

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

APPELLATE CASE NO. 2020-000617

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

Appellants,

vs.

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

Respondents.

RECORD ON APPEAL – AMENDED VOLUME I OF VI

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INDEX VOLUME I

ORDERS

Order dated March 17, 2020	1
Order (Ending Case) dated September 11, 2019.....	4
Order dated April 20, 2018.....	13
Consent Order Granting Application and Motion of SDC Properties, Inc. to Intervene and be Joined as Party Defendant dated March 28, 2017.....	17

PLEADINGS

Second Amended Notice of Appeal and Petition dated July 24, 2017	20
Respondent's Answer to the Second Amended Notice of Appeal and Petition dated August 8, 2017	45
Answer of Respondent/Defendant SDC Properties, Inc. to Amended Appeal and Petition of the Appellants/Petitioners dated June 27, 2017	49
Appellants'/Petitioners' Brief in Reply to Court's Questions dated March 2, 2018	54
Respondent's/Defendant's SDC Properties, Inc.'s Brief in Reply to Court's Post-Hearing Questions dated March 12, 2018	120
Appellants'/Petitioners' Return to the Court's Questions dated September 7, 2018 (pages 1 to 342).....	149

INDEX VOLUME II

Appellants'/Petitioners' Return to the Court's Questions dated September 7, 2018 (pages 343 to 385).....	492
Notice of SDC Properties, Inc.'s Motion and Motion for Summary Judgment dated October 1, 2018.....	535
Appellants'/Petitioners' Memorandum in Opposition to SDC Properties, Inc's Motion for Summary Judgement dated January 15, 2019.....	537
Appellants'/Petitioners' Amended Memorandum in Opposition to SDC Properties, Inc's Motion for Summary Judgement dated March 8, 2019	543

Memorandum in Support of SDC Properties, Inc.'s Motion for Summary Judgment dated March 11, 2019	560

Plaintiffs' S.C.R.Civ.R. 59(e) Notice of Motion and Motion to Alter or Amend Judgment dated September 13, 2019.....	586

Memorandum in Opposition to Plaintiff's Rule 59(e) Motion filed September 13, 2019, Submitted by Respondent/Defendant SDC Properties, Inc. dated November 19, 2019.....	589

Memorandum in Support of Plaintiffs' S.C.R.Civ.R. 59(e) Motion to Alter or Amend Judgment dated November 22, 2019.....	595

TRANSCRIPTS

Transcript of Proceedings dated November 28, 2016	605

Transcript of Proceedings dated November 16, 2017	725

Transcript of Board of Zoning Appeals Meeting dated August 27, 2018 (pages 1-174).....	818

INDEX VOLUME III

Transcript of Board of Zoning Appeals Meeting dated August 27, 2018 (pages 175 to 331)	992

Transcript of Proceedings dated March 12, 2019.....	1149

Transcripts of Proceedings dated November 25, 2019	1243

OTHER MATERIALS

Record on Appeal from The Town of Hilton Head Board of Zoning Appeals (pages 1 to 34).....	1457

INDEX VOLUME IV

Record on Appeal from The Town of Hilton Head Board of Zoning Appeals (pages 35 to 465)	1492

INDEX VOLUME V

Record on Appeal from The Town of Hilton Head Board of Zoning Appeals
(pages 466 to 966) 1992

INDEX VOLUME VI

Record on Appeal from The Town of Hilton Head Board of Zoning Appeals
(pages 967 to 1,004) 2492

CERTIFICATES

Certificate of Counsel 2528

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-07-02712

Beachwalk Hotel & Condominiums Association, Inc., et al.

Town of Hilton Head, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before me on Appellant's Motion to Alter or Amend Judgment; filed September 13th, 2019. After hearing from parties and review of the file I hereby deny the motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$N/A
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

_____	3069	_____
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Thomas C. Taylor

Kathleen M. McDaniel

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian E. Hulbert

Barry L. Johnson

Gregory M. Alford

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

ELECTRONICALLY FILED - 2020 Mar 17 3:33 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712



Beaufort Common Pleas

Case Caption: Beachwalk Hotel & Condominiums Association Inc , plaintiff, et al VS
Town Of Hilton Head Island , defendant, et al
Case Number: 2016CP0702712
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2020-03-17 14:04:00 page 3 of 3

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

THIS MATTER is before me upon the Appellants/Petitioners' Notice of Appeal and Petition filed December 30, 2016, appealing from a decision of the Town of Hilton Head Island Board of Zoning Appeals ("BZA") dated November 28, 2016 to uphold determinations made by Nicole Dixon, CFM, Sr. Planner for the Town of Hilton Head Island, SC ("Town") in her letter of August 23, 2016 to Chester C. Williams, Esquire, an attorney for Appellants/Petitioners ("Determination Letter"). The Determination Letter expressed Ms. Dixon's determination that the proposed development of land ("Parcel E") owned by Respondent/Defendant SDC Properties, Inc. ("SDC") for a Spinnaker Welcome Center, as contemplated by the Development Plan Review Application DPR-001056-2016, is permitted under the applicable Town code requirements. From time-to-time the Appellants/Petitioners amended their Notice of Appeal and Petition.

Originally, the Town and/or the BZA were) the only Respondents/Defendants. Subsequently, by order, SDC was granted leave to intervene and be joined as a party Respondent/Defendant, which it did.

The Respondent/Defendant SDC Properties, Inc. is part of the Spinnaker group of companies headquartered at Hilton Head. Part of the subject planned unit development (PUD) was used for the development of Waterside by Spinnaker as a timeshare project. Within that PUD, the Appellants/Petitioners own a parcel of land which was formerly built and operated as a hotel and/or residential condominiums, but now is, and for many years has been, out of operation, dilapidated, and in poor repair and disuse.

