. Do you
24 probably mean your strick mathematical calculation.
25 You walked me through and you're right. It exceeds

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15

1 the 15.1 which is the acreage of this PUD. But then
2 it leads 4(a), flexibility built in. And the
3 Spinnaker guys are on this piece of land, gave up
4 acreage exactly as the code told them to do. And
5 now it's, no. Now, you don't get to use your
6 property. Puts the Town in a tough spot as
7 Mr. Taylor alluded to in his remarks earlier.

8 Both in the dialogue at Pages 121 and 122
9 and in the dialogue at 145 and 146, Mr. Alford
10 asserted the position that we share with him that it
11 would be inappropriate to spin out those
12 mathematical calculations upon which Beachwalk
13 relies and not apply Section 106 -- excuse me --
14 102 B.1. which is Exhibit 1 today which has the
15 definitions.

16 Pages 121 to 122, Lines 22 through 5, Mr.
17 Alford had earlier explained it this way, quote,

18 sure. Well, let me say this. I go with Mr. Johnson
19 then. Math is math. One plus one is two. The math
20 may be correct, the formula was not -- or wasn't.
21 The formula was. The formula as a matter of law,
22 the law being 16-10-102.B., that's where the formula
23 is. They didn't use that formula.

24 We believe that the only appropriate
25 analysis of density for my clients' project is LMO

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16

1 16-10-102 B.1. used to interpret and apply LMO
2 Section 16-3-1-106 G.4(a). We do not believe
3 contrary to view taken by Beachwalks that LMO
4 Section 16-3-106.G.4(a) can be considered by the
5 court or the BZA or the Town alone in a vacuum,
6 despite that that is their argument.

7 In their memorandum filed a couple days
8 ago, Friday afternoon, the 22nd of November,
9 Beachwalk says, quote, there's only one method. And
10 they're referring to what I just described, and
11 that's to rely on 16-3-106.G.4(a) and not to take
12 into consideration the definition of density in the
13 LMO that we have referred the court to in LMO

14 Section 16-10-102.B.1.

15 It's also interesting that the Section
16 that Beachwalk relies on, LMO Section
17 16-3-106.G.4(a) does not provide any mechanism for
18 the calculation of acreage. LMO Section
19 16-3-106.B.1. does provide for the calculation of
20 acreage for the LMO.

21 Now, if you go back to Exhibit 1, LMO
22 Section 16-10-102.B.1. and you focus on the language
23 that I read earlier about mixed-use developments,
24 you don't count any of all the other stuff. You
25 only count nonresidential density to calculate

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17

1 density for nonresidential. So if you look further
2 into the transcript, and I didn't pull those quotes
3 out, but, there was some discussion, I believe it
4 was at the first BZA appeal hearing, that there was,
5 I think, around 5,000 square feet that somebody
6 described as commercial, i.e., nonresidential, in
7 the Waterside by Spinnaker project.

8 And then that one of the members of the
9 Board commented that when inquired what that was

10 used for, it was used as storage and administrative
11 and rentals and sales for that condominium project.
12 And the observation was made that's not really
13 commercial. That's just incidental, just like a
14 hotel will have an office and storage areas, not
15 really a separate standalone commercial thing. It's
16 our view that there's no other commercial property
17 that's been developed out of this PUD.

18 Now, if you look at the record of the last
19 exhibit, No. 4, is a copy of an exhibit, I think, it
20 was Exhibit No. 2 from the BZA remand hearing. It
21 been in the record of this thing from the beginning
22 in one form or another. And it indicates approval
23 in May, I think, of 1987. It could have been '86,
24 '87, I think of those densities for the PUD.

25 If Your Honor will look near the top

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18

1 center line for commercial and office, it indicates
2 of 21,913 square feet are allowed. The record here
3 indicates that the underlying base zoning district
4 in which the Beachwalk property, the Waterside by
5 Spinnaker property and the SDC property is

6 located -- is within a district called the RD
7 District, the Resort District of -- for Hilton Head.
8 Under that district, we are allowed to have 8,000
9 gross square feet of commercial per acre.

10 SDC's parcel was a little over an acre in
11 size. But the application that it made was for
12 approval of 7,500 square feet. And that's what
13 Ms. Dixon approved.

14 Based on all of these things, it is our
15 view that the BZA had before it the section we rely
16 on and the section that Beachwalk relies on. They
17 had before it an extensive dialogue about these
18 square footages. And they made the decision they
19 made. I was a little struck by one comment. Put my
20 hands back on it. In the memorandum that Beachwalk
21 filed on Friday, November, 22nd where Beachwalk at
22 Page 4 interprets the decision of the BZA on remand
23 --

24 JUDGE DUKES: Now, is this the memo
25 or the motion?

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19

1 MR. JOHNSON: Yes, the memo.

2 JUDGE DUKES: Okay. Let's see. Was
3 the memo filed?

4 MR. TAYLOR: Do you need a copy,
5 Judge? I have a hard copy if you'd like it.

6 JUDGE DUKES: Cause I'm looking for
7 it here and can't find it. All right. I'm sorry.
8 What page?

9 MR. JOHNSON: Page 4, I think, Your
10 Honor. I've got a marked up copy. Beginning with
11 the second paragraph in the middle of Page 4 of that
12 Beachwalk memorandum in support filed November
13 18th -- excuse me -- 22nd, quote, as to the third
14 question, the BZA unanimously voted to confirm that
15 the existence of the Waterside PD-2 Overlay District
16 and the LMO's PD-2 Overlay District regulation must
17 be taken into consideration with respect to any
18 development of Parcel E. And further to confirm
19 that the existing development on the other parcels
20 within the Waterside PD-2 Overlay District must be
21 taken into account in connection with any proposal
22 development of Parcel E.

23 Not in particular that the BZA did not
24 carve out or otherwise accept the average density
25 regulations of LMO Section 3-106.G.4. From its

1 answer to the court's third question meaning that
2 the BZA has affirmed the applicability of the
3 average density regulations of LMO Section
4 16-3-106.G.4(a) to any proposed development of
5 Parcel E. I think that's a far reach, Your Honor.

6 If you look on Page 5, they get to that
7 conclusion in the paragraph that starts in the
8 middle of the page by saying, quote, by unanimously
9 agreeing that Parcel E is subject to the LMO PD-2
10 Overlay District regulations and any existing
11 development on the other parcels in Waterside PD-2
12 Overlay District must be taken into account in
13 connection with any proposed development of Parcel
14 E.

15 The BZA had to have relied on LMO Section
16 16-3-101.B. and 16-3-301.B. which say that if any
17 land is located in an overlay district, then the
18 LMO's regulations governing development in the
19 overlay district shall apply to the regulations
20 governing development in the underlining base zoning
21 district.

22 And also on LMO Section 16-3-102.C.,
23 16-3-106.D. which say that the standards governing
24 an overlay zoning district shall control over the
25 base zoning district regulations whether they are

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21

1 more restrictive or less restrictive than the base
2 zoning district.

3 Well, first of all, they didn't say that.
4 That is an argumentative assumption made by
5 Beachwalk. We believe that the clear language of
6 the BZA remand decision was that everything has to
7 be taken into account. And that's true, but you
8 can't take density into account without taking into
9 account the definition of density under the LMO.

10 And if you apply that standard, then you
11 have a result which as Ms. Dixon said in, I think,
12 the first hearing, for the reasons that I have, I
13 think, enunciated today, it would have complied
14 under the original PUD because it's less commercial
15 than 21,000 feet and to complies under the current
16 RD District.

17 And when you calculate that density, you

18 can only compare the average densities of commercial
19 or nonresidential to commercial or nonresidential.
20 You can't milk them altogether. Otherwise, as I
21 said in one of the hearings, you're going to wind up
22 because of the downzoning that has occurred on
23 Hilton Head all over the place with properties that
24 are not protected as this LMO definition of density
25 protects my client and entitles it to build it's

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22

1 7,500 square feet and spruce up the way the
2 neighborhood looks a little bit.

3 Now, as to the standing issue, I might
4 address that for a minute. Your Honor's order of
5 September the 11th did find that the Beachwalk
6 entities had standing. Now, I understand that
7 Beachwalk is asserting that on Page 7 at Paragraph
8 11 of Your Honor's order of September 11th, 2019,
9 you nevertheless found that they did not have
10 standing. But I don't think that's what you found.

11 JUDGE DUKES: Which page and
12 paragraph?

13 MR. JOHNSON: Seven and 11. Page 7.

2019-11-25 Transcript.txt
Bottom of the Page 11.

14 JUDGE DUKES: I found it.

15 MR. JOHNSON: That is a finding that
16 Your Honor made. I don't think there's any reason
17 to strike that. That's based on evidence that was
18 in the record. I don't think there's any reason to
19 strike that on a Rule 59 motion. It's not
20 irrelevant to the whole thing. It's not immaterial.
21 And it is a finding of fact that Your Honor has
22 made.
23

24 So I think, Your Honor, that what I would
25 say in conclusion is there's plenty of facts in the

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1 record. There's plenty of law in the record. And
2 the way I view it, the law actually totally supports
3 the decision of Ms. Dixon and the interim decisions
4 of the BZA and the decision of this court in the
5 order of September the 11th of this year. And that
6 the Rule 59 motion should be denied.

7 This is their eighth bite at this apple.
8 And I would respectfully suggest that Your Honor's
9 order should be affirmed. You may want to modify it

10 in some way and deal with the arguments that you
11 heard today and let them proceed to Columbia if
12 that's what they want to do.

13 JUDGE DUKES: Thank you so much.

14 MR. ALFORD: Your Honor, these
15 gentlemen would like to respond to Mr. Johnson's
16 arguments. I'd be happy to let them do that and
17 then I'll forward if the court would like. Whatever
18 the court's preference is.

19 JUDGE DUKES: Give Mr. Taylor the
20 option. You want to respond once or twice or
21 however you'd like.

22 MR. TAYLOR: It's okay to let Greg
23 and then we'll respond very briefly to both if
24 that's okay, Judge.

25 JUDGE DUKES: Okay. All right.

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24

1 MR. ALFORD: Thank you, Your Honor.
2 This is a big record. I mean, we've been up and
3 down, back and forth, sideways. And I think what's
4 important to think about, you know, umbrella,
5 policy. What are we talking about? The policy is

6 pretty much laid out by Vulcan. And the courts,
7 with respect to the courts, aren't supposed to get
8 involved in local zoning decisions unless there's a
9 real clearly defined problem with the decision made.

10 So this court after studying it and then
11 sending it back and asking for clarification, which
12 was ultimately wise, I think, the BZA got to look at
13 this thing. The local zoning and local governing
14 authority got to look at this thing twice. This is
15 their determination. This is their community. This
16 is their municipality. This is their zoning law
17 that they are interpreting, being the BZA.

18 And so, I think it's very important for
19 the court to consider, with respect to the court,
20 it's role which is very limited. We operate under
21 the any evidence or conversely the no evidence
22 standing. If there's any evidence in the record
23 with respect, Your Honor, you have a very narrow
24 lane with which to operate in.

25 So, I point that out because sometimes I

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25

1 think it's easy to lose sight of that standard of

2 review when we begin just to talk about this LMO
3 section and density and this calculation and that
4 calculation. All of a sudden the file's this big,
5 and we really are trying to figure out what it
6 means. But with all due respect, that's up to the
7 BZA. This court's just got to figure is it a clear
8 error. Is there a clear error her?

9 There ain't really much clear to me at all
10 in this thing, but I'm not very smart. So it's --
11 that's why maybe it takes so much paper and so many
12 words. If it takes all this paper and all these
13 words, it probably ain't a real clear error. I
14 mean, right? Maybe.

15 Okay. Well, then let's walk through it a
16 little bit. One of the most important points that I
17 would make to you is actually -- I take it out of
18 Page 2 of the Plaintiff's motion -- 59(e) motion
19 which was filed 13 September 2019, 9:23 a.m. And
20 I'm on Page 2 of 3. I am a little less than halfway
21 down. And I'm not going to read super fast because
22 court reporters get made at me when I do that. But,
23 I'm going to start with word based.

24 Based on that finding -- based on that BZA
25 finding which this honorable court must accept

1 unless it is arbitrary, capricious or has no
2 relation to a lawful purpose, paren, which
3 Petitioners/Appellants argued it is not. Okay, so
4 they -- they'll concede the standard. It's got to
5 be arbitrary, capricious and not related to anything
6 lawful, that finding.

7 It was an error of law for the BZA to then
8 have ignored the agreed facts that if the existing
9 density on the other -- of the other parcels within
10 PD-2 Overlay District was taken into account, there
11 was no density left to build the proposed Welcome
12 Center.

13 Okay. They're wanting to tell you that
14 there's a clear legal error based on an
15 interpretation of facts. Sorry. You lose. If
16 they're interpreting facts, the BZA wins. They're
17 upheld. This is how it works. So this sentence
18 right here is in essence the fatal flaw in their
19 argument.

20 They -- there was agreed upon facts, no
21 question about it, stipulated facts in the record.
22 They don't like the way those facts were

23 interpreted. And so, they want to come to you and
24 say, hey, they didn't interpret those facts
25 correctly, error of law. Well, sorry. It's just

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1 not so.

2 This -- if you read the pleading, they
3 say, error of law for the BZA to have then ignored
4 the agreed facts. Maybe they just didn't interpret
5 them the way you did. Maybe they agreed with me,
6 which is astounding, frankly. Just kidding. But,
7 because I'm not a mathematician. And I'm not smart.
8 But -- it took me a while, but I did figure out that
9 one and one equals two. Math is math, but it's
10 about the formula. It's about how they applied the
11 density formula.

12 You can't do what they want you to do.
13 And the BZA didn't do it to their credit. You can't
14 read one section of the code in a vacuum, especially
15 when you're dealing with a property that is
16 codeveloped, if you will, with other properties over
17 a long period of time.

18 And I think Mr. Johnson made a good point.

19 If you were to -- sorry. If you were to go and look
20 at any remaining development rights on Hilton Head
21 and you went strictly into the little section -- one
22 little section of the code, nothing could ever be
23 redeveloped again. I mean -- do you understand?

24 There's this sort of -- there's been this
25 constriction over time which is probably

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1 appropriate. But that constriction cannot ignore or
2 take away rights that were vested to developers and
3 owners who operated in good faith of the Town. And
4 then the Town's not supposed to turn around, say,
5 got you. We're going to go over here to this code
6 section only and we're not going to use the
7 definition of density that we have in the code in
8 general that, by the way, we're required to use if
9 you read the whole code.