The appeal of this matter is pursuant to S.C. Code § 6-29-840 (1994), providing the mechanism for appeal and judicial review by the circuit court of an appeal under S.C. Code § 6-29-820 (1994) from the decision of the BZA upholding the determinations made by Ms. Dixon in the Determination Letter.

The BZA first considered this matter on the original 2016 appeal by the Petitioners/Appellants, upholding the Determination Letter. Then, in early 2017, the BZA conducted its second hearing, this upon the motion for reconsideration filed by the Appellants/Petitioners, and declined to reconsider its original decision to uphold the Determination Letter.

Following a thorough hearing before this court on the appeal to the circuit court by the Appellants/Petitioners, I issued an order remanding this case to the BZA to consider three

questions. The BZA thereafter conducted its third hearing in this matter, whereupon it came back to me for a second hearing and final decision.

Upon this court's initial review of this matter at our first hearing, I found that the record from below was unclear as to certain issues that I believed were important for appropriate judicial review of this appeal, including the basis for the BZA's decision. Thus, I determined that the certified record of the proceedings before the BZA and the original Application for Appeal APL-001673-2016 were insufficient to complete my review and, as stated, I remanded the matter to the BZA for a rehearing, directing the BZA specifically to focus upon and answer the following questions for the court's further consideration:

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

Subsequently, on remand, the BZA conducted a rehearing of this matter and focused upon the above three questions. The BZA answered those questions as follows:

Question 1: Yes.

Question 2: Yes.

Question 3: "Because (the BZA has) determined Parcel E is subject to the LMO's PD-2 Overlay District, we need to take into consideration the existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E".

In the course of the BZA remand hearing, counsel for Respondents/Defendants, moved the BZA to dismiss the appeal of the Appellants/Petitioners on the grounds of their alleged “lack of standing”. The BZA voted to deny the motion.

Also, at the BZA remand hearing the BZA made and considered its own motion to uphold the determinations in the Determination Letter, and the original decision of the BZA to uphold the determinations in the Determination Letter. This motion at the BZA remand hearing failed on 3-3 split vote leaving, as still standing before me, the BZA’s original decision in this appeals process made on December 28, 2016, to uphold the Determination Letter of Ms. Dixon, and to deny the appeal from that Determination Letter by Appellants/Petitioners.

The matter came back to me from the BZA remand hearing on the foregoing determinations by the BZA, together with its answers to my questions. Also before me, following the BZA’s remand hearing, were the Motion for Summary Judgment by Respondent/Defendant SDC, and the Motion for Summary Judgment by Appellants/Petitioners.

Thus at the further hearing before me on March 12, 2019, I considered the following:

1. Respondent/Defendant SDC’s Motion for Summary Judgment, filed October 1, 2018; and
2. Appellants/Petitioners’ Motion for Summary Judgment, filed on October 24, 2018; and
3. The merits of the appeal, itself, which were back before me, having been stayed pending the outcome of the BZA remand hearing.

The issues have been extensively briefed, and re-briefed, and all parties have been ably represented by counsel. The two hearings (November 16, 2017 and March 12, 2019) conducted by this court enabled me to consider fully all arguments and briefs, as well as the court’s

questions, in addition to the huge record on appeal consisting of multiple reams of paper of documents and transcripts of testimonies, discussions, and hearings of the evidence and proceedings before the BZA.

Respondent/Defendant SDC's Motion for Summary Judgment:

Respondent/Defendant SDC moved for summary judgment under *SCRCP* Rule 56 on the grounds of the Appellants/Petitioners' alleged "lack of standing" and related principles. I have determined that the Appellants/Petitioners do have standing and, therefore, I deny this Motion for Summary Judgment by the Respondent/Defendant SDC.¹

Appellants/Petitioners' Motion for Summary Judgment:

Appellants/Respondents moved for summary judgment under *SCRCP* Rule 56 on the grounds that they believe they were entitled to judgment as a matter of law. I have determined that the Appellants/Petitioners are not entitled to judgment as a matter of law and, therefore, I deny their Motion for Summary Judgment.²

The Merits of the Appeal Itself:

In considering the merits of this appeal, the court is cognizant that its review is constrained by the law of South Carolina, as well expressed in the Vulcan³ case : "[T]he decision of the zoning board will not be upheld where it is based on errors of law, or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion (citations omitted)". Otherwise, of course, this court must uphold the BZA's decision.

¹ Pursuant to *SCRCP* Rule 52(a) findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 56.

² Pursuant to *SCRCP* Rule 52(a) findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 56.

³ Vulcan Materials Company v. Greenville County Board of Zoning Appeals, 266 S.C. 81, 221 S.E.2d 773 (Ct. App. 1976).

Having fully re-considered this appeal, since having first considered this appeal and remanded it to the BZA, I here deny the appeal and petition by the Appellants/Petitioners, and grant judgment in favor of the Respondents/Defendants.

In reaching these decisions, I have concluded that the Town's Senior Planner (Nicole Dixon) in her Determination Letter, and in the underlying Notice of Action (DPR-001056-2016), and the BZA, all had evidence to support their findings and determinations.

In this decision, I find that there was, in fact, substantial evidence in the record before the BZA to support the decision of the BZA in upholding the November 28, 2016 Determination Letter issued by the Town's Senior Planner, Ms. Dixon, and her underlying Notice of Action (DPR-001056-2016). Without limitation, some of this evidence included the following:

1. The proposed development of Parcel E as a commercial building for a welcome center for timeshare sales activities, check-ins, etc. is a use that is, in fact, among the uses allowed under the current RD District zoning of the subject property.
2. The proposed development of Parcel E as a commercial building with a square footage of 7,500 is less than the 8,000 square feet of nonresidential uses allowed per net acre in the RD District.
3. The subject property, Parcel E, contains 1.068 acres and appears to qualify for as much as 8,544 square feet of nonresidential or commercial construction.
4. The subject property, Parcel E, is a part of what is today called the Waterside PUD, formerly known as the Town Center PUD.
5. The rights to develop Parcel E under the Categorical Exemption Certificate for the Town Center PUD, as issued by the Town of Hilton Head Island in 1995, expired in 2000.

6. Parcel E was not developed before the expiration in 2000 of the Categorical Exemption Certificate and, therefore, did not become vested, beyond that date in 2000, as to uses, densities and design standards under the Categorical Exemption Certificate.
7. Under the master plan protected by the 1995 Categorical Exemption Certificate, Parcel E could have been developed to the extent of 16,787 square feet of nonresidential uses and 12,916 square feet of retail.
8. The proposed development of Parcel E at 7,500 square feet is substantially less than the 16,787 square feet of office and 12,916 square feet of retail formerly permitted under the master plan formerly protected by the 1995 Categorical Exemption Certificate.
9. The proposed development of Parcel E at 7,500 square feet does not exceed the square footage limitations for nonresidential construction under the current RD District zoning or under the former, previously-vested, master plan for Town Center PUD.
10. The Determination Letter recites numerous other facts in the history of this Parcel E, and the Town Center PUD of which it is a part (now known as Waterside PUD), concerning the history of open space requirements, calculations, distributions, allocations, and sharings within the PUD.
11. Despite numerous questions in the record by BZA members, and by this court, to the Appellants/Petitioners, the Appellants/Petitioners have failed to demonstrate any cognizable harm, damage, or injury to them or their property located within the PUD

if the Respondent/Defendant SDC Properties, Inc. is permitted to develop its Parcel E as presently approved by the Town of Hilton Head Island.

12. If the view of the Appellants/Petitioners were to prevail, there would be no allowable economic utility for the subject property, Parcel E, since no development, construction, or permitted use can take place thereon.

In addition to the substantial supporting evidence found, I have concluded as a matter of law that the Town's Staff Planner (Nicole Dixon) and the BZA properly considered every aspect of this matter, through extensive considerations and deliberations in the original reviews and proceedings, and in the BZA's remand hearing, and committed no error of law, no arbitrariness or unreasonableness, and no abuse of discretion. Therefore, in keeping with Vulcan, I uphold the BZA on this appeal and deny the appeal of the Petitioners/Appellants.

Accordingly, **IT IS HEREBY ORDERED:**

1. Respondent/Defendant SDC Properties, Inc.'s Motion for Summary Judgment is denied.
2. Appellants/Petitioners Beachwalks' Motion for Summary Judgment is denied.
3. The appeal and petition of the Appellants/Petitioners is hereby denied on the merits.

AND IT IS SO ORDERED.



Beaufort Common Pleas

Case Caption: Beachwalk Hotel & Condominiums Association Inc , plaintiff, et al VS
Town Of Hilton Head Island , defendant, et al
Case Number: 2016CP0702712
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2019-09-11 10:19:15 page 9 of 9

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, and
SDC Properties, Inc.

Respondents/Defendants.

ORDER

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

Following the filing of this appeal by the Appellants, SDC Properties, Inc. (“SDC”), the owner of the tract of land referred to as Parcel E that is the subject of the DPR Application, by motion filed on February 5, 2017, moved to intervene in this appeal, and upon consent of all

parties, SDC was joined as a party defendant in this appeal on March 28, 2017. In the interim, the Respondent BZA filed its Answer on March 9, 2017, and thereafter, on April 18, 2017, the Appellants filed an Amended Notice of Appeal and Petition, which was answered by SDC on June 27, 2017. Subsequently, the Appellants filed their Second Amended Notice of Appeal and Petition on July 24, 2017, which was answered by the BZA and SDC on August 8, 2017 and September 1, 2017, respectively. Following briefing by all parties and the submission to the Court of a certified copy of the proceedings held before the Board of Zoning Appeals, including the hearing by the BZA on Application for Appeal APL-001673-2016 on November 28, 2016 and the hearing before the BZA on the Appellants' Petition for Reconsideration on January 23, 2017, a hearing pursuant to S.C. Code Annot. Section 6-29-840 was held before the undersigned, sitting as a Special Circuit Judge, on December 18, 2017. Present for the Appellants were Thomas C. Taylor and Chester C. Williams; present for SDC was Barry L. Johnson; and present for the BZA was Gregory M. Alford. All counsel having been heard and persuasive arguments having been made, I determine and find as follows:

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

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

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

AND IT IS SO ORDERED this _____ day of March, 2018.

Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Judge



Beaufort Common Pleas

Case Caption: Beachwalk Hotel & Condominiums Association Inc , plaintiff, et al VS
Town Of Hilton Head Island , defendant, et al
Case Number: 2016CP0702712
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2018-04-20 11:12:13 page 4 of 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	CONSENT ORDER GRANTING
Appellants/Petitioners,	)	APPLICATION AND MOTION OF SDC
	)	PROPERTIES, INC. TO INTERVENE AND
vs.	)	BE JOINED AS PARTY DEFENDANT
	)	
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS and SDC	)	
PROPERTIES, INC.,	)	
	)	
Respondents/Defendants.	)	
	)	

Upon SDC Properties, Inc.'s "Notice of Application and Motion to Intervene and be Joined as Party Defendant" in the captioned matter, the attorneys for the existing parties having consented thereto, and this Court having determined that it is right and appropriate that the said Application and Motion should be granted, and that certain scheduling matters should also be set, which are also consented to by counsel for the existing parties, **IT IS HEREBY ORDERED:**

1. SDC Properties, Inc. is allowed to intervene in the captioned matter and to be joined as a party defendant, based upon the showing set forth in its said Notice of Application and Motion to Intervene and be Joined as a Party Defendant, and based upon the requirements of Rule 24, *SCRCP* and Rule 19, *SCRCP*, and such law as the cases have made and provided.
2. The Appellants/Petitioners shall have twenty (20) days after service upon them of a copy of the within signed Order, within which to serve their Amended Summons and Petition upon the parties, including SDC Properties, Inc.