10 And I think it's important for the court
11 -- I didn't cite it. I'm not -- I can find it for
12 the court. But I think as a general rule of
13 statutory construction, you should try to read code
14 sections that may have any conflict, you try to read

15 them together.

16 The code section that they want you to
17 rely on, the G, which is Exhibit 3, doesn't say --
18 I'm in Exhibit 3 that Mr. Johnson passed up --
19 doesn't say, oh, yeah, by the way, when you do all
20 this density stuff, go ahead and ignore code Section
21 16-10-102. It doesn't say that. If it did, perhaps
22 they'd be correct and they'd prevail. But it
23 doesn't. And they don't. And they aren't. Let me
24 rephrase that. It doesn't. They aren't.
25 Therefore, they don't.

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1 When I first considered the standing
2 argument that they raised, I thought, well, of
3 course, they have standing. They're a neighboring
4 property owner. I mean they're right there next to
5 them. I mean, in fact, the LMO was changed.
6 Standing used to be a certain -- you had to be
7 within a certain distance to have standing. That
8 got changed to say you got to show -- you got to be
9 -- somewhere around there, we've got to be harmed.

10 There is not one iota of evidence anywhere

11 in the record of their harm, not a witness, no
12 testimony, nothing but an assertion in a courtroom
13 which, with respect to these fine attorneys, is not
14 evidence. No evidence. Any evidence. Same
15 standard.

16 I believe, as written, Paragraph 11 is
17 correct because there's -- they've had the
18 opportunity to present evidence in front of the BZA.
19 They don't get to put evidence here because it's a
20 closed record review. So, my position is Paragraph
21 11 is correct.

22 I believe, unfortunately, for Beachwalk,
23 the Appellants, that they have not met the standard
24 or presented the court with what is necessary with
25 respect to allow the court to overturn the decision

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1 of the BZA based on the Vulcan Materials and
2 well-established standard in South Carolina.

3 Thank you.

4 JUDGE DUKES: Thank you so much.

5 Mr. Taylor.

6 MR. WILLIAMS: Thank you, Your Honor.

7 With respect to the density issues, what I'm hearing
8 Mr. Johnson and Mr. Alford say is it's one or the
9 other. It's the LMO Section 16-10-102.G.1 density
10 for calculation or it's the 16-3-106.G.4(a)
11 calculation. And that's not correct. They both
12 need to be taken together.

13 When you read the definition of density
14 that's in LMO Section 16-10-102.G.1, it first of all
15 deals with if you have a single tract. Well, all of
16 it is coached in terms of a single tract.

17 And let's take for example if you have a
18 one-acre tract that's in a zoning district that
19 allows 8,000 square feet of commercial space per net
20 acre or it allows 12 residential dwelling units per
21 acre, then you can develop that one-acre tract or
22 any sort of combination of that 8,000. If you
23 develop 8,000 square feet of commercial then you
24 have no availability to do residential. If you
25 develop it for 12 residential units, then you have

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1 no ability to do commercial. Or, you could be
2 somewhere in the middle with 4,000 feet of

3 commercial and six residential dwelling units.

4 When you boil it down, that's what that
5 section says. So you can't use the acreage that's
6 allocated to the commercial use if you're doing a
7 mixed development. Say you have 4,000 square feet,
8 you've used up half an acre of the allocation of the
9 density. You can't then do another 12 units of
10 residential because you're going over your density
11 limit.

12 One of the benefits of being in a PD-2
13 Overlay District is that you have multiple parcels
14 that when you consider the average density on has --
15 density has to be calculated as if it's one parcel.
16 And that's where the provisions that Mr. Johnson and
17 Mr. Alford want you to pick and choose between come
18 into play.

19 They refer to their Exhibit 4 today which
20 was from -- it's in the Town's records and on, I
21 think, a May 1987 planning commission meeting when
22 the Waterside PUD Overlay District was revised. And
23 while it's correct as Mr. Johnson says it, it is a
24 substantial amount of commercial square footage
25 that's allocated there.

1 As Mr. Johnson well knows because he was
2 the one who got the categorical exemption for Robert
3 Graves and his partners, who were then the owners,
4 that after the categorical exemption expired in, I
5 think, 2000, none of this mattered anymore. And the
6 only thing that matters is the current LMO's
7 regulations with respect to density. You've got to
8 comply with what the RD District says. And the
9 average density requirements then come into play.

10 If you do want to go back to the 1987
11 calculation, you'll notice it allocates 6.8 acres
12 for residential development of 200 dwellings. Well,
13 in fact, they used over ten acres of the development
14 for that residential. And so they want to be able
15 to pick and choose here. But we want to rely on
16 this Exhibit 4 for certain purposes, but don't pay
17 attention to it for other purposes.

18 So when you take into -- when you look at
19 the entire 15-acre tract that is the Waterside PUD,
20 that's where you need to come down when you start
21 looking at the density. And as Mr. Alford said, the
22 facts aren't in dispute. The density that's out

23 there is a density that's out there. And Ms. Dixon
24 agreed that if you take into account the average
25 density then you can't develop anything on Parcel E

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1 because there's no density. That's clear and it's
2 in the transcript.

3 And it's not -- it's not about an
4 interpretation of the facts. What is -- what's at
5 play here is the application of the law to the facts
6 and in the interpretation of the law, not the
7 interpretation of the facts. And in that instance,
8 we think the BZA made a mistake.

9 They didn't -- they said you have to take
10 into account all of the LMO's PD-2 Overlay District
11 regulations when considering Parcel E. And those
12 regulations include the average density regulations.
13 And when you take into account the average density
14 regulations, Ms. Dixon agreed on the record that
15 there's no density left for Parcel E. So for them
16 to say -- for the BZA to say you have to take these
17 regulations into account but then to uphold Ms.
18 Dixon's determination is an error of law.

19 That's what it seems to us all this boils
20 down to. And the fact that the BZA took it into
21 consideration shouldn't foreclose any further
22 judicial review of it. The question is whether or
23 not they got it right. And we believe that they did
24 not get it right.

25 Mr. Johnson talked about properties being

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1 protected. And this property was protected.
2 Mr. Johnson took this property -- took the entire
3 PUD through the categorical exemption process. And
4 he got that approval which allowed the developmental
5 of the property as provided for in the 1987 Master
6 Plan until March of 2000. And they relied on that
7 to go ahead and do the Waterside by Spinnaker
8 development that's currently there.

9 They then didn't do anything about Parcel
10 E. And so, I mean, there's no taking here because
11 they had the right to develop their property under
12 the old master plan until March of 2000. They
13 elected not to do that. So they let their rights
14 lapse.

15 The fact of the matter is that when you
16 look at the PD-2 regulations which control over all
17 the other regulations because this is in a PD-2
18 District, then there's -- and you take into account
19 the average density, there's no density left for
20 development on Parcel E.

21 MR. TAYLOR: Your Honor, thank you
22 for hearing us.

23 JUDGE DUKES: Thank you so much. I
24 appreciate it. Yes, sir?

25 MR. JOHNSON: If I could speak

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1 briefly to a couple points, Your Honor?

2 JUDGE DUKES: Just really briefly.
3 It might trigger up responses.

4 MR. ALFORD: It's like, I only have a
5 few more questions for the witness.

6 MR. JOHNSON: We did not argue that
7 it's either/or. What we argued was that the LMO
8 Section 16-10-102.B.1 should be properly used to
9 interpreted and apply. The G.4(a) section they
10 rely. The Waterside by Spinnaker project, I don't

11 know how Mr. Williams gets to ten acres for that
12 because the land planner, Mr. Theodore, testified at
13 the BZA first appeal hearing that there was 9.1
14 acres of common space out of the 15.1 acres in the
15 whole PUD. So I don't get that.

16 On the taking issue, the U.S. Supreme
17 Court in the Lucas case did not say, well, Mr. Lucas
18 could have built on these lots or his predecessor in
19 title could have built on these lots 20 years
20 before; and, therefore, there's no taking. Taking
21 is a current standard, not an old standard. And
22 these -- not a taking case, but it's a dark cloud
23 over this whole case at this point.

24 I think the whole discussion about how do
25 you integrate the full LMO including the one section

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1 that they really rely on. They've got to get -- two
2 subordinate sections, but the one section they
3 really rely on and the rest of the BZA including
4 what we rely on proves the point that the BZA
5 decision and Ms. Dixon's decision and Your Honor's
6 decision of September 11th in this case are not

7 arbitrary, not capricious and not in the category of
8 things that do not bear reasonable relationship to
9 the facts of the law.

10 So, again, we would urge Your Honor to
11 deny the motion.

12 MR. ALFORD: And, Your Honor, may I
13 be heard? I'm sorry. I would just join in adopting
14 the arguments made for the record. Adopting
15 arguments made by SDC's counsel, Mr. Johnson, and
16 join in the request that you deny the motion.

17 JUDGE DUKES: Thank you.

18 MR. WILLIAMS: And just for --

19 JUDGE DUKES: Final thought?

20 MR. WILLIAMS: Yes, to clarify -- to
21 help Mr. Johnson. When I refer to the ten acres, if
22 you look at the subdivision plat for the 15-1 acres,
23 Waterside by Spinnaker is on what I believe is
24 designated as Parcel B. And it showed -- that
25 subdivision plat that shows that Parcel B is a

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1 little over 10 acres. That's where the ten-acre
2 figure comes from.

3 MR. JOHNSON: Thank you, Your Honor.

4 JUDGE DUKES: Thank you all so much.

5 (Whereupon, the hearing was concluded

6 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
11 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,
11 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 Kathleen McDaniel, Esquire, Burnette Shutt McDaniel,
14 912 Lady Street, Post Office Box 1929, Columbia,
15 South Carolina 29202

14

15 In witness whereof, I set my hand and
16 sealed this 26th of April, 2020.

16

17

18 My Commission
19 expires 2/7/28

19

20

21

22

23

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

24

25



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Case # 16-02712

EXHIBITS

Plaintiff(s) Beachwalk Hotel et al
vs.
Defendant(s) Town of HHI et al

PLAINTIFF'S EXHIBITS	DEFENDANT'S EXHIBITS	COURT'S EXHIBITS
1 LMO Excerpt	1	1
2 Hearing Excerpt	2	2
3 LMO Excerpt	3	3
4 Attachment H	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11	11	11
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17	17	17
18	18	18
19	19	19
20	20	20

Court Reporter Deborah S Thomas Trial Judge Dukes
Clerk of Court [Signature]

Date 11-25-19

CERTIFIED TRUE COPY
of the instrument recorded in the Office of the
Register of Deeds for Beaufort County, S.C., on
Date 7-29-1999
in Book 1195 Page 942
This document contains 4 pages.
Register of Deeds - Beaufort County, SC

12-8-14

3/10/93

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

BEAUFORT COUNTY, S.C.
RECORDING FEES COLLECTED
TRANSFER FEES \$ 800.00
COUNTY \$ 352.00 STATE \$ 832.00
GENERAL WARRANTY DEED 942

39611

KNOW ALL MEN BY THESE PRESENTS, THAT, POPE AVENUE ASSOCIATES, a South Carolina Partnership, together with its successors and assigns ("Grantor") for and in consideration of the sum of Three Hundred Twenty Thousand and no/100 Dollars (\$320,000.00) to Grantor in hand paid at and before the sealing of these presents by **SDC** PROPERTIES, INC., a Utah Corporation ("Grantee") of Post Office Box 6899, Hilton Head Island, South Carolina 29938-6899, the receipt of which is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto SDC Properties, Inc., a Utah Corporation, its successors and assigns forever, the property described on Exhibit "A" ("Property") attached hereto.

TOGETHER WITH ALL AND SINGULAR, the rights, members, hereditaments and appurtenances to the said Property belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the Property before mentioned unto SDC Properties, Inc., a Utah Corporation, its successors and assigns forever.

AND GRANTOR DOES hereby bind itself, its successors and assigns, to warrant and forever defend, all and singular, the Property unto SDC Properties, Inc., a Utah Corporation, its successors and assigns, against Grantor, its successors and assigns, and all persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed this 14th day of July, 1999.

Signed, sealed and delivered
in the presence of:

POPE AVENUE ASSOCIATES, a South Carolina Partnership

Karen B. Murphy
[Signature]

By: [Signature]
Richard A. McGinty
Its General Partner

55
R550-18-202

943

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ACKNOWLEDGMENT

The undersigned notary public does hereby certify that Richard A. McGinty, a General Partner of Pope Avenue Associates, a South Carolina Partnership, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 14th day of July, 1999.


Notary Public for South Carolina
My commission expires Oct 19, 2003

EXHIBIT "A"**Legal Description**

All that certain piece, parcel or lot of land situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, and shown as "Parcel E" on that certain Plat entitled "A Survey of 15,100 Acres Waterside P.U.D., a Section of Parcel 58 Forest Beach Subdivision" dated December 9, 1987, and prepared by Surveying Consultants, said plat being recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 35, page 79. For a more detailed description, reference is made to said plat of record.

This conveyance is subject to all covenants, conditions, restrictions and easement as described in that certain Declaration of Covenants, Conditions and Restrictions for Waterside P.U.D. as recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 494, page 419 and all amendments thereto as well as all easements, restrictions, covenants and conditions of record in the Office of the Register of Deeds for Beaufort County, South Carolina, and further subject to all declarations, covenants, restrictions, easements and plats of record in the Office of the Register of Deeds for Beaufort County, South Carolina.

This being a portion of the property conveyed to Pope Avenue Associates by deed of Robert L. Graves, Richard A. McGinty and Robert S. Crum dated September 18, 1974, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 223, page 1963.

The within Deed was prepared by Mark S. Simpson, Esquire, of Jones, Scheider & Patterson, P.A., Post Office Drawer 7049, Hilton Head Island, South Carolina 29938-7049.