3. Thereafter, the remaining parties shall have such times as are allowed by the *South Carolina Rules of Civil Procedure* for further pleadings and motions.

AND IT IS SO ORDERED.

Marvin H. Dukes, III, Special Circuit Judge

Beaufort, South Carolina
March _____, 2017

WE SO MOVE:

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Bluffton, SC
March 27, 2017

*Attorneys for Defendant SDC Properties,
Inc.*

WE SO CONSENT:

LAW OFFICE OF THOMAS C. TAYLOR, LLC

ALFORD & THORESON, LLC

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Beachwalk Hotel & Condominiums
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LLC*

*Attorneys for the Defendant The Town of
Hilton Head Island*



Beaufort Common Pleas

Case Caption: Beachwalk Hotel & Condominiums Association Inc , plaintiff, et al VS
Town Of Hilton Head Island , defendant, et al
Case Number: 2016CP0702712
Type: Order/Consent Order

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2017-03-28 11:01:50 page 3 of 3

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.

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

Respondents/Defendants

SECOND
AMENDED
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"), pursuant to South Carolina Rule of Civil Procedure 15 (a), within 30 days of the filing of the Respondent/Defendant SDC Properties, Inc.'s ANSWER OF RESPONDENT/DEFENDANT SDC PROPERTIES, INC. TO AMENDED APPEAL AND PETITION OF THE APPELLANTS/PETITIONERS on June 27, 2017, do hereby file their Second Amended Notice of Appeal and Petition, to 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

¹ A true and correct copy of the Determination letter of August 23, 2016 is attached to the original Notice of Appeal dated and filed December 30, 2016, as Exhibit 1.

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.

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 the new Defendant 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

² A true and correct copy of the Notice of Action is attached to the original Notice of Appeal as Exhibit 2.

³ See the fifth paragraph of the Determination letter, at the top of page two.

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 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

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.

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 Master Plan for the Town Center PUD dated February 11, 1987 (referred to in the fifth paragraph of the Determination Letter), or the 1987 Master Plan, which was approved by the Planning Commission on May 6, 1987.

Shortly after the Planning Commission's approval of the 1987 Master Plan, the structure that is now the Beachwalk Hotel was permitted on Parcels A & C of the Waterside PUD Tract, and thereafter construction was completed in accordance, the Appellants assume, with the 1987 Master Plan.

C. The Categorical Exemption

By way of his letter of March 3, 1995 to Robert L. Graves, Thomas P. Brechko, then the Acting Administrator of the LMO,⁸ acknowledged the right of Pope Avenue Associates, then the owner of the Waterside PUD Tract, to develop the Waterside PUD Tract in conformance with the 1987 Master Plan, and approved a Categorical Exemption for the Waterside PUD (the "Categorical Exemption") from all subsequent amendments to the DSO and the LMO with regard to permitted uses, densities and design standards for five years, after which any future development on the Waterside PUD Tract parcels is to be subject to all relevant provisions of the LMO.⁹

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.

⁸ The Town's LMO Official was previously known as the LMO Administrator. Teri B. Lewis, AICP is currently the LMO Official. The LMO Administrator had powers, duties, and obligations similar to the LMO Official.

⁹ A copy of Mr. Brechko's March 3, 1995 letter to Mr. Graves is attached to the original Appeal to the BZA as Exhibit D.

The Categorical Exemption was issued upon application by Pope Avenue Associates under the administrative procedures adopted by the Town Council pursuant to former LMO Section 16-7-698,¹⁰ which provided for procedures for the determination of vested rights in order to provide fair and equitable determination of vested rights claimed by property owners pursuant to any approval previously granted under the LMO or any approval previously granted prior to the adoption of the LMO. Pope Avenue Associates claimed the vested right to develop the Waterside PUD Tract as allowed under the 1987 Master Plan, notwithstanding subsequent amendments to the LMO that limited development on the Waterside PUD Tract to lower development densities and more strict development standards, and the Categorical Exemption recognized Pope Avenue Associates' right to do so prior to the five-year expiration date of the Categorical Exemption.

After the issuance of the Categorical Exemption, the Spinnaker Project was permitted on Parcel F of the Waterside PUD Tract, and thereafter construction was completed in accordance, the Appellants assume, with the 1987 Master Plan.

Of particular importance to this Appeal, the Categorical Exemption expired on March 3, 2000. After that date, any future development on the Waterside PUD Tract "shall be subject to all relevant provisions of the then existing LMO."

D. The LMO

On October 7, 2014, the current LMO was adopted by the Town Council. This current LMO is substantially different in many respects from the earlier versions of the LMO. The existence and validity of the Waterside PD-2 District was reaffirmed in the current LMO as a Listed Master Plan.¹¹

¹⁰ See the LMO as of November 15, 1993, the date of the Town Council's adoption of Ordinance No. 93-33, which added Section 16-7-698 to the LMO.

¹¹ See LMO Table 16-3-106.G.4.

II. THE PD-2 OVERLAY DISTRICT

LMO Section 16-1-108.F.2 recognizes the continuing validity of PD-2 Master Plans and the corresponding PD-2 Planned Development Overlay Districts, such as the Waterside PD-2 District, approved prior to October 7, 2014, the date of adoption of the current LMO.

The purpose of the PD-2 Overlay District is to encourage creativity in design and planning in the development of parcels by allowing greater design flexibility than the underlying base zoning district so that natural features may be protected and development concentrated in more suitable or less environmentally sensitive areas.¹² Any use permitted in the underlying base district is permitted in a PD-2 Overlay District.¹³

To allow for the encouraged design flexibility, concentration of development, and protection of natural features, a section or phase of a PD-2 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 PD-2 planned development, or by an appropriate reservation of common open space elsewhere in the PD-2 planned development.¹⁴

Of particular importance to this Appeal, LMO Section 16-3-106.G.4.a provides that the average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district. (Emphasis added.)

LMO Section 16-3-106.G.5 and LMO Table 16-3-106.G.4¹⁵, which includes “Waterside (Town Center)” as a Listed Master Plan, says, with respect to the Listed Master Plans, that “their Town-approved Master Plans including associated text and any subsequent amendments are hereby incorporated by reference as a part of the Official Zoning Map and LMO text.” In other

¹² See LMO Section 16-3-106.G.1.

¹³ See LMO Section 16-3-106.G.3. The base zoning district for Parcel E is the RD District.

¹⁴ See LMO Section 16-3-106.G.4.a.

¹⁵ That Table designation is likely a typographical error. Because it is in LMO Section 16-3-106.G.5, the Table should probably be designated as Table 16-3-106.G.5.

words, the 1987 Master Plan is, for the Waterside PUD, part and parcel of the Town's Official Zoning Map and the LMO text.¹⁶

III. ADMINISTRATIVE DETERMINATIONS

LMO Appendix A, Section A-1, identifies the LMO Official as the person designated by the Town Manager "who administers and enforces" the LMO. Mrs. Teri B. Lewis AICP, is the LMO Official. LMO Appendix A, Section A-1.A.3 authorizes the LMO Official to make written interpretations of the LMO, as provided for in LMO Section 16-2-103.R. LMO Section 16-10-101.F authorizes the LMO Official to delegate her authority as the LMO Official to a professional-level employee under the LMO Official's authority or control.

Mrs. Lewis is the Town's LMO Official in the Town's Community Development Department, and Ms. Dixon is a Senior Planner in the Town's Community Development Department, under the authority and control of the LMO Official, with delegated authority from Mrs. Lewis to act on her behalf.

Issues on Appeal

The pertinent portions of the Determination Letter for this appeal are Ms. Dixon's pronouncements that:

- a. "I have determined that the Spinnaker Welcome Center is permitted as proposed as long as it does not exceed what was allowed on that masterplan or what is permitted by the current LMO."
- b. "The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements and a Notice of Action was issued on July 28, 2016."
- c. "The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements".¹⁷

¹⁶ LMO Section 16-1-107.A.2 requires the original and all revised versions of the Official Zoning Map be kept on file, either in hardcopy or digital form, at Town Hall.

¹⁷ See Exhibit 1 to the original Notice of Appeal dated and filed December 30, 2016.

This Appeal seeks to reverse the Determination Letter, but only in part. Specifically, the Appellants disagree that the proposed Spinnaker Welcome Center can be developed on “as long as it does not exceed what was allowed on [the Conceptual Master Plan for the Town Center P.U.D. approved by the Town’s Planning Commission on 06 May 1987]”. On the other hand, the Appellants agree that the proposed development of “the Spinnaker Welcome Center is permitted as proposed as long as it does not exceed ... what is permitted by the current LMO.” However, as the record shows, the construction of the proposed Welcome Center would exceed the allowable density of the 15.1 acre parcel under the PD-2 overlay district. For that reason, this Appeal also seeks to reverse that part of the Determination Letter in which Ms. Dixon asserts that “The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements”.

The Appellants hereby appeal the BZA’s upholding of Ms. Dixon’s August 23, 2016 determination letter and ask that her determination that “the Spinnaker Welcome Center is permitted as proposed as long as it does not exceed what was allowed on that masterplan or what is permitted by the current LMO” be invalidated and voided. In addition, the Appellants appeal the BZA’s upholding of Ms. Dixon’s declaration that “The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements”.

This appeal is made pursuant to South Carolina Code Annotated Section 6-29-820 *et. seq.* and the applicable provisions of the Municipal Code of the Town of Hilton Head Island including Section 16-2-307. As specific grounds for and in support hereof, the Appellants would show and allege that:

1. The subject matter, parties, and all things alleged herein are within the jurisdiction of the Court.
2. S.C. Code Annotated Section 6-29-820(A), authorizes appeals from any decision of a zoning board of appeals to the circuit court as follows:

A person who may have a substantial interest in any decision of the board of appeals ... may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to

law. The appeal must be filed within thirty days after the decision of the board is mailed.

3. Further, the Town of Hilton Head Island's Land Management Ordinance (the "LMO") §16-2-307.A, provides in part as follows:

A person who may have a substantial interest in any decision of the Board of Zoning Appeals ... may appeal from a decision of the Board to the Circuit Court of Beaufort County.

4. Appellant Beachwalk Hotel & Condominiums Association, Inc. is a South Carolina not-for-profit corporation with its principal place of business in Beaufort County, South Carolina. Appellant Beachwalk Hilton Head LLC is a South Carolina for-profit corporation with its principal place of business in Beaufort County, South Carolina. The Appellants own property adjacent to the proposed "Spinnaker Welcome Center" and are an aggrieved party in that their personal, pecuniary, or property rights will be affected by Ms. Dixon's determination letter. See, e.g., S.C. Attorney General's Opinion letter dated February 17, 2009 to Hon. John Wade, stating that an "aggrieved party" generally refers to "a party where personal, pecuniary, or property rights have been adversely affected by another person's actions or by a Court's decree or judgment."

5. The Town of Hilton Head Island is a body politic and a political subdivision. Section 6-29-800(A)(1) of the Code of Laws of South Carolina (1976), as amended, which is part of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "State Enabling Act"), grants the Town's BZA the power and duty to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance portions of the LMO. When hearing and deciding appeals, the BZA may subpoena witnesses, and may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination, and to that end shall have all the powers of the officer from whom the appeal is taken, and may issue or direct the issuance of a permit,¹⁸ and is authorized to make findings of fact and conclusions of law.¹⁹

¹⁸ See SC Code Annot. Section 6-29-800(D).

¹⁹ See SC Code Annot. Section 6-29-800(E).