TMS: A PORTION OF DISTRICT 550, MAP 1E, PARCEL 203

1495
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BK 1195 PG 942
FOLDER #

RECORDED
1957 AUG 31 PM 3:37
BK 1195 PG 942
Shaw G. Shaw

945

Ex. B

3/18/93

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

BEAUFORT COUNTY, S.C.
RECORDING FEES COLLECTED
TRANSFER FEES \$ 800.00
COUNTY \$ 352.00 STATE \$ 822.00
GENERAL WARRANTY DEED 942

39611

KNOW ALL MEN BY THESE PRESENTS, THAT, POPE AVENUE ASSOCIATES, a South Carolina Partnership, together with its successors and assigns ("Grantor") for and in consideration of the sum of Three Hundred Twenty Thousand and no/100 Dollars (\$320,000.00) to Grantor in hand paid at and before the sealing of these presents by SCD PROPERTIES, INC., a Utah Corporation ("Grantee") of Post Office Box 6899, Hilton Head Island, South Carolina 29938-6899, the receipt of which is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto SDC Properties, Inc., a Utah Corporation, its successors and assigns forever, the property described on Exhibit "A" ("Property") attached hereto.

TOGETHER WITH ALL AND SINGULAR, the rights, members, hereditaments and appurtenances to the said Property belonging or in anywise incident or appertaining.

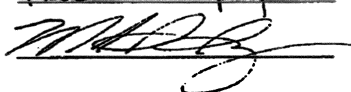
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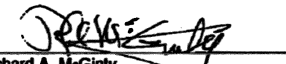
AND GRANTOR DOES hereby bind itself, its successors and assigns, to warrant and forever defend, all and singular, the Property unto SDC Properties, Inc., a Utah Corporation, its successors and assigns, against Grantor, its successors and assigns, and all persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed this 14th day of July, 1990.

Signed, sealed and delivered
in the presence of:

POPE AVENUE ASSOCIATES, a South Carolina Partnership

Karen B. Murphy


By: 
Richard A. McGinty
Its: General Partner

57
P550-18-202



943

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

The undersigned notary public does hereby certify that Richard A. McGinty, a General Partner of Pope Avenue Associates, a South Carolina Partnership, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 14th day of July, 1999.


Notary Public for South Carolina
My commission expires Oct 19, 2003

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This being a portion of the property conveyed to Pope Avenue Associates by deed of Robert L. Graves, Richard A. McGinty and Robert S. Curn dated September 16, 1974, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 223, page 1953.

The within Deed was prepared by Mark S. Simpson, Esquire, of Jones, Schelder & Patterson, P.A., Post Office Drawer 7049, Hilton Head Island, South Carolina 29938-7049.

TMS: A PORTION OF DISTRICT 550, MAP 18, PARCEL 202

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50 JUL 29 AM 11:22

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1950 AUG 31 PM 3:37

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Sharon D. Smith
DEputy County Director

AN ORDINANCE OF THE TOWN OF HILTON HEAD ISLAND

ORDINANCE NO. 93-33

PROPOSED ORDINANCE NO. 92-35

AN ORDINANCE TO AMEND CHAPTER 7, "THE LAND MANAGEMENT ORDINANCE (LMO) OF THE TOWN OF HILTON HEAD ISLAND", OF TITLE 16 OF THE MUNICIPAL CODE OF THE TOWN OF HILTON HEAD ISLAND, 1983, BY AMENDING SECTION 16-7-250, DEFINITIONS; BY AMENDING PART B, PRIOR APPROVALS, OF ARTICLE III. NONCONFORMITIES AND PRIOR APPROVALS; BY AMENDING ARTICLE VI, ADMINISTRATION, BY ADDING PART J, VESTED RIGHTS DETERMINATIONS; AND PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, the Town Council of the Town of Hilton Head Island did on January 19, 1987 amend Chapter 7 of Title 16 of the Municipal Code by enacting a Land Management Ordinance (LMO) of the Town of Hilton Head Island; and

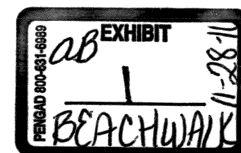
WHEREAS, the Town Council accepted, on July 8, 1991, the Town of Hilton Head Island 1991 Comprehensive Plan as adopted by the Planning Commission on June 19, 1991; and

WHEREAS, the Comprehensive Plan for the Town of Hilton Head Island outlines, among other things, the need for establishing growth control measures that are designed to preserve the natural environment, maintain the quality of life and reduce residential and commercial development at buildout, while maintaining a viable economic environment in the community; and

WHEREAS, the Town Council on December 18, 1991, adopted a resolution which: established a joint Town Council-Planning Commission Subcommittee, hereinafter referred to as the Growth Management Task Force; directed the Growth Management Task Force to develop the Growth Management Element of the Comprehensive Plan; and, notified property owners of the pendency of ordinances resulting from the Growth Management Element that would amend the LMO; and

WHEREAS, the Town Council contracted for services with the firm of Freilich, Leitner & Carlisle to review and recommend amendments to the LMO; and

WHEREAS, the firm of Freilich, Leitner & Carlisle completed an analysis of the LMO and recommended amendments to said ordinance which among others included changes to Article III, Nonconformities and Prior Approvals; and



WHEREAS, the Planning Commission, following a positive recommendation from the Growth Management Task Force, and Public Hearings conducted on October 7, 1992, September 8, 1993, voted to recommend to Town Council that the proposed amendments to Articles II, III and VI of the LMO, as shown in Attachment A, be adopted; and

WHEREAS, the Town Council finds that it is in the Town's best interest and welfare to regulate the conditions under which development plans that have prior approvals may be pursued, since development undertaken based upon previously granted approvals may: be inconsistent with the goals and objectives of the Comprehensive Plan; be in conflict with the use provisions of the underlying zoning district; be in conflict with the site regulations, including allowable densities and intensities of use, as established in Article IV of the LMO; not fully adhere to the design and performance standards set forth in Articles VIII and IX of the LMO; create substantial impacts on public facilities and natural resources; and, create a public or private nuisance; and

WHEREAS, the Town Council, in amending Article III of the LMO, recognizes and acknowledges that cases may exist where all or a portion of a development plan which has received prior approval has become vested and declares that these amendments to Article III shall not be interpreted as denying such vested rights, where such rights are found to exist; and

WHEREAS, the Town Council recognizes the need to enact more detailed administrative procedures for the review and determination of the validity of claims of vested rights.

NOW, THEREFORE, BE IT ORDERED AND ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF HILTON HEAD ISLAND, S.C.; AND IT IS ORDAINED BY THE AUTHORITY OF SAID COUNCIL:

Section 1 Amendment. That Chapter 7, Land Management Ordinance (LMO) of the Town of Hilton Head Island, of Title 16 of the Municipal Code of the Town of Hilton Head Island, S.C., be, and hereby is amended, a copy of which is attached hereto and incorporated fully herein as Attachment A entitled "Proposed Amendments to Article II, Definition of Terms; Article III, Nonconformities and Prior Approvals; and Article VI, Administration."

Note: Additions to the Municipal Code are shown as **bold and underlined** text and deletions to the Municipal Code are shown as ~~strikeouts~~.

Section 2 Severability. If any section, phrase, sentence, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

Section 3 Effective Date. This Ordinance shall be effective upon the enactment by the Town Council of the Town of Hilton Head Island.

Passed, approved and adopted by the Council for the Town of Hilton Head Island on this 15th day of November, 1993.


Harvey W. Ewing, Jr., Mayor


Sandi Santaniello, Town Clerk

Public Hearing: 10-7-92 and 9-8-93
First Reading : 11-2-92
Revised First Reading: 8-2-93 and 10-18-93
Second Reading and Adoption: 11-15-93

Revised 11/09/93

Proposed Ordinance 92-35

Attachment A

**"Proposed Amendments to Article II, Definition of Terms;
Article III, Nonconformities and Prior Approvals; and
Article VI, Administration."**

Add the following definitions to Land Management Ordinance Section 16-7-250.
Definitions:

Legally established: Any land use, development, building, structure or site, including any lot of record, which was established, constructed, used or recorded pursuant to, and in conformance with all relevant requirements of the Ordinances then in effect.

Legally maintained: As used in this chapter, the phrase "legally maintained" shall mean that any and all conditions, obligations and requirements of any permit, approval or certificate of any description issued by Beaufort County, South Carolina or the Town of Hilton Head Island, shall have been met within the time frame, if any, required by such permit, approval or certificate, or that the permit, approval, or certificate has been fully executed according to its terms.

Legal nonconformity: Any land use, development, building structure or site, including any lot of record which was legally established, but which is not presently in full compliance with the provisions of this chapter as amended.

Nonconforming use: Any legally established activity using land, buildings or structures which was legally established, but which is not permitted on the applicable site by right, as a special exception or as a conditional use pursuant to Article IV of this Chapter.

Nonconforming building or structure: Any building or structure which was legally established, but which is not presently in compliance with the design and performance standards as set forth in Articles VIII, IX and X of this Chapter or with the applicable regulations of the zoning district in which it is located as set forth in Article IV of this Chapter.

Nonconforming site or lot of record: Any site or lot of record which was legally established, but which is not presently in compliance with the applicable zoning district regulations set forth in Article IV and/or with the applicable subdivision regulations set forth in Article VIII, Part C of this Chapter.

ARTICLE III, NONCONFORMITIES AND PRIOR APPROVALS

PART B. PRIOR APPROVALS GRANTED PRIOR TO THE ADOPTION OF THIS CHAPTER

Section 16-7-350. Findings of Fact,--and Statement of Intent and Purpose.

This Part B of Article III is adopted in accordance with the 1985 Comprehensive Plan for the Town of Hilton Head Island, as amended, to regulate the conditions under which development plans which were granted approval prior to the adoption of this chapter may be pursued. In addition to the findings and recommendations contained therein, Town Council further finds that a compelling situation exists, and will continue to exist, with regard to the Town's ability to accommodate the impact of the ~~rate of~~ development as more specifically detailed in the said Comprehensive Plan, while at the same time exercising its obligation to minimize any potential danger to the public health, safety and general welfare.

Town Council further finds that, pursuant to the terms of any land development regulations or ordinances the ordinance in effect prior to the adoption of this Chapter, that certain development approvals were granted, including, but not necessarily limited to, namely "preliminary approvals" and "final development permits" issued by Beaufort County or the Town of Hilton Head Island. In adopting this Part B of Article III, it is not the intent of Town Council to deny to any individual who has received a prior development permit or approval, including but limited to, a preliminary approval or a final development permit which has been legally maintained a reasonable opportunity to proceed with development plans based on such prior approvals or permit. It is the intent of Town Council in enacting these provisions to attempt to strike a balance between such development opportunities the provision of a reasonable opportunity to implement development plans which received prior approvals which have been legally maintained and the obligation incumbent upon the governing authority to adopt land use regulations which are consistent with the said Comprehensive Plan and necessary to protect, promote and improve the public health, safety and welfare.

The purpose of this Part B of Article III is to regulate the conditions under which development plans that have prior approvals may be pursued, consistent with the findings and intent of this section. Development proposed to be undertaken pursuant to prior approvals may be: inconsistent with the goals and objectives of the Comprehensive Plan; in conflict with the use provisions of the underlying zoning district; be in conflict with the site regulations, including allowable densities and intensities of use, as established in Article IV of this chapter; and/or not fully compliant with the design and performance standards set forth in Articles VIII and IX of this chapter. Further, such development may create substantial impacts on public facilities and natural resources or may create a public or private nuisance.

Section 16-7-352. Status Expiration of Previously Issued Prior Final Development Permits.

- (a) Any final development permit granted approval prior to the effective date of this chapter shall remain valid for the life of such permit or until December 31, 1994, whichever shall occur first, subject to such conditions as may have been required pursuant to the granting of such permit and subject to the requirements of Part B of Article VII of this chapter.

- (b) The following shall not be construed to extend the life of a final development permit beyond December 31, 1994:
- (1) Completion of a phase or a portion of a phase, whether or not designated in the final development permit.
 - (2) Completion of infrastructure for a phase or a portion of a phase, whether or not designated in the final development permit.
 - (3) Obtaining a building permit, certificate of compliance or certificate of occupancy for a phase or a portion of a phase, whether or not designated in the final development permit.
- (c) Any final development permit granted approval prior to the effective date of this chapter for which a vested rights or equitable estoppel determination has been made pursuant to the procedures provided for in Section 16-7-698 shall remain valid for the length of time and under such conditions as provided for in the vested rights determination.

Section 16-7-354. Expiration of Prior Final Development Permit.

~~Any final development permit granted prior to the effective date of this chapter shall become invalid upon its expiration.~~

Section 16-7-356. Status Expiration of Previously Approved Prior Preliminary Approvals.

- (a) Any preliminary approval which was granted prior to the effective date of this chapter shall remain valid for the life of such approval or until December 31, 1994, whichever shall occur first, and shall be consistent with the terms of the ordinance in effect at the time such approval was granted, and subject to such conditions as may have been required pursuant to the granting of such approval.
- (b) Any application filed pursuant to the requirements of this chapter for Planning Commission review and/or development plan

review, based upon such a prior approval, but submitted after the effective date of this chapter, shall be subject to applicable requirements and procedures of Articles VI and VII of this chapter. In the granting of a development plan approval pursuant to such application, the Planning Commission or Administrator shall require conformance to the greatest degree practical with applicable site regulations set forth in Article IV and design and performance standards set forth in Articles VIII and IX. Any or all parcels of a tract granted prior preliminary approval for unspecified commercial use shall conform to the permitted commercial uses in Article IV for the specific zoning district within which it is located.

(c) The following shall not be construed to extend the life of a development plan which was granted preliminary approval prior to the effective date of this chapter beyond December 31, 1994:

- (1) Obtaining a final development permit or development plan approval for a plan or a phase or a portion of a phase, whether or not designated in the preliminary approval.
- (2) Completion of a phase or a portion of a phase, whether or not designated in the preliminary approval.
- (3) Obtaining a building permit, certificate of compliance or certificate of occupancy for a phase or a portion of a phase, whether or not designated in the preliminary approval.

(d) Where a FUD master plan, which was granted approval prior to the effective date of this chapter, has been incorporated into the official Town zoning map pursuant to Section 16-7-435 of this chapter, the provisions of that section shall govern the implementation of such FUD master plan.

(e) Any preliminary approval which was granted prior to the effective date of this chapter for which a vested rights or equitable estoppel determination has been made pursuant to the procedures provided for in Section 16-7-698 shall remain valid for the length of time and under such conditions as provided for in the vested rights determination.

(Ord. No. 87-23, 9-16-87)

Section 16-7-358. Expiration of Prior Preliminary Approval.

~~Any preliminary approval granted prior to the effective date of this chapter, or any applicable amendment hereto, shall become invalid upon the expiration of such approval unless a development plan application for such proposed development, or any phase thereof, is filed in completed form prior to such expiration.~~

PART C. APPEALS

Section 16-7-360. Appeal to Board of Adjustment.