6. On the local level, LMO Appendix A, Section A-3.A, provides that the BZA hears and decides appeals on written interpretations of the LMO Official on zoning regulations where it is alleged there is an error in an order, requirement, decision or determination made by an administrative official in the enforcement of the zoning ordinance.

7. Section 6-29-800(B) of the SC Code Annotated, referring to the BZA, provides that: "Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county."

8. Again on the local level, consistent with the State Enabling Act, LMO Section 16-2-103.T.2.a, provides that a decision or written interpretation made by the LMO Official or other administrative official pursuant to the LMO, may be appealed to the BZA by any person aggrieved by the decision or interpretation who alleges that the LMO Official or other administrative official erred in making the decision or interpretation.

9. On August 23, 2016, Ms. Dixon, acting in her capacity as a Senior Planner for the Town and with authority of the Town, issued the Determination Letter (Exhibit 1) to Chester C. Williams, Esq., counsel for the Appellants. The Determination Letter addressed the legality of the proposed construction of the Spinnaker Welcome Center. As noted above in the introduction, the pertinent portions of the determinations set forth in the August 23, 2016 letter were that:

- a. "I have determined that the Spinnaker Welcome Center is permitted as proposed as long as it does not exceed what was allowed on that masterplan or what is permitted by the current LMO."
- b. "The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements and a Notice of Action was issued on July 28, 2016."
- c. "The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements".

The Appellants disagree with the Determination Letter and allege that the Determination Letter is incorrect, is in error, is arbitrary and capricious, and is contrary to the LMO.

10. The Appellants have a substantial interest in the decision of the BZA set forth in the Notice of Action (attached as Exhibit 2 to the original Notice of Appeal), and are authorized to file this appeal to Circuit Court pursuant to SC Code Annotated Section 6-29-820 (A).

11. The Appellants have exhausted their administrative remedies by virtue of their appeal to the BZA in case number APL-001515-2016, which was denied by the Notice of Action attached as Exhibit 2.

12. The Appellants timely filed their original appeal to Circuit Court by virtue of filing same within thirty (30) days of the mailing of the Notice of Action attached as Exhibit 2 to the original Notice of Appeal and Petition dated and filed December 30, 2016.

13. The Appellants hereby request that this honorable Court first review the certified record and hold that such certified record is insufficient for review because it does not contain any evidence addressing the Appellants/Petitioners' contention (as is set forth on page 23) that the Developer does not own the property. As such, the Appellants/Petitioners request that this honorable Court, pursuant to S.C. Code Annot. Section 6-29-840, remand this case to the Board of Zoning Appeals for a rehearing on the issue of whether the Developer owns the property at issue in this appeal.

14. Once the issue of the true legal ownership of the property is resolved by rehearing of the BZA, the Appellants request that this honorable Court review all the evidence in this case, including the filing of the original appeal to the BZA No. APL-001515-2016, the Appellants' arguments made against the Determination Letter at the November 28, 2016 Hearing, the relevant exhibits and testimony adduced at the November 28, 2016 Hearing (as shown in the Transcript that will be filed in this case), the BZA's actions and votes on BZA No. APL-001515-2016, the controlling Municipal Code sections, and the applicable state statutes and controlling case law, and based thereon enter an Order setting aside the BZA's decision to deny APL001515-2016 and uphold the Determination Letter. That Order should be based upon the facts and evidence in the record that will show the BZA failed to properly follow the Town of Hilton Head Island's established Land Management Ordinance and related Municipal Code provisions, failed to properly accept the undisputed facts agreed to at the Hearing, and failed to objectively consider the relevant, competent additional evidence adduced at the Hearing. Such a review will show the

BZA's decision was without competent evidentiary support in the record, and reveals an abuse of discretion amounting to an error of law.

15. The Appellants specifically allege that the BZA's denial of appeal No. APL1515-2016 and the upholding of Ms. Dixon's Determination Letter was incorrect as a matter of law, and was arbitrary, capricious, and without reasonable relation to a lawful purpose, as follows:

A. APPLICABLE LMO PROVISIONS

The Appellants contend both the Town staff, in reviewing and approving the Development Plan Review application for the Spinnaker Welcome Center, and the BZA, in denying the Appeal, overlooked or misinterpreted the provisions of several directly applicable sections of the LMO, and applicable South Carolina case law.

1. CONFLICTING LMO PROVISIONS

LMO Section 16-1-106.A.1 says, "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."

Further, LMO Section 16-1-106.A.2 says, "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]

2. ZONING DISTRICTS

LMO Section 16-3-101.A declares, "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."

In addition, LMO Section 16-3-101.B says, "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]

As to Overlay Zoning Districts specifically, LMO Section 16-3-102.C says:

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]

3. AUTHORITY OF THE TOWN STAFF

The 2004 decision of the South Carolina Court of Appeals entitled *McCrowey v. Zoning Board of Adjustment*²⁰ confirms what should be a self-evident proposition: The Town staff does not have the authority to alter or waive the provisions of a zoning ordinance.

B. TESTIMONY AT THE BZA HEARING

At the November 28, 2016 BZA hearing on the Appeal, counsel for the Appellants called Curtis L. Coltrane, Esq., former Town Attorney; Todd Theodore, a land planner with Wood+Partners, who submitted the Development Plan Review application for the Spinnaker Welcome Center; Charlie Halterman, a representative of SDC Properties, Inc.; and Ms. Dixon as witnesses, and they testified under oath administered by the Chairman of the BZA. (See the Transcript of Record prepared by Stenographic Reporter and Notary Public Amanda Brown, as is filed in this matter.)