~~Any person aggrieved by a determination made pursuant to the provisions of this article shall have the right to appeal to the Board of Adjustment consistent with the procedures and requirements set forth in Article VI of this chapter.~~

Section 16-7-360. Determination of Vested Rights.

Determinations of claims of vested rights pursuant to a prior preliminary approval or prior final development permit shall be made in accordance with the provisions of section 16-7-698 of this chapter.

ARTICLE VI. ADMINISTRATION

PART J. Vested Rights Determinations

Section 16-7-698. Procedures for the Determination of Vested Rights.

In order to provide for the fair and equitable determination of vested rights pursuant to any approval previously granted pursuant to this chapter, or any approval granted prior to the adoption of this chapter, the Town Council shall adopt, by resolution, administrative procedures for the determination of vested rights.

PROCEDURE FOR DETERMINATION OF VESTED RIGHTS

Section 1 Purpose and Intent:

(A) The purpose and intent of these Vested Rights Determination Procedure provisions are:

- (1) To implement the requirements of the State and Federal Constitutions, Statutes of South Carolina and Common Law of South Carolina that limit the application of comprehensive plans and land use ordinances and regulations with respect to property owners with vested rights;
- (2) To recognize that development projects for which vested rights have been obtained must be accounted for in the comprehensive plan and land use ordinances and regulations of the Town of Hilton Head Island, South Carolina;
- (3) To provide a method for determining and quantifying the number of projects, development projects, and land uses, now non-conforming, or which may become non-conforming due to subsequent amendments to the land management ordinances and regulations of the Town of Hilton Head Island, South Carolina, but which are vested, so that such projects, development projects and land uses can be accounted for in the existing and future Comprehensive Plans and land use ordinances and regulations of the Town of Hilton Head Island, South Carolina;
- (4) To establish uniform and non-burdensome procedures and specific criteria for the determination of Vested Rights and claims of Equitable Estoppel in order to aid in the accomplishment of sound and orderly planning;
- (5) To protect legitimate investment-backed expectations;
- (6) To protect the planning and plan implementation processes;
- (7) To settle potential disputes and to minimize costly and protracted litigation;
- (8) To facilitate implementation of goals, objectives and policies set forth in the Town of Hilton Head Island Comprehensive Plan of 1991 and the Land Management Ordinance (§ 16-7-100, *et. seq.*, *Code of the Town of Hilton Head Island*, (1983)); and
- (9) To ensure that all applicable legal standards and criteria are utilized in the determinations to be made hereunder.

Section 2 Definitions:

(A) The words or phrases used herein shall have the meaning prescribed in § 16-7-250, *Code of the Town of Hilton Head Island*, (1983), except as otherwise indicated herein. In the case of any conflict between the definitions set forth in § 16-7-250, *Code of the Town of Hilton Head Island*, (1983), and herein, the definitions set forth herein shall apply to matters arising under these Regulations:

- (1) Administrator means the Director of Community Development for the Town of Hilton Head Island, South Carolina.
- (2) Aggrieved Person means and refers to any person who has an immediate and substantial pecuniary interest in the outcome of any application for a Categorical Exemption or Vested Rights Determination.
- (3) Applicant means and refers to a property owner, or duly designated agent of the property owner, who makes an application for a Categorical Exemption Certification or for a Vested Rights Determination pursuant to these Regulations.
- (4) Board of Adjustment means and refers to the Board of Adjustment for the Town of Hilton Head Island, South Carolina.
- (5) Building Permit means and refers to a Building Permit issued by the Town Of Hilton Head Island, South Carolina, authorizing commencement of any construction or other improvement to real property, in accordance with the Building Code then in effect and the Land Management Ordinance.
- (6) Categorical Exemption or Categorically Exempt means and refers to a parcel, development project or any phase or portion thereof, which has been declared to be exempt from the application of all or any portion of the existing Land Management Ordinance, or any future amendments thereof, pursuant to these Regulations.
- (7) Categorical Exemption Certificate means and refers to the written document issued by the Administrator upon a Final Determination that a given parcel, development project or any portion thereof is Categorically Exempt.
- (8) Deliver and Delivery mean and refer to the deposit of any written notification required by these Regulations into the United States Mail, to the mailing address of the Applicant as shown on the

Application for Categorical Exemption Certificate or Vested Rights Determination, with first class postage affixed thereto; or by personal, hand delivery to the Applicant.

- (9) Development and/or Development Project shall mean and refer to any form of construction or other improvement, including site improvements, to real property, and shall further mean and refer, without limitation, to subdivisions, Planned Unit Developments, commercial or other non-residential building or structure, or any other form of planned improvements to real property. In these Regulations, this definition is intended to be all-encompassing, and to cover any form of rights to use or improve real property claimed by an Applicant.
- (10) Equitable Estoppel means and refers to a state of facts where it would be inequitable for the Town of Hilton Head Island, South Carolina to enforce all or any portion of the existing Land Management Ordinance, or amendments thereto, with respect to a particular parcel, development project or portion or phase thereof because an Applicant or and Applicant's predecessor in interest has: (1) relied in good faith (2) upon conduct, representations or silence of the Town of Hilton Head Island, South Carolina, amounting to a mis-representation or concealment of facts, (3) where the Applicant was without reasonable means of obtaining knowledge of the truth of the disputed matters, and (4) has made substantial improvements to his property, or has incurred substantial obligations as a result of such reliance. The terms Vested Rights and Equitable Estoppel are sometimes used interchangeably throughout these Regulations and a reference to one shall mean and include a reference to the other.
- (11) Final Decision or Final Determination means and refers to the decision of the Administrator on an application for a Categorical Exemption or on an Application for a Vested Rights Determination.
- (12) Land Management Ordinance means and refers to § 16-7-100, *et seq.*, *Code of the Town of Hilton Head Island*, (1983) and any amendments thereto.
- (13) Notice of Completeness means and refers to a written notice by which an Applicant for Vested Rights Determination or Categorical Exemption is notified that an application is complete.
- (14) Notice of Incompleteness means and refers to a written notice by which an Applicant for Vested Rights Determination or Categorical Exemption is notified that an application is incomplete, and specifying the item or items which are missing.

- (15) Notice of Dismissal means and refers to a written notice which notifies an Applicant that he has failed to respond to the Notice of Incompleteness within the time frame established by these Regulations, and which further notifies the Applicant that his Application is dismissed.
- (16) Town means and refers to the Town of Hilton Head Island, South Carolina.
- (17) Town Council means and refers to the Town Council of the Town of Hilton Head Island, South Carolina.
- (18) Valid or Validly-Issued Final Development Permit means and refers to Final Development Permit or any other authorization, including, without limitation: Development Plan approval [subject to the provisions of § 16-7-666, *Code of the Town of Hilton Head Island*, (1983)]; variances; "comfort letters" issued by the Town of Hilton Head Island, South Carolina; agreements between any agency of the Town of Hilton Head Island, South Carolina, and any third party; settlement agreements entered into to resolve litigation between the Town of Hilton Head Island and any other party, provided that such was legally issued; was issued by an individual or agency of the Town of Hilton Head Island, South Carolina possessing the requisite authority to issue the same; was not issued by mistake; which has not expired, lapsed, or been abandoned, revoked or canceled; or is not subject to expiration, lapse, abandonment or revocation by the passage of time or the conduct of the Applicant or the Applicant's predecessors in interest. All conditions of approval set forth in any such Valid Final Development Permit must have been satisfied by the Applicant or the Applicant's predecessor in interest.
- (19) Verified Copy means and refers to a copy of an original document submitted by an Applicant to the Town, pursuant to these Regulations, which copy bears (or is accompanied by) a sworn statement from the Applicant that the copy is a true and correct copy of the entire original document.
- (20) Vested Rights means and refers to the rights of an Applicant to be exempt from the application of all or any portion of the existing Land Management Ordinance, or any amendment thereto, to a particular parcel, development project or portion or phase thereof because the Applicant or the Applicant's predecessor in interest has: (1) performed substantial work or incurred substantial obligations; (2) in good faith reliance; (3) on any Final Development Permit or Building Permit issued by the Town of Hilton Head Island, South Carolina. The terms Vested Rights and Equitable Estoppel are sometimes used interchangeably throughout these regulations and a reference to one shall mean and include a reference

to the other.

- (21) **Vested Rights Determination means and refers to the Final Decision of the Administrator, pursuant to which a parcel, development project or any portion or phase thereof is deemed to have Vested Rights or a valid claim of Equitable Estoppel against the Town, thereby exempting the parcel, development project or any portion or phase thereof from all or any portion of the Land Management Ordinance, or any amendment thereto.**

Section 3 General Provisions and Applicability:

(A) **Term of these Regulations:** These regulations shall remain in effect unless and until repealed, amended or modified by Resolution of the Town Council in accordance with applicable State Law and local ordinances and procedures.

(B) **Quarterly Report:** The Administrator shall provide a report to Town Council on a quarterly basis, which report shall provide a summary of:

- (1) The number of applications filed for Categorical Exemptions during the quarter, and the status and/or disposition of such applications; and,
- (2) The number of applications filed for Vested Rights Determinations during the quarter, and the status and/or disposition of such applications.

(C) **Annual Review:** At least once every year prior to adoption of the Annual Budget and Capital Improvements Program, the Administrator shall prepare a report to the Town Council on the subject of Vested Rights which shall include:

- (1) Recommendations on amendments, if appropriate, to these Regulations;
- (2) The number of applications filed for Categorical Exemptions during the preceding year, the disposition of such applications and the number of dwelling units by type and square footage of non-residential development represented by such Categorical Exemptions.
- (3) The number of applications filed for Vested Rights Determinations during the preceding year, the disposition of such applications and the number of dwelling units by type and square footage of non-residential development represented by such determinations;
- (4) The location of Categorically Exempt parcels, developments and development projects, including the zoning district in which they are located;
- (5) The location of parcels, developments and development projects where it has been determined that Vested Rights apply, including the zoning district in which they are located;
- (6) The number, identification and location of applications for Categorical Exemptions and Vested Rights Determinations which are denied;
- (7) Other data, analysis or recommendations which the Administrator may deem appropriate, or as may be

requested by the Town Council.

(D) **Effect of Annual Review:** This annual review may, in whole or in part, form the basis for Town Council action to repeal, amend or modify these Regulations; provided, however, that the Town Council may cite and the Town Council may rely upon such other data, information, reports, analyses and documents relevant to any such decision as may be available to the Town Council.

(E) **Amendments:** Changes to these regulations must be made by Resolution of the Town Council. Nothing herein precludes the Town Council or limits the discretion of the Town Council to amend these Regulations at such other times as the Town Council may deem to be necessary or desirable.

(F) **Affected Area:** These regulations shall apply within the boundaries of the Municipal Limits of the Town of Hilton Head Island, South Carolina.

(G) **Applicability:** These Regulations shall apply to all claims for Categorical Exemptions and Vested Rights Determinations, except as otherwise set forth below.

(H) **Inapplicability:** These Regulations shall not apply to nor shall the procedures for obtaining a Categorical Exemption or Vested Rights Determination be available to claims for Vested Rights or Categorical Exemptions based only upon existing zoning of property.

Section 4 Categorical Exemptions:

(A) Categorical Exemptions: The following are Categorically Exempt if an application for Categorical Exemption is filed by the Applicant pursuant to this Section 4 and a Categorical Exemption Certificate is issued by the Town:

- (1) Parcels, developments or any portion or phase thereof, which are the subject of a valid Vested Rights Determination issued by the Town pursuant to these Regulations.
- (2) Parcels, developments or any portion or phase thereof, which are the subject of any Final Development Permit issued prior to the adoption of these Regulations, and which Final Development Permit has not expired, lapsed, been abandoned, revoked or otherwise declared invalid;
- (3) Owners of parcels, developments, or any portion or phase thereof, as defined in Subsections one (1) and two (2) above, wherein a valid Building Permit has been obtained by the owner, or the owner's predecessor in interest, shall not be required to obtain a Categorical Exemption Certification unless the construction is abandoned, or the Building Permit pursuant to which construction is taking place lapses, expires or is waived.

(B) Procedure for obtaining a Categorical Exemption Certificate:

- (1) **Application:** Any person wishing to obtain a Categorical Exemption Certificate shall file an "Application for a Categorical Exemption Certificate" as set forth herein.
- (2) **Submission of Application:** An Applicant shall file a complete "Application for Categorical Exemption Certificate" with the Administrator no later than December 31, 1994, or within one year of the date of the adoption of any amendment to the Land Management Ordinance from which the Applicant believes he is Categorically Exempt. Failure to submit a complete application within the time frames set forth herein shall be deemed to constitute a waiver and abandonment of the alleged right to obtain a Categorical Exemption.
- (3) **Submission Requirements:** An application for a Categorical Exemption Certificate shall be made on a form established for such purpose by the Town and shall, at a minimum, contain the following information:

- (a) Name and current mailing and street address of the Applicant;
- (b) A description of the development for which the Categorical Exemption is sought, including current survey showing site improvement and copies of relevant deeds;
- (c) Location of development for which the Categorical Exemption is sought, including the Zoning District;
- (d) Total land area of the development for which the Categorical Exemption is sought;
- (e) Total area of impervious surface and open space, of the development for which the Categorical Exemption is sought;
- (f) Number of residential dwelling units, by type, within the development for which the Categorical Exemption is sought;
- (g) Type and amount of non-residential square footage, of the development for which the Categorical Exemption is sought;
- (h) Phases of the development, or portions of the development for which the Categorical Exemption is sought, if applicable;
- (i)
 - (i) a verified copy of any valid Vested Rights Determination issued by the Town pursuant to these Regulations; or
 - (ii) a verified copy of a valid Final Development Permit including any plans, drawings and/or narrative associated with or relating to the Final Development Permit issued by the Town prior to the effective date of these Regulations.
- (j) A sworn narrative statement from the Applicant setting forth the Applicant's basis for his claim of Categorical Exemption.
- (k) A filing fee in the amount of One Hundred and no/100 (\$100.00) Dollars.
- (l) A sworn statement, in a form prescribed by the Town, and signed by the Applicant, attesting that:
 - (i) any Valid Final Development Permits, contracts, appraisals, reports, or any other documents or materials submitted are valid as of the date of the submission and that the Applicant has not assigned, sold or otherwise transferred his interest in and

to the rights described in the said documents;

- (ii) setting forth the names and addresses of any party known to the Applicant to have any pecuniary interest in the outcome of the Categorical Exemption Application;
- (iii) that there are no prior adverse final Administrative determinations of the Town or any federal, state or other local governmental agency affecting the Applicant's Categorical Exemption claim;
- (iv) that there are no prior adverse orders of any state or federal court affecting the Applicant's Categorical Exemption claim;
- (v) that there is no pending administrative action or court proceeding in which the Applicant's Categorical Exemption claim will be affected by the outcome; and,
- (vi) that the Applicant is aware of no other information or document, not submitted with his application, disclosure of which would potentially have a negative impact on his application.

(4) Review of Application for Completeness:

- (a) The Administrator shall review the application within ten (10) days of submission and inform the Applicant, in writing, as to whether or not the application is complete. If complete, the Administrator shall proceed to review the application as set forth herein.
- (b) If the Administrator determines that the application is incomplete, a Notice of Incompleteness shall be Delivered to the Applicant.
- (c) The Administrator shall take no further action on an incomplete application until the deficiencies are corrected and the application is resubmitted. If a complete application is not resubmitted within fifteen (15) days from the date of Delivery of the Notice of Incompleteness to the Applicant, the application shall be dismissed; a Notice of Dismissal shall be delivered to the Applicant, and all fees paid shall be retained by the Town. A dismissal pursuant to this subsection shall be without prejudice to the Applicant's right to refile a complete application, subject, however, to the time frames set forth in Section 4 (B)(2) herein.
- (d) A determination of completeness shall only constitute a determination that the application is in

compliance with the submission requirements of these Regulations and shall not imply compliance with the substantive requirements of these Regulations nor shall it indicate that the information submitted is accurate or has been verified.

(5) Public Hearing on Application:

- (a)** At the same time that the Administrator delivers the Notice of Completeness to the Applicant, the Administrator shall also notify the Applicant of the time and place for a public hearing on the Application. Said public hearing shall be no more than fifteen (15) days following the delivery of the Notice of Completeness.
- (b)** At the public hearing, the Applicant shall be given the opportunity to make an oral presentation on the facts and applicable law in support of the Application to the Administrator, and the Administrator shall be given the opportunity to ask questions of the Applicant concerning the materials submitted hereunder and the presentation of the Applicant.
- (c)** While the hearing will be open to the public, comments from the public concerning the application shall not be taken at the hearing.

(6) Issuance or Denial of Categorical Exemption Certification:

- (a)** Following review by the Administrator and the public hearing, the Administrator shall issue his Final Decision, issuing or denying the Application for Categorical Exemption Certification for all, or a portion of, the applicable development.
- (b)** If granted, the Categorical Exemption Certification shall be specific as to the development, or portion thereof, which is Categorically Exempt; large-scale, multi-phase development may be determined to be Categorically Exempt in part, but not as a whole.
 - (i)** The Categorical Exemption Certification may specify any Land Management Ordinance provisions to which the exemption will or will not apply.
 - (ii)** The Categorical Exemption Certification shall also specify that the Categorical Exemption Certification shall be valid for a period of five (5) years from the date of said Categorical Exemption Certification unless another time period is stated therein and the Administrator documents the reasons for the alternate time period; and

that after the expiration of the Categorical Exemption Certification, the affected property shall be subject to all provisions of the then existing Land Management Ordinance.

- (c) If the Application for Categorical Exemption is denied, the Administrator shall specify his reasons therefore, in writing.
- (7) **Delivery of Final Determination:** The Administrator shall Deliver his Final Determination to the Applicant within sixty (60) days of the public hearing , unless the Administrator and the Applicant agree, in writing, to extend the deadline.
- (8) **Denial is without Prejudice to certain other rights:** A denial of an Application for a Categorical Exemption Certificate shall not prejudice the right of the Applicant to seek a Vested Rights Determination based upon the same facts and/or documentation, subject, however, to the time limits set forth in Section 5(B), infra.

Section 5 Procedures for Vested Rights Determinations:

(A) **Necessity for Application:** All development other than that which is determined to be Categorically Exempt pursuant to these Regulations shall be presumed to be subject to the existing Land Management Ordinance, and any amendments thereto, unless the Applicant demonstrates, by a preponderance of the evidence, that Vested Rights have been acquired pursuant to South Carolina law or that the Town is Equitably Estopped from enforcing all or portions of the Land Management Ordinance with respect to all or portions of the development.

(B) **Submission of Application:** An Applicant shall file a complete "Application for Vested Rights Determination" with the Administrator no later than December 31, 1994, or within one year of the date of the adoption of any amendment to the Land Management Ordinance which the Applicant believes affects or involves any Vested Right of the Applicant. Failure to submit a complete application within the time frames set forth herein shall be deemed to constitute a waiver and abandonment by the Applicant of any alleged Vested Rights.

(C) **Submission Requirements:** An application for a Vested Rights Determination shall be made by the Applicant on a form established for such purpose and provided by the Town, and, at a minimum, shall contain the following information:

- (1) All of the information required by Section 4(b)(3) supra;
- (2) Verified Copies of all Final Development Permits, contracts, appraisals, reports, or any other documents or materials upon which the applicant's claim of Vested Rights or Equitable Estoppel is based;
- (3) A sworn narrative statement from the Applicant setting forth the basis for the Applicant's claim of Vested Rights. To the extent applicable, the narrative statement should address the criteria for a determination of Vested Rights or Equitable Estoppel set forth in Section 6 infra.
- (4) A filing fee in the amount of Five Hundred and no/100 (\$500.00) Dollars.
- (5) A sworn statement, in a form prescribed by the Town, and signed by the Applicant, attesting that:
 - (a) any Valid Final Development Permits, contracts, appraisals, reports, or any other documents or materials submitted are valid as of the date of the submission and that the Applicant has not assigned, sold or otherwise transferred his interest in and to the rights described in the said documents;

- (b) setting forth the names and addresses of any party known to the Applicant to have any pecuniary interest in the outcome of the Vested Rights Determination;
- (c) there are no prior adverse final Administrative determinations of the Town or any federal, state or other local governmental agency affecting the Applicant's Vested Rights claim;
- (d) there are no prior adverse orders of any state or federal court affecting the Applicant's Vested Rights claim;
- (e) there is no pending administrative action or court proceeding in which the Applicant's claim of Vested Rights will be affected by the outcome; and
- (f) the Applicant is aware of no other information or document, not submitted with his application, disclosure of which would potentially have a negative impact on his application.

(D) Review of Application for Completeness:

- (1) The Administrator shall review the Application for Vested Rights Determination within fifteen (15) days of submission and inform the Applicant, in writing, as to whether or not the application is complete. If complete, the Administrator shall proceed to review the application as set forth herein.
- (2) If the Administrator determines that the application is incomplete, a Notice of Incompleteness shall be Delivered to the Applicant.
- (3) The Administrator shall take no further action on an incomplete application until the deficiencies are corrected and the application is resubmitted. If a complete application is not resubmitted within twenty (20) days from the date of Delivery of the Notice of Incompleteness to the Applicant, the application shall be dismissed; a Notice of Dismissal shall be delivered to the Applicant, and all fees paid shall be retained by the Town. A dismissal pursuant to this subsection shall be without prejudice to the Applicant's right to refile a complete application, subject, however, to the time frames set forth in Section 5(B) herein.
- (4) A determination of completeness shall only constitute a determination that the application is in compliance with the submission requirements of these Regulations and shall not imply compliance with the substantive requirements of these Regulations nor shall it indicate that the information submitted is accurate or has been verified.

(E) Public Hearing on Application:

- (1) At the same time that the Administrator delivers the Notice of Completeness to the Applicant, the Administrator shall also notify the Applicant of the time and place for a public hearing on the Application. Said public hearing shall be no more than fifteen (15) days following the delivery of the Notice of Completeness.
- (2) At the public hearing, the Applicant shall be given the opportunity to make an oral presentation on the facts and applicable law in support of the Application to the Administrator, and the Administrator shall be given the opportunity to ask questions of the Applicant concerning the materials submitted hereunder and the presentation of the Applicant.
- (3) While the hearing will be open to the public, comments from the public concerning the application shall not be taken at the hearing.

(F) Issuance or Denial of Vested Rights Determination:

- (1) Following review by the Administrator and the public hearing, the Administrator shall issue his Final Decision, issuing or denying the Application for Vested Rights Determination.
- (2) The Final Decision shall contain the Administrator's findings of fact and conclusions of law with regard to the Application for Vested Rights Determination, and shall, at a minimum, contain the following:
 - (a) Whether the Applicant has been found to have acquired Vested Rights or has a valid claim of Equitable Estoppel and the basis for such finding;
 - (b) If the proposed Determination includes findings and a conclusion that Vested Rights or a valid claim of Equitable Estoppel exists, then the Final Decision shall further state the geographic scope of the determination in relation to the total area of the development site; the specific buildings or uses to which the determination applies; the substantive scope of the Vested Rights determined to have been acquired and the limitations applicable thereto, if any, including, but not limited to, the applicability of impact fees and building permit allocations; any other appropriate conditions, consistent with the rights of the applicant, which are needed to ensure consistency with the Comprehensive Plan and Land Management Ordinance.
 - (c) The Vested Rights Determination shall also specify that the Vested Rights Determination shall be valid for a period of five (5) years from the date of said Vested Rights Determination unless

another time period is expressly stated therein and the Administrator documents the reasons for the alternate time period; and that after the expiration of the Vested Rights Determination, the affected property shall be subject to all provisions of the then existing Land Management Ordinance.

(F) **Delivery of Final Determination:** The Administrator shall Deliver his Final Determination to the Applicant within sixty (60) days of the public hearing, unless the Administrator and the Applicant agree, in writing, to extend the deadline.

(G) **Withdrawal of Application:** An Applicant may withdraw an application for a Vested Rights Determination at any time by submitting a written request to the Administrator. Withdrawal of an application for a Vested Rights Determination shall result in the forfeiture of all administrative fees paid by the applicant for the processing of the application. Withdrawal of an Application under this subsection shall be without prejudice to the rights of the Applicant to re-file an Application for Vested Rights Determination, subject to the time limitations set forth in Section 5(B) herein.

Section 6 Standards and Criteria for Issuance of Vested Rights Determinations:

(A) General Requirements for Common Law Vested Rights.

- (1) The Applicant has the duty and responsibility to demonstrate by a preponderance of the evidence that a Vested Right to proceed with the proposed development without being subject to specific requirements of the existing Land Management Ordinance, and any amendments thereto, has been legally established and/or to demonstrate that the Town is Equitably Estopped from applying specific provisions of the existing Land Management Ordinance, and any amendments thereto, to the proposed development.**
- (2) The applicable legal requisites to establish a claim of Vested Rights to initiate or complete development which does not conform to the existing Land Management Ordinance or amendments thereto are:**
 - (a) that the Applicant has made a substantial change of position or has incurred substantial obligations and expenses with respect to the land affected by the permit;**
 - (b) acting in good faith and in reasonable reliance on a valid, unexpired approval or act of the Town; or,**
 - (c) that the Applicant has, in good faith, applied for an approval or permit to initiate development or construction based upon the existing zoning ordinances prior to any amendment thereto being legally pending; provided, however, that the mere filing of an application will not be sufficient to establish a claim of vested rights, unless said application is Legally Maintained, as defined in § 16-7-250, Code of the Town of Hilton Head Island, (1983).**
- (3) The applicable legal standards for a determination that the Town is Equitably Estopped from enforcing the provisions of the existing Land Management Ordinance, or amendments thereto are:**
 - (a) that the Applicant has, in good faith, relied upon conduct, representations or silence of the Town of Hilton Head Island, South Carolina, amounting to a concealment or mis-representation of facts;**
 - (b) in circumstances where the Applicant was without knowledge of the true state of facts, and was without reasonable means of determining the true state of facts;**
 - (c) the Applicant has relied, to his detriment upon such affirmative act, representation or omission, and has made substantial improvements or incurred substantial obligations with respect to the**

land;

- (d) it would be unjust or inequitable to subject the proposed development or construction to the requirements of the Land Management Ordinance, given the totality of the circumstances.

- (4) If the applicant is determined to have acquired Vested Rights, or if the Town is determined to be Equitably Estopped from applying certain specified provisions of the existing Land Management Ordinance, or amendments thereto, to the proposed construction or development, the Applicant shall be granted a Vested Rights Determination.

(B) **Specific Criteria:** The following specific criteria shall guide both the Applicant in submitting evidence and the Administrator in considering the evidence so that all relevant facts are reviewed and so that an adequate record is made for further administrative or judicial review. The specific criteria are not intended to limit either the Administrator or the Applicant in applying the common law of Vested Rights or Equitable Estoppel, and the Administrator may, in any particular case, consider all such applicable law.

- (1) **Good Faith.** Acting in good faith may mean, and consideration may be given to, the degree to which the Applicant has made diligent efforts in a timely fashion toward completion of the subject development. Diligent efforts shall require reasonable and timely pursuit of all necessary governmental approvals, certifications and permits; financing; and marketing, together or in a sequence customary to the industry.

- (a) The Administrator may find good faith has not been shown:

- (i) where the Applicant has not made diligent efforts to pursue all reasonable means to remedy or avoid the factors preventing him from commencing or continuing with the proposed development; or
- (ii) where all permits, approvals, and certifications which should reasonably be obtained are not obtained and have not been delayed by factors beyond the Applicant's control;
- (iii) where delays are occasioned by the actions of any person holding a legal or equitable interest in the property, its agents, contractors, or employees acting on behalf of the Applicant;
- (iv) where there is a discontinuation of attempts to obtain all necessary governmental

approvals, certifications and permits; financing; and marketing, together, or in a sequence customary to the industry.

- (b) Recognizing that land development is a complex process involving a series of governmental approvals which must be obtained over time, the following factors may be considered where relevant:
- (i) The marketing practices associated with the proposed development, e. g., whether the entire development is being marketed for sale as a whole or whether only individual lots or dwelling units are being marketed;
 - (ii) The reasonable development time line for a development of the type and size being proposed;
 - (iii) The number and type of contractors, engineers, consultants, tradesman, and professionals working on the proposed development, and the nature of their respective activities;
 - (iv) Whether the Final Development Permit (if any) was issued in compliance with then current Land Management Ordinance or the Development Standards Ordinance;
 - (v) Whether the Applicant was on notice that active or documented efforts were being pursued by the Town to adopt the current Land Management Ordinance at the time that the Valid Final Development Permit was issued; to establish that active and documented efforts had been undertaken, the Administrator must find that there was more than circumstantial notice of a change in the regulations. Comments by Town personnel shall not be deemed sufficient to establish notice of a change in the Land Management Ordinance.
 - (vi) Whether the Applicant has inquired and conferred with the appropriate Town officials as to the use to which the property may be put and the conditions and requirements applicable to such use.
 - (vii) With regard to claims of Vested Rights arising from an Application for an approval or permit for development which has been made in reliance on existing zoning,

whether or not any amendment to the existing zoning was legally pending prior to the submission of the application.