In his testimony, Mr. Coltrane (who drafted the controlling ordinance as the Town Attorney) explained the process the Town went through that resulted in the March 3, 1995 “categorical exemption” letter from Thomas Brechko to Robert Graves (the “1995 categorical exemption”), and the effect of the 1995 categorical exemption on the properties included in the Waterside (Town Center) PD-2 Planned Development Overlay District²¹ (the “Waterside PD-2 Overlay District”), including the expiration of the 1995 categorical exemption on March 3, 2000, and the corresponding termination of the right of owners of properties in the Waterside PD-2

²⁰ *McCrowey v. Zoning Board of Adjustment of the City of Rock Hill*, 599 S.E. 2d 617 (SC App. 2004).

²¹ See LMO Section 16-3-106.G.5, and LMO Table 16-3.G.4, the Listed PD-2 Master Plans.

Overlay District to develop their properties with the uses and densities provided for in the 1987 Conceptual Master Plan for the 15.1 acres in the Waterside PD-2 Overlay District. See Transcript, pp 16-22. Specifically, see Mr. Coltrane's testimony summarizing the intent of the "categorical exemption" at page 21:

- Q. And Curtis in a nutshell, is it accurate to say that basically it was either a matter to all these permit holders who had given permits before the restrictive LMO or the predecessor came to be, either build or lose your rights?
- A. Well, either build within a given time frame or therefore build in conformance with whatever the LMO said to build to it.

Transcript, p. 21, lines 3-11.

Following Mr. Coltrane's testimony, Mr. Theodore (who in addition to being the developer's land planner, sits on the Town's Planning Commission) (Transcript p. 25, lines 1-2) was sworn and testified as follows:

1. That when he submitted the DPR Application on behalf of the developer, he was not aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District, nor was he aware that the properties comprising the Waterside PD-2 Overlay District were the subject of the 1995 Categorical Exemption. Transcript, p. 25, lines 11-16 and pp. 25-26, lines 25-4.
2. That he acknowledged and agreed that Parcel E is part of the property included in the Waterside PD-2 Overlay District. Transcript, p. 26, lines 5-15, and p. 32, lines 9-13.
3. That he did not take the LMO's current PD-2 Overlay District regulations into account when preparing the DPR Application. Transcript, p. 38, lines 21-25.
4. That in preparing the DPR Application, he did not check to see if the overall density for the 15.1 acres in the Waterside PD-2 Overlay District was in conformance with the maximum density limitation of the base Resort Development District (the "RD District"). Transcript, p.55, lines 5-24.

5. That the development of the 15.1 acres in the Waterside PD-2 Overlay District as a new PD-2 Overlay under the current LMO requirements cannot be permitted with the development densities that currently exist on the 15.1 acres in the Waterside PD-2 Overlay District. Transcript, p. 39, lines 1-25.

While Mr. Theodore did an admirable job as the developer's land planner during his testimony attempting to minimize the importance of the PD-2 overlay that applies to the property (but which he was unaware of when making the application), BZA member David Fingerhut cut to the chase in his questions:

- Q. When you made the application, I think you did, pertaining to Tract D, that you were not aware this was a PD-2 overlay district; is that correct?
- A. That is correct.
- Q. Does that fact materially with that fact materially change your application with the town?
- A. We would have looked at the open spaces and buffers because it then looks at the property as a whole, be we also rely on the town to provide us with the historical background on the PD-2 information and, you know, apparently that '87 plan or whatever is missing.
- Q. So one follow up. So without that analysis, can your application be viewed as valid if that material fact was not presented?
- A. I don't know. That is the town.
- Q. You're right.

Transcript, p.55, lines 5-25.

At the conclusion of Mr. Theodore's testimony, Charlie Halterman, the Construction Manager for the developer, was called, sworn and testified. Mr. Halterman identified the 15.1 acre property which is the subject of this matter, from his personal knowledge and then identified the

deed for the property. Transcript, p. 61, line 6-12 and p. 63, line 6-23. See the Deed attached to the Transcript as Exhibit B.

Finally, Ms. Dixon was called by the Appellants and testified:

1. That when she began her review of the DPR Application, she was not aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District, nor was she aware that the properties comprising the Waterside PD-2 Overlay District were the subject of the 1995 Categorical Exemption. Transcript, p. 68, lines 3-6 and p. 67, lines 14-20.
2. That she learned that Parcel E was part of the property included in the Waterside PD-2 Overlay District and that the Waterside PD-2 Overlay District was the subject of the 1995 Categorical Exemption when informed of those facts by counsel for the Appellants. Transcript, p. 68, lines 3-6 and p. 67, lines 14-20.
3. That she approved the DPR Application after she was aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District and that the Waterside PD-2 Overlay District was the subject of the 1995 Categorical Exemption. Transcript, p. 68, lines 7-13.
4. That she acknowledged and agreed that Parcel E is part of the property included in the Waterside PD-2 Overlay District.²²
5. That in reviewing the DPR Application, she did not check to see if the overall density for the 15.1 acres in the Waterside PD-2 Overlay District was in conformance with the maximum density limitation of the base RD District, and that she only reviewed the DPR Application for conformance of Parcel E by itself with the density requirement of the RD District. Transcript, p. 69, lines 5-13.
6. That if the development of Parcel E must conform to the current LMO requirements for a PD-2 Overlay District, then the density calculation for the

²² Ms. Dixon acknowledged in the Determination Letter that Parcel E is within the Waterside PD-2 Overlay District.

15.1 acres in the Waterside PD-2 Overlay District set forth on Page 13 and 14 of the narrative attached to the BZA Appeal application are correct. Transcript, pp. 70, lines 17-25 and p.71, lines 1-10.