- (2) **Detrimental Reliance:** In determining whether the Applicant has reasonably and substantially relied on an alleged governmental approval, act or omission, the following factors may be considered:

- (a) The type of approval, act or omission, relied upon;
- (b) The regulatory system in effect at the time the approval, act or omission occurred;
- (c) Whether the approval, act or omission was formal or informal;
- (d) The point in the sequence of required regulatory approvals when the relied upon approval, act or omission occurred. A determination that a development approval claimed by the Applicant as giving rise to Vested Rights or Equitable Estoppel is the final act required (or which was required under the existing land use ordinances) to authorize development shall weigh in favor of making a Vested Rights Determination.
- (e) The level of detail included in the approval issued by the Town or the act or omission relied upon.

- (3) **Substantial Improvements, Expenses or Obligations:** In determining whether the Applicant has made a substantial change of position or has incurred substantial obligations or expenses, the following factors may be considered:

- (a) The extent to which contributions have been made by the Applicant for public infrastructure for the proposed development, taking into account the relative significance of such contributions as compared to the size, value, and density of the project, and whether performance is complete;
- (b) The total amount of direct costs of development incurred by the Applicant as compared to the total project cost; provided, however, that costs incurred prior to the Town act or approval upon which the owner relied shall not be considered;
- (c) The extent to which surveys, design plans, engineering plans, plats, building plans and specifications have been prepared in reliance on a valid Final Development Permit, and the total amount of money reasonably spent thereon relative to the size of the development;
- (d) The professional fees incurred for the development;

- (e) The nature of any expenditures allegedly made in reliance upon reasonable investment-backed expectations, the company to whom such expenditures were paid, and the business relationship or any familiar or other relationship of the recipient of such expenditures to the Applicant;
- (f) The reasonableness of the total expenditures as compared to customary development practices for a development of similar size and scale on Hilton Head Island, South Carolina;
- (g) The then-present intent of the Applicant to develop a specific project at the time the reliance was deemed to have occurred, as opposed to a tenuous, contingent, speculative, distant or non-existent intent;
- (h) Whether the parcel of land was purchased contingent upon the issuance of the specific Valid Final Development Permit, and whether the Town knew that the Applicant was relying upon the issuance of the Valid Final Development Permit. The existence in a Vested Rights Determination Application of written evidence in the records of the Town of such knowledge shall weigh in favor of the determination.
- (i) The extent to which irrevocable contracts or agreements have been negotiated and executed by the Applicant to pursue the proposed development.

(C) **Equity of Applying Land Management Ordinance to Applicant:** In determining whether it would be inequitable to apply the current Land Management Ordinance to the Applicant, the following factors may be considered:

- (1) The terms of any agreement by and between the Town and the Applicant, or the Applicant's predecessor in interest, executed in conjunction with a development approval;
- (2) The conditions of development approval and the level of, or progress of the Applicant toward, fulfillment of such conditions;
- (3) the number, frequency and timing of Town approvals or acts relied upon by the Applicant;
- (4) Whether and for how long the subject parcel was developable prior to the applicability of the current Comprehensive Plan and Land Management Ordinance, and the type and extent of development that could have occurred when the Applicant acquired the property, incurred substantial obligations or expenditures, or substantially changed his position;
- (5) The reasonableness and good faith of any alleged reliance on governmental approvals, acts or omissions,

given the totality of the circumstances;

- (6) Whether the Applicant had obtained financing or a loan commitment prior to the effective date of these Regulations;
- (7) The use to which the Applicant intended to put the land prior to the effective date of these regulations;
- (8) Whether a capacity reservation, or similar agreement reserving utility or other infrastructure capacity, has been maintained by the Applicant and the requirements for continuing to maintain such capacity, and
- (9) Whether the project is in separate ownerships, and the number of owners and size of parcels in the project under separate ownership (projects shall be considered as a whole).

(D) Standards and Criteria Inapplicable to a Vested Rights Determination:

The following standards may not be relied upon by the applicant and shall not be applicable to a Vested Rights Determination:

- (1) Actions of the Applicant taken after the effective date of the existing Land Management Ordinance, or any amendment thereto; provided, however, that activities of the Applicant which are underway, or which are the next step in a development process, and which are continuing to a reasonable completion of the development project, and which cannot be halted without substantial harm and loss of investment, may be considered;
- (2) Real Property Taxes paid by the Applicant;
- (3) Appraised value of the land as set by the Beaufort County Appraiser;
- (4) Acts or approvals which are not specific to the subject parcel or proposed development;
- (5) Conceptual approvals, informal approvals or encouragement by the Town or any of its staff or officials unless the Town Official has express authority to authorize the specific action;
- (6) Rezoning which are not accomplished in conjunction with a specific plan of development;
- (7) Development that has occurred outside of the boundaries of the proposed development; and,
- (8) A Valid Final Development Permit that is superseded by a subsequent Valid Final Development Permit; or which is abandoned by the Applicant in pursuit of a different development plan.
- (9) Applications to initiate development or construction based upon existing zoning where an amendment to the existing zoning is legally pending prior to the filing of the application.

Section 7 Effect of Categorical Exemptions and Vested Rights Determinations:

(A) **Effect on Land Management Ordinance:** Issuance of a Categorical Exemption or a Vested Rights Determination shall relieve the Applicant from being subject to only those provisions of the existing Land Management Ordinance, and amendments thereto, as are set forth in the Categorical Exemption or Vested Rights Determination. A Categorical Exemption or a Vested Rights Determination shall have no effect on other applicable governmental requirements.

(B) **Amendment of Final Development Permits with accompanying Categorical Exemptions or Vested Rights Determination:**

The granting of a Categorical Exemption or a Vested Rights Determination shall not be construed as a limitation on the Applicant or a successor in interest from seeking an amendment of any Final Development Permit; provided, however that any material change in the proposed development and any increased impact resulting from such amendment shall cause the proposed development to be subject to the then current Land Management Ordinance, any Categorical Exemption or Vested Rights Determination notwithstanding.

(C) **Sale of Lots or Parcels:** Nothing herein shall preclude the sale of a parcel of land or a lot with a Categorical Exemption or a Vested Rights Determination.

(D) **Geographic Scope:** The Categorical Exemption or Vested Rights Determination shall apply only to the particular parcel(s) of land for which application was made for the Categorical Exemption or Vested Rights Determination.

(E) **Reconsideration/Revocation of Vested Rights Determination:** A Categorical Exemption or a Vested Rights Determination may be reconsidered and revoked by the Administrator, notwithstanding any other provision of these Regulations, if the Administrator determines that the Final Determination on a Categorical Exemption or on a Vested Rights Determination was based on materially inaccurate or incomplete information and that correct and complete information was reasonably obtainable by the Applicant.

Section 8 Appeals:

(A) **Appeal from the Final Decision of the Administrator:** An appeal from any Final Decision of the Administrator pursuant to these Regulations, including, but not limited to, issuance or denial of a Categorical Exemption or Vested Rights Determination shall be to the Court of Common Pleas for Beaufort County, South Carolina, pursuant to the provisions of S. C. Code Ann. § 6-7-750 (Supp. 1992).

Section 9 Administration:

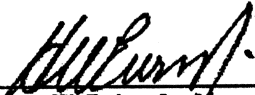
(A) **Rules and Regulations:** The Town may adopt by Resolution any other rules, administrative guidelines, forms, work-sheets and processes as are necessary to efficiently and fairly administer and implement these Regulations.

(B) **Administrative Fees:** The Town may establish and modify by Resolution a fee schedule for each of the administrative procedures, determinations, approvals and certifications required by these Regulations.

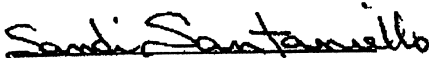
Section 10 Conflict and Severability:

- (A) **Conflict:** In the event of any conflict between other regulations and these Regulations, the more restrictive is deemed to be controlling. These Regulations are not intended to amend or repeal any existing Town Ordinance.
- (B) **Severability:** If any section, phrase, sentence or portion of these Regulations is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such section, phrase, sentence or portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining sections, phrases, sentences or portions thereof.

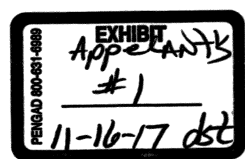
PASSED AND ADOPTED by the Town Council of the Town of Hilton Head Island, South Carolina, at a special meeting of said Town Council held on the 2nd day of December, 1993.


Harvey W. Ewing, Jr., Mayor

ATTEST:


Sandi Santaniello, Clerk

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

ORIGINAL

-----/

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.

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8 843.785.5050
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10 **-AND-**

11 **CHESTER C. WILLIAMS, ESQUIRE**
12 Chester C. Williams, L.L.C.
13 17 Executive Park Road
14 Suite 2
15 Hilton Head Island, South Carolina 29938
16 843.842.5411
17 firm@ccwlaw.net

18 **ALSO PRESENT:**
19 Board Members
20 Barry Johnson, Esquire

21

22

23

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D O C U M E N T A R Y E V I D E N C E

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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

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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

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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

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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

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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 --

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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.

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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 --

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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.

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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

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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?

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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 that 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.

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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.

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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

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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

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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

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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

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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

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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:

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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.

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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.

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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

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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

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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

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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

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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?

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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

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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

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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

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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.

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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

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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

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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

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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

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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.

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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.

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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

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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,

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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

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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?

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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.

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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,

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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

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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.

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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.

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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

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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

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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

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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.

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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.

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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

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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..)

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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

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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

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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

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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 do you 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

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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.

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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

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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?

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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.

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1 EXAMINATION

2 BY MR. STANFORD:

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

6 A No, sir.

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

9 A It was purchased after he purchased the
10 other piece.

11 MR. STANFORD: Any questions from
12 the town?

13 Any questions from the board?

14 Thank you. You're excused.

15 MR. WILLIAMS: We call Nicole
16 Dixon.

17 MR. CUTRER: I had a question.

18 EXAMINATION

19 BY MR. CUTRER:

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

24 A It supports basically recreation and
25 our big outdoor pool.

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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

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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

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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

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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.

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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

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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.

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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

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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

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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.

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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 not withstanding 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

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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

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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.

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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

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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

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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

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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

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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.

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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

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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

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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:

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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

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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

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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.

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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

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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

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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

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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

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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

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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.

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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

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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.

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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 someway 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

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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.

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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

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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

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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,

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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

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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

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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.

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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.

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1 MR. CUTRER: Against the motion.

2 MS. HALEY: Ms. Laudermitlch.

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

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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.

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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 --

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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.)

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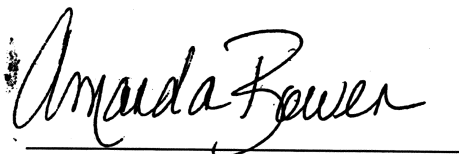
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C E R T I F I C A T E

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

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1 TOWN OF HILTON HEAD ISLAND
 BOARD OF ZONING APPEALS
2 STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT

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16 The Petition For Reconsideration of
17 Application For Appeal Number APL-001673-2016, a
18 hearing before the Board of Zoning Appeals,
19 taken before Ceil Weser, Certified Court
20 Reporter and Notary Public, at the Hilton Head
21 Island Town Government Center, Benjamin M.
22 Racusin Council Chamber, One Town Center Court,
23 Hilton Head Island, South Carolina, on the 23rd
24 day of January, 2017, commencing at or about the
25 hour of 2:41 p.m.

1 APPEARANCES OF COUNSEL:
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 3 and BEACHWALK HILTON HEAD, LLC:
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- - -

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1 MR. STANFORD: The next matter
2 before us is a Motion to Reconsider on
3 behalf of Beachwalk Hotel Condominiums
4 Association and Beachwalk Hilton Head,
5 LLC and its request that the Board of
6 Zoning Appeals reconsider the decision
7 to uphold the decision of the Town
8 official, and this is a matter
9 identified as APL-1673-2016. In a case
10 like this each side has a period of 20
11 minutes to make its presentation. The
12 purpose of the motion is as stated to
13 ask the board to reconsider the
14 decision that was made previously on
15 this matter.

16 In cases like this we normally
17 hear from the Applicant first and then
18 we will hear from the Town, and we have
19 20 minutes according to our rules.
20 Thank you.

21 (Whereupon, Exhibits
22 Number 1 and 2 were marked for
23 identification.)

24 MR. TAYLOR: Mr. Stanford, my name
25 is Tom Taylor. As the board knows Chet

1 Williams and I represent Beachwalk in
2 this matter.

3 Mr. Chairman, before the clock
4 starts and before Chet makes the
5 argument, I would just like to make
6 something on the record to make sure
7 that it is clear is you will recall
8 without me going into a lot of it, at
9 the end of our hearing on November 28
10 Mr. Johnson was called by the chairman
11 and offered the opportunity to speak.
12 I requested the opportunity to question
13 Mr. Johnson. The chairman denied that.
14 I made a request to make a proffer of
15 evidence and the Chair denied that and
16 asked me to make it in writing.

17 On November 29 I transmitted to
18 Mr. Hulbert a proffer which has been
19 marked as Exhibit 1, along with a cover
20 letter which is marked Exhibit 2. They
21 have been given to Ceil, the court
22 reporter for this official and I have
23 handed the them up to the Chairman. I
24 just want to make sure that is on the
25 record.

1 MR. STANFORD: I think that is a
2 correct statement of the record. Thank
3 you.

4 MR. TAYLOR: Yes, sir.
5 And I would like to ask Mr.

6 Williams to make the argument.

7 MR. WILLIAMS: Good afternoon,
8 gentlemen. I am Chester Williams. I
9 along with Mr. Taylor are Co-Counsel
10 for Beachwalk in this matter. We are
11 here before you today in a Petition For
12 Reconsideration that we filed on
13 December 2. In the November 28 hearing
14 by a 4 to 2 vote the BZA upheld the two
15 determinations that were made by Nicole
16 Dixon in her letter to me that was
17 dated August the 23rd, 2016. Those two
18 determinations were number 1, she said
19 I have determined that the Spinnaker
20 Welcome Center is permitted as long as
21 it does not exceed what was allowed on
22 that Master Plan or what is permitted
23 by the current LMO.

24 And she also made a second
25 determination, the proposed Welcome

1 Center Project (DPR-001056-2016) meets
2 all current LMO requirements, and a
3 Notice of Action was issued on July 28,
4 2016.

5 The appeal that we filed seeks to
6 reverse those determinations, but only
7 in part. The portion of the first part
8 that says that Parcel E can be
9 developed as long as it does not exceed
10 what was allowed on that Master Plan
11 and which refers to that Master Plan I
12 think you will recall the discussion.
13 It was a reference to the Conceptual
14 Master Plan for the Town Center PUD
15 approved by the Town's Planning
16 Commission in 1987. We disagreed with
17 that part of the determination; but we
18 agreed with the other part of that
19 first determination, that the Spinnaker
20 Welcome Center is permitted as proposed
21 as long as it does not exceed what is
22 permitted by the current LMO. I think
23 that is a valid statement, that is a
24 legitimate determination.

25 The second part of the appeal is

1 we seek reversal of the portion of the
2 determination letter that says that the
3 Development Plan Review Application
4 submitted for the Spinnaker Welcome
5 Center meets all current LMO
6 requirements.

7 You will recall and the transcript
8 before you that is a part of the
9 minutes of that meeting showed that we
10 made our presentation, Miss Dixon made
11 a presentation. Mr. Stanford, at your
12 invitation Barry Johnson, who is also
13 here as Counsel for SDC Properties also
14 made a presentation. Following
15 discussions there was a motion made and
16 seconded that the appeal would be
17 denied. That motion passed by a 4 to 2
18 vote.

19 That transcript is there for you
20 all. And if you read through the
21 transcript, I just want to point out
22 some of the things that the transcript
23 shows. Miss Dixon acknowledged in the
24 first paragraph of the determination
25 letter that Parcel E, and just to

1 refresh your memory, Parcel E is the
2 undeveloped tract formed at the
3 Waterside run and Pope Avenue that is
4 the subject, that is the proposed site
5 for the Spinnaker Welcome Center. She
6 made a determination in that letter
7 that Parcel E is in the LMO's Waterside
8 PD-2 Overlay District, and she again
9 acknowledged that and the record
10 attests to that on several occasions.
11 I mean I can give you the references to
12 the transcript for the pages and lines
13 if you want to take the time to go look
14 at those.

15 Todd Theodore who is also here
16 today and who sits on the Town's
17 Planning Commission testified at the
18 appeal hearing that he agreed that
19 Parcel E is part of the property that
20 is included in the Waterside PD-2
21 Overlay District. And he also agreed
22 that any development of Parcel E must
23 comply not only with the base zoning
24 district requirements, but also with
25 the PD-2 Overlay District requirements.

1 And again if you want, I will give you
2 the citations for the transcript for
3 the pages and the lines.

4 Miss Dixon testified at the appeal
5 hearing that when she reviewed the
6 development plan, the Review
7 Application for the Spinnaker Welcome
8 Center, she did not check to see if the
9 overall density for the 15.1 acres that
10 are the total of the Waterside PD-2
11 Overlay District was in conformance
12 with the maximum density requirements
13 in the LMO for the PD-2 Overlay
14 Districts; and that she reviewed that
15 application only for conformance of
16 Parcel E by itself with the density
17 requirements of the RD District. In
18 other words, she did not take into full
19 account the PD-2 standards and
20 requirements for density;
21 notwithstanding the fact that she
22 agreed that the parcel is in the PD-2
23 District.

24 Miss Dixon also agreed that if the
25 LMO's PD-2 District Overlay

1 requirements are applied to Parcel E,
2 then Parcel E can't be developed as
3 proposed for the Spinnaker Welcome
4 Center.

5 Miss Dixon and Mr. Johnson when he
6 spoke both agreed in the end that the
7 Parcel E can no longer be developed at
8 the densities and uses provided for in
9 the 1987 Master Plan.

10 You will recall, Mr. Chairman,
11 that you did comment, "Well, we have
12 been talking about this for 45 minutes
13 and now you tell us that is
14 unimportant. In fact, Mr. Johnson
15 referred to that 1987 Master Plan as
16 being irrelevant. And he agreed that
17 development of the parcel is now
18 governed by the current LMO.

19 Miss Dixon also testified that the
20 PD-2 Overlay District is always going
21 to be applicable to Parcel E, but
22 development of Parcel E is governed by
23 the current LMO density standards.

24 So to recap, the matters that were
25 established at the hearing are number

1 1, Parcel E is in the PD-2 Overlay
2 District, that is the Waterside PUD.

3 Number 2, any development of
4 Parcel E must comply not only with the
5 base RD District zoning requirements,
6 but also with the PD-2 Overlay District
7 requirements.

8 Number 3, when Miss Dixon reviewed
9 the Development Plan Review Application
10 for the Spinnaker Welcome Center, she
11 did not check that application for
12 conformance with the density
13 requirements of the PD-2 Overlay
14 District.

15 Number 4, if you do compare or
16 review the PD-2 -- excuse me, the DPR
17 Application in conformance with the
18 PD-2 Overlay District requirements,
19 Parcel E can't be developed as proposed
20 in the Development Plan Review
21 Application.

22 Number 5, Parcel E can no longer
23 be developed at the densities and uses
24 that were provided for in the 1987
25 Master Plan that are now governed by

1 the current LMO requirements.

2 And number 6, the PD-2 Overlay
3 District requirements are always going
4 to be applicable to Parcel E. Those
5 matters were established with testimony
6 and that was what the Board had before
7 it at the time it would make the
8 decision.

9 Part of the problem that we had
10 with that initial hearing was that we
11 didn't know Miss Dixon's reasoning for
12 how she came to her determinations in
13 the letter until she testified at the
14 hearing. And her testimony was
15 basically that she couched her
16 arguments in terms of interpretation of
17 the LMO. Mr. Chairman and the record
18 acknowledged that we had heard two
19 competing interpretations of the
20 applications of the rules.

21 In his motion to uphold the
22 determination, Mr. Cutrer said and I
23 quote, "I believe I have heard Miss
24 Dixon say that those requirements that
25 were in the PD-2 density don't apply.

1 The property meets the current LMO
2 standards." The motion of the board
3 was based on the assumption -- it was
4 based on Miss Dixon's interpretation of
5 LMO that the PD-2 requirements are not
6 applicable to the development of Parcel
7 E. That is the bottom line which is
8 the basis of the board's 4 to 2 vote.

9 So with that 4 to 2 vote it means
10 that the determination letter stands as
11 is. Even though she agrees that Parcel
12 E is in the Waterside PD-2 Overlay
13 District, it is clear from Miss Dixon's
14 testimony, and she admits also that she
15 did not apply the PD-2 Overlay District
16 standards and regulations to the
17 proposed development of Parcel E.

18 In doing so, Miss Dixon failed to
19 follow the mandatory provisions of at
20 least five different LMO sections. I
21 have handed up to you a list of
22 excerpts from the LMO, certain
23 provisions. And those are the ones
24 that I am referring to here,
25 specifically Section 16-1-106.A.2,

1 16-3-101.B, 16-3-102.C, 16-3-106.D, and
2 16-3-106.G.4a.

3 The first four -- and again, you
4 know, I didn't understand what Miss
5 Dixon's reasoning was until that
6 hearing. But when you look at those
7 first four LMO sections that I have
8 cited together, they say that if the
9 tract of land is in the PD-2 Overlay
10 District, the PD-2 Overlay District
11 standards and regulations always
12 control over the standards and
13 regulations of the base zoning
14 district. It consistently uses the
15 term, "shall" and but the PD-2 always
16 controls over the base zoning district.
17 If that is the case, then Miss Dixon
18 when she reviewed the DPR Application
19 was required by the LMO to look at the
20 controlling density locations of the
21 PD-2 District. She didn't do it. She
22 admitted she didn't do it, and she also
23 admitted that if she had, she could not
24 have approved the DPR Application.

25 Instead she chose to, as she puts

1 it, interpret the LMO in a manner that
2 disregards the mandatory standards and
3 regulations of the PD-2 Overlay
4 District.

5 Now, there is no ambiguity here,
6 nor do we think there is any
7 opportunity for interpretation. The
8 law is what the law is, and the Town
9 staff is not free to interpret the LMO
10 in a manner that disregards the
11 mandatory provisions of the code. All
12 applicable requirements of the LMO
13 would have to be taken into
14 consideration by the staff when they
15 review applications. They have no
16 leeway. They can't pick and choose
17 which sections they are going to follow
18 and which one's they are going to
19 disregard.

20 Miss Dixon determined that the DPR
21 Application for the proposed Spinnaker
22 Welcome Center "meets all current LMO
23 requirements." Clearly, since she
24 didn't take into account the PD-2
25 overlay requirements, that is not the

1 case. She admitted she didn't do that.
2 And because Mr. Cutrer's motion was
3 based on Miss Dixon's interpretation
4 that the PD-2 Overlay District
5 requirements do not apply to the
6 development of Parcel E, the BZA ought
7 to grant the Petition For
8 Reconsideration and hear this matter
9 over again.

10 In addition, the vote of the BZA
11 just simply upheld the determination as
12 is, and when it did that it also upheld
13 the part of the determination saying
14 that Parcel E could be developed as
15 long as it doesn't exceed what is
16 allowed in the 1987 Master Plan. Well,
17 everybody agreed, everybody including
18 Miss Dixon agreed that no, they can't
19 follow what is in the 1987 Master Plan.
20 That all expired on March 3, 2000.

21 So the vote of the BZA as it stood
22 upholds that determination, which
23 everybody agrees is an incorrect
24 interpretation. So for that reason
25 alone you ought to vote to grant the

1 Petition For Reconsideration and rehear
2 this matter and move forward from
3 there.

4 One other matter that I wanted to
5 raise that I did not mention in the
6 Petition For Reconsideration is the
7 Notice of Action. The hearing was on
8 November 28. The Notice of Action was
9 made on November 30. It wasn't put
10 into my post office box until December
11 2. I didn't get it until December 5.
12 The Petition For Reconsideration had to
13 be filed on December 2, so when I filed
14 the Petition For Reconsideration I
15 didn't have the benefit of seeing what
16 the Notice of Action said. No findings
17 of fact, no conclusions of law, the
18 exact same thing that we have been
19 through on January 9 with the review.
20 This Notice of Action does not meet the
21 requirements of the State bar, of the
22 code, or of the BZA's rules of
23 procedure, another grounds for granting
24 the Petition For Reconsideration. So
25 that if we do have to take this up with

1 the Chairman of the Board, we take it
2 up with the Notice of Action that
3 contain insufficient findings of fact
4 and conclusions of law that the Circuit
5 Court enacted.

6 I would ask that the copy of the
7 Notice of Action that I have delivered
8 to you and the excerpts from the LMO be
9 included in the record. Mr. Taylor has
10 marked two copies and given it to the
11 court reporter.

12 MR. TAYLOR: They are marked as 3
13 and 4, Chet.

14 (Whereupon, Exhibits
15 Numbers 3 and 4 were marked for
16 identification.)

17 MR. WILLIAMS: Mr. Johnson has
18 copies. I will give Nicole copies and
19 Teresa Haley has copies.

20 We think it is pretty cut and
21 dried.

22 MR. STANFORD: We will accept
23 those into the record, thank you.

24 MR. WILLIAMS: We think the issues
25 are pretty cut and dried. You got to

1 follow the code. You have got to
2 follow all of the code. You can't pick
3 and choose. Miss Dixon said that she
4 didn't follow all of the code
5 provisions. If the property is in the
6 PD-2 Overlay District you got to follow
7 the PD-2 Overlay District regulations,
8 and therein is the problem because if
9 you look at the average density of the
10 PD-2 Overlay District, there is no more
11 density than that from the development
12 parcel.

13 I will be glad to answer any
14 questions that you have.

15 MR. STANFORD: Thank you.

16 Any questions for Chet Williams?

17 Thank you for your succinct
18 presentation.

19 Can we hear from the Town?

20 MS. DIXON: The staff doesn't have
21 anything to add. The staff believes
22 that we made the correct decision and
23 are upholding on our staff's
24 determination; and we don't have
25 anything else to add.

1 MR. STANFORD: Any questions for
2 Nicole?

3 We have none.

4 Do we have a public hearing on a
5 motion? I don't think we do.

6 MR. WILLIAMS: No, sir.

7 MR. STANFORD: All right. We have
8 a presentation of a motion. That
9 motion seeks to ask this Board to
10 reconsider that decision. The Motion
11 to Reconsider if made can only be made
12 by one of the members of the Board who
13 voted for the motion. Those members
14 who voted for the motion were Wilson,
15 Cutrer, Johnson, and Stanford.
16 Mr. Cutrer is not here. Mr. White, I
17 think you were not present at that
18 meeting, so you can't participate in
19 this. So in this situation we can have
20 a Motion to Reconsider that may be made
21 by Mr. Wilson, by Mr. Johnson, or by
22 me. We can have a Motion to Deny the
23 Application and Petition for
24 Reconsideration; or if there is no
25 motion whatsoever made by a member of

1 the BZA, the application or Petition
2 For Reconsideration is automatically
3 being denied.

4 Does anyone wish to make a motion
5 in this situation?

6 Are there any motions to be made
7 by any member of the Board of Zoning
8 Appeals, assuming that you understand
9 that you can only make a motion to
10 approve it if you are one of those who
11 voted to deny the appeal.

12 Hearing none, the Petition For
13 Reconsideration is automatically deemed
14 to be denied as a result of no action,
15 no motion being made by the BZA.

16 MR. WILLIAMS: Thank you,
17 Mr. Chairman.

18 (Whereupon, the hearing on the
19 Petition For Reconsideration
20 was concluded at 3:00 p.m.)

21
22
23
24
25

1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA:

4 BEAUFORT COUNTY:

5

6 I, Ceil Weser, CSR and Notary
7 Public in and for the above county and state, do
8 hereby certify that the foregoing testimony was
9 taken before me at the time and place
10 herein before set forth; that the witness was by
11 me first duly sworn to testify to the truth, the
12 whole truth, and nothing but the truth, that
13 thereupon the foregoing testimony was later
14 reduced by computer transcription; and I certify
15 that this is a true and correct transcript of my
16 stenographic notes so taken.

17 I further certify that I am not of
18 counsel to either party, nor interested in the
19 event of this cause.

20

21

22

23

Ceil Weser, CCR

24

Notary Public

25

Beaufort, South Carolina

EXHIBIT 3

PETITION FOR RECONSIDERATION

APPLICABLE LMO PROVISIONS

LMO Section 16-1-106.A.1. Conflicts with Other LMO Standards

When any LMO provision is inconsistent with another LMO provision, ...
the more restrictive provision shall govern unless the terms of the more
restrictive provision specify otherwise. [Emphasis added]

LMO Section 16-1-106.A.2. Conflicts with Other LMO Standards

When there is a conflict between an overlay zoning district and an
underlying base zoning district, **the provisions of the overlay district
shall control.** [Emphasis added]

LMO Section 16-3-101.A. Compliance with District Standards

No land within the Town shall be developed except in accordance with the
zoning district regulations of this chapter [*i. e.*, LMO Chapter 16-3: Zoning
Districts] and all other regulations of this Ordinance.

LMO Section 16-3-101.B. Types of Zoning Districts

Land within the Town is classified by this Ordinance to be within one of
several base zoning districts. **Land within any base zoning district may
also be classified into one or more overlay zoning districts, in which
case regulations governing development in the overlay district shall
apply in addition to the regulations governing development in the
underlying base zoning district.** [Emphasis added]



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LMO Section 16-3-102.C. Relationship Between Base and Overlay Zoning Districts

Regulations governing development in an overlay zoning district **shall** apply in addition to the regulations governing development in the underlying base zoning district. **The standards governing the overlay zoning district shall control, whether they are more restrictive or less restrictive than a base zoning district.** [Emphasis added]

LMO Section 16-3-106.D. Relationship Between Base and Overlay Zoning Districts

Regulations governing development in an overlay zoning district **shall** apply in addition to the regulations governing development in the underlying base zoning district. **The standards governing the overlay zoning district shall control, whether they are more restrictive or less restrictive than a base zoning district.** [Emphasis added]

LMO Section 16-3-106.G.4.a. Planned Development Overlay (PD-2) District; Density and Development Standards:

A section or phase of the planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the planned development or by an appropriate reservation of common open space elsewhere in the planned development. **The average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district.** [Emphasis added]



EXHIBIT 4



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:	Hearing Date:
APL-1673-2016	Waterside – Spinnaker Welcome Center	November 28, 2016

Parcel or Location Data:	Applicant:
30 Waterside Drive Resort Development Zoning District R552 018-000 0202 0000 Corridor Overlay District Waterside (Town Center) PD-2 Overlay	Chester C. Williams

Brief Description:
Staff has received an Appeal from Chester C. Williams on behalf of Beachwalk Hotel & Condominium Association, Inc and Beachwalk Hilton Head, LLC. The appellant is appealing 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.

BZA Action:
At their meeting on November 28, 2016, the Board voted to deny APL-1673-2016 and uphold the determination of the LMO Official.

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 November 29, 2016.

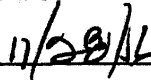
30

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.

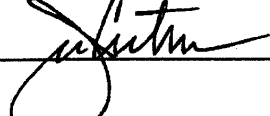
Chairman of BZA:



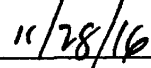
Date:



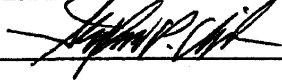
Maker of Motion:



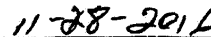
Date:



Second to Motion:



Date:



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



Town of Hilton Head Island
One Town Center Court
Hilton Head Island, SC 29928

CERTIFIED MAIL



91 7199 9991 7036 2313 0849



U.S. POSTAGE PITNEY BOWES

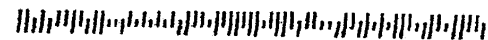
ZIP 29928 \$ 005.11⁵
02 1W
0001392114 NOV 30 2016



Chester C. Williams
Law Office of Chester Williams
17 Executive Park Road, Suite 2
PO Box 6028
Hilton Head Island, SC 29938

15 12/2

2993836028 B014



ADMITTED TO UNITED STATES
SUPREME COURT BAR
ADMITTED IN SOUTH CAROLINA
AND GEORGIA
CERTIFIED CIRCUIT
COURT MEDIATOR

LAW OFFICE OF
THOMAS C. TAYLOR, LLC
22 BOW CIRCLE
SUITE A
HILTON HEAD ISLAND, SC 29928
TELEPHONE 843-785-5050
TELECOPIER 843-785-5030
www.thomastaylorlaw.com • tom@thomastaylorlaw.com

MAILING ADDRESS
P.O. BOX 5550
HILTON HEAD ISLAND, SC
29938

January 4, 2017

Via U.S. Mail and E-Mail Attachment to: gregg@alfordlawsc.com

Gregory M. Alford, Esq.
Alford & Thoreson Law Firm
18 Executive Park Road
Building 1
Hilton Head Island, SC 29928

Re: **Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC. v. The Town of Hilton Head Island and/or The Town of Hilton Head Island Board of Zoning Appeals; In the Court of Common Pleas Civil Action Number 2016-CP-07-2712**

Dear Gregg:

I appreciate you acknowledging service on behalf of the Town of Hilton Head Island, of the enclosed copy of the Summons and Notice of Appeal and Petition with Exhibits 1, 2, and 3, in the above captioned case. Please sign the Acknowledgement of Service and return it to me in the self-addressed, stamped envelope enclosed. Thank you.

With kind regards, I am

Cordially yours,

LAW OFFICE OF THOMAS C. TAYLOR, LLC



Thomas C. Taylor

TCT/dpt

Enclosure(s)

cc: Chester Williams, Esq.
Brian Hulbert, Esq.

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 & Condominiums	)	
Association, Inc. and Beachwalk	)	
Hilton Head, LLC.,	)	
	)	
Appellants/Petitioners	)	
	)	
vs.	)	ACKNOWLEDGEMENT OF SERVICE
	)	
The Town of Hilton Head Island	)	
and/or The Town of Hilton Head	)	
Island Board of Zoning Appeals,	)	
	)	
Respondents/Defendants	)	

ON BEHALF of The Town of Hilton Head Island, the undersigned Gregory M. Alford, Esq., an attorney licensed and in good-standing in South Carolina, with the law office of Alford and Thoreson Law Firm, hereby accepts and acknowledges service of process of the **Summons and Notice of Appeal and Petition** filed December 30, 2016, in the above captioned case, this the ____ day of _____, 2017.

Gregory M. Alford, Esq.
Alford and Thoreson Law Firm
18 Executive Park Road, Bldg. 1
Hilton Head Island, SC 29928

ATTORNEY FOR THE DEFENDANT
THE TOWN OF HILTON HEAD ISLAND

Hilton Head Island, South Carolina

1487

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 2016-CP-07- 2712

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

Appellants/Petitioners

vs.

The Town of Hilton Head Island
and/or The Town of Hilton Head
Island Board of Zoning Appeals,

Respondents/Defendants

NOTICE OF APPEAL
AND PETITION

(Non-Jury)

The Appellants/Petitioners, Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (hereinafter collectively referred to as the "Appellants"), hereby appeal the decision of the Town of Hilton Head Island Board of Zoning Appeals (hereinafter referred to as the "BZA") dated November 28, 2016 (and mailed on November 30, 2016) to uphold the determinations made by Nicole Dixon, CFM, Senior Planner for the Town of Hilton Head Island, SC (hereinafter referred to as the "Town") in her letter of August 23, 2016¹ to Chester C. Williams, Esq., (hereinafter referred to as the "Determination Letter") that the proposed development of the Spinnaker Welcome Center as contemplated by the Development Plan Review Application DPR-001056-2016 is permitted under the applicable Town code requirements and controlling case law. The record of the BZA Hearing is replete with clear and convincing evidence that the proposed development will exceed the permitted density on the land, and the Town staff's Determination Letter flies in the face of the Town's adopted Land Management Ordinance requirements and if upheld, will establish a dangerous precedent undercutting the strict development guidelines that have helped build Hilton Head Island's national reputation for quality land planning.

¹ A true and correct copy of the Determination letter of August 23, 2016 is attached as Exhibit 1.

Introduction

Ms. Dixon held in the Determination Letter that the proposed development of the Spinnaker Welcome Center as contemplated by Development Plan Review Application DPR-001056-2016 (the "DPR Application") on that certain tract of land containing 1.068 acres, more or less, designated as "Parcel E" on the plat of survey entitled "15.100 Acres Waterside P.U.D." recorded in Beaufort County Plat Book 35 at Page 79 (the "Waterside PUD Survey") "is permitted as proposed [in the DPR Application] as long as it does not exceed what was allowed on that masterplan or what is permitted by the current LMO."

The Waterside PUD Survey admitted into evidence at the Hearing shows a 15.100 acre tract subdivided into four separate parcels. Parcel E is the subject of the DPR Application, the Determination Letter, and this Appeal; the tract designated as "Parcel D" is the right-of-way of Waterside Drive; the tract designated as "Parcel F" is the site of the Waterside by Spinnaker interval occupancy (timeshare) development (the "Spinnaker Project"); and the tract designated as "Parcel A&C" is the site of the Beachwalk Hotel. See attachment 1 to the Appeal Application initially filed with the BZA. The Property is zoned Resort Development ("RD"), and is located within both the Corridor Overlay District and the PD-2 Waterside (Town Center) Overlay District ("Waterside PD-2 District").

Appellant Beachwalk Hotel & Condominiums Association (sometimes herein singularly referred to as "BH&CA") is the owners association of the owners of the various condominium units in the Beachwalk Hotel. Appellant Beachwalk Hilton Head, LLC (sometimes herein singularly referred to as "BHH") is the owner of many of the condominium units in the Beachwalk Hotel.

The Appellants initially appealed Ms. Dixon's Determination Letter to the Town's BZA in case number APL001515-2016, and a hearing was held on November 28, 2016. Presentations were made by counsel on behalf of the Appellants, by Ms. Dixon, and, at the invitation of the Chairman of the BZA, by Barry L. Johnson, Esq., counsel for SDC Properties, Inc., the developer of the proposed Spinnaker Welcome Center. In addition, exhibits were identified and placed into evidence. At the conclusion of the Hearing, a motion was made and seconded to deny the Appeal. That motion passed by a 4-2 vote. The official Board of Zoning Appeals' Notice of

Action in the matter was apparently signed and then mailed out via certified US mail on November 30, 2016.²

BH&CA, for itself and on behalf of its constituent members, and BHH, disagree with the determination made by Ms. Dixon about the permitted uses, densities, and design standards applicable to development on Parcel E, and specifically allege that Ms. Dixon admittedly failed to evaluate the proposed development from the required perspective of average density in the entire PD-2 overlay district. Further, the Appellants allege that Ms. Dixon necessarily, and incorrectly, relied on information that was, and still is, unavailable, in making her determination, and incorrectly construed or interpreted the Town's LMO and Town documents affecting the development potential of the various parcels that are part of the Waterside PUD Tract, and therefore erred in making the conclusions and determinations set forth in the Determination Letter. Thus, the Appellants seek relief by this Appeal.

In particular, in making her determination, Ms. Dixon relied on what she thought was, or may be, shown on the Conceptual Master Plan for the Town Center PUD dated 27 July 1987 (the "1987 Master Plan"), which, the Appellants submit, shows revisions to the Town Center PUD Master Plan approved by the Town's Planning Commission on May 6, 1987. However, as Ms. Dixon admits in the Determination Letter, the Town Staff is unable to locate a copy of the 1987 Master Plan.³ The 1987 Master Plan is the most recent Town-approved Master Plan for the PD-2 Town Center (Waterside) Overlay Zoning District, which includes the entire Waterside PUD Tract, and is part of the Town's Official Zoning Map. Accordingly, Ms. Dixon made her determination based at least in part on a document that neither she, the Town, the BZA nor this Court has to review.

The Appeal

I. BACKGROUND

Parcel E is located at 30 Waterside Drive, and is identified as Parcel 202 on Beaufort County Tax Map 18. The Property is zoned Resort Development ("RD"), and is located within

² A true and correct copy of the Notice of Action is attached as Exhibit 2.

³ See the fifth paragraph of the Determination letter, at the top of page two.

both the Corridor Overlay District and the PD-2 Waterside (Town Center) Overlay District ("Waterside PD-2 District").

A. The 1984 Master Plan

What is now the Waterside PD-2 District received preliminary approval on December 12, 1983 from the Joint Planning Commission under the provisions of the Town's 1983 Development Standards Ordinance (the "DSO")⁴ as the Town Center P.U.D. The November 5, 1984 Conceptual Master Plan for Town Center P.U.D. (the "1984 Master Plan"),⁵ which Ms. Dixon refers to in the Determination Letter, was part and parcel of that approval.⁶

B. The 1987 Master Plan

On May 6, 1987, the Town's Planning Commission voted to approve a conditional use application to change the boundary of the Waterside PUD, which resulted in the current configuration of the Waterside PUD Tract, and also a special exception application to amend the 1984 Master Plan to (i) increase the number of hotel rooms permitted on the Waterside PUD Tract from 50 rooms to 94 rooms, (ii) reduce the permitted square footage for office and retail space, (iii) reduce the permitted residential dwelling units from 222 to 200, and (iv) require 1.3 acres of common open space.⁷ The Town's records at one point included a copy of the 1987 Master Plan showing, the Appellants submit, the amendments to the Waterside PUD approved by the Planning Commission May 6, 1987. The files of the Town Planning Department no longer contain a copy of the 1987 Master Plan.

In the Determination Letter, Ms. Dixon refers in several places to "the 1987 master plan." The Appellants do not know if Ms. Dixon, by this reference, means the unapproved Conceptual

⁴ The DSO was the Town's development standards ordinance that was in place prior to the Town's adoption of its first version of the Land Management Ordinance on 19 January 1987.

⁵ What is now the Waterside PUD was originally named Town Center P.U.D.

⁶ A copy of the 1984 Master Plan is attached to the original Appeal to the BZA as Exhibit C.

⁷ See the minutes of the May 6, 1987 Planning Commission meeting that are part of the Town's records. Note that the Development Summary chart that is part of the 1984 Master Plan required that 50% of the Waterside PUD Tract remain as open space; however, the Appellants do not know what the open space requirement of the 1987 Master Plan is, because the Town cannot produce it.