7. That the development of the 15.1 acres in the Waterside PD-2 Overlay District as a new PD-2 Overlay under the current LMO requirements cannot be permitted with the development densities that currently exist on the 15.1 acres in the Waterside PD-2 Overlay District. Transcript, pp. 72, lines 4-25 and p. 73, lines 1-10. See also her admission at page 108 to questions by Mr. Fingerhut: "If you're going to look at the entire PD-2 and based on their density on the current LMO, but use what is existing out there now, then Chet has demonstrated in his math that they would not be allowed to do what they are proposing. Staff does not interpret the LMO that way."
8. That the 1995 Categorical Exemption states that after its expiration on March 3, 2000, any future development of the properties in the Waterside PD-2 Overlay District "shall be subject to the provisions of the LMO in effect at that time." Transcript, p. 73, lines 22-25 and p. 74, lines 1-13.
9. That the PD-2 Overlay District requirements of LMO Section 16-3-106.G are part of the current LMO requirements. Transcript, p. 88, lines 2-7.
10. That, notwithstanding the fact that Parcel E is in the Waterside PD-2 Overlay District, the Town staff does not agree that development of Parcel E must comply with the average density requirements of the LMO's PD-2 Overlay District provisions in LMO Section 16-3-106.G.4.a. Transcript, p. 77, lines 10-16.
11. That if the average density limitations of the PD-2 Overlay District are applied to the entire 15.1 acres in the Waterside PD-2 Overlay District, then the existing development in place exceeds the LMO's density limitations. Transcript p. 70, lines 17-24.
12. That she based her decision to approve the DPR Application on the expiration of the 1995 Categorical Exemption freeing Parcel E from the requirement of

compliance with the current LMO PD-2 Overlay District regulations. Transcript, p. 74, lines 14-25.

13. That the PD-2 Overlay District is still applicable to Parcel E, but, in her opinion, the Town staff does not now have to go back and look at the overall average density of the 15.1 acres in the Waterside Overlay District, as required by LMO Section 16-3-16.G.4.a. Transcript p. 77, lines 10-16.
14. That the 1987 Conceptual Master Plan has no bearing on the development of Parcel E. Transcript p. 112, lines 14-18.

In his statement to the BZA, Defendant SDC Properties, Inc.'s counsel Barry Johnson acknowledged that any right to develop any portion of the 15.1 acres in the Waterside PD-2 Overlay District as permitted by the 1987 Conceptual Master Plan terminated when the 1995 Categorical Exemption expired on March 3, 2000, and that a court had upheld the five year life of the 1995 Categorical Exemption. During his presentation, in response to a question from BZA member Jerry Cutrer, Mr. Johnson agreed that the development of Parcel E is now governed by the provisions of the current LMO, and that the 1987 Conceptual Master Plan is now "irrelevant" to the development of Parcel E. Transcript, p. 97, lines 2-6.

After Mr. Johnson's presentation, Thomas C. Taylor, Esq., co-counsel for the Appellants, sought to ask Mr. Johnson questions. Transcript p. 103, lines 16-20. However, Mr. Johnson claimed to be exempt from questioning, and Chairman Stanford refused to allow Mr. Taylor to question Mr. Johnson. As soon as practical thereafter, Mr. Taylor asked to make a proffer of evidence he expected Mr. Johnson to testify to, but Chairman Stanford denied that request, and asked if Mr. Taylor could submit a written proffer. Transcript pp. 118-119. Mr. Taylor's written Proffer of Evidence was filed with Chairman Stanford on 29 November 2016, and a true and correct copy of same is attached to the original Notice of Appeal and Petition dated and filed December 30, 2016, as Exhibit 3.

C. THE BZA MEMBERS' DISCUSSION

During the BZA's discussion after the testimony of the witnesses and Mr. Johnson's statements, BZA member Robert Johnson asked Ms. Dixon, "This master plan if it were to appear,

does it have any bearing on what we're talking about?" Ms. Dixon answered, "It does not." Transcript, p.112, lines 15-18.

Mr. Cutrer moved to deny the appeal, stating, "I believe I've heard Ms. Dixon say those requirements that were in that PD-2 density don't apply. The property meets the current LMO standard. The results of the determination letter way back in 1987 said all that expired in 2000. It is expired. I heard testimony from the staff that says this property would comply with the current LMO, so I move to deny the appeal." Transcript pp. 116, lines 20-25 and p. 117, lines 1-6. That motion was seconded by Mr. Wilson, and it was approved by a vote of 4-2.

D. COMPLIANCE WITH CURRENT LMO REQUIREMENTS

It is evident from the record that when Ms. Dixon said she reviewed the DPR Application "under the current LMO," as to the LMO's density limitations, she meant only the RD District's limitations under the current LMO, and not the PD-2 Overlay District's density limitations of the current LMO. But, Ms. Dixon also agreed that the LMO's PD-2 Overlay District requirements are part of the current LMO requirements, and that she did not take into account the LMO's PD-2 Overlay District average density requirements for the 15.1 acres in the Waterside PD-2 Overlay District.

Ms. Dixon cannot be right on both points: If Parcel E is in the Waterside PD-2 Overlay District, which she admits it is, and if the LMO's PD-2 Overlay District requirements are part of the current LMO, which she admits they are, then any development of Parcel E must comply with all of the LMO's PD-2 Overlay District requirements, including the PD-2 Overlay District's density requirements and limitations. In fact, and in law, LMO Sections 6-1-106.A.1, 16-1-106.A.2, 16-3-101.A, 16-3-101.B, and 16-3-102.C *require* that any proposed development on Parcel E comply with all of the LMO's PD-2 Overlay District requirements, including the PD-2 Overlay District's density requirements and limitations, which control over the underlying base RD District's density requirements and limitation; and Ms. Dixon has no authority to alter or waive those requirements.

LMO Section 16-1-106.A.1 states that when LMO provisions are inconsistent, the more restrictive provision shall govern unless the terms of the more restrictive provision specify

otherwise. LMO Section 16-3-101.A states that no development of land shall occur except in accordance with the zoning district regulations of the LMO.

LMO Section 16-3-101.B provides that if any land is located in an overlay district, then the LMO's regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district. And, LMO Sections 16-1-106.A.2 and 16-3-102.C *require* that when there is a conflict between an overlay zoning district and an underlying base zoning district, the provisions of the overlay district **shall** control, whether they are more restrictive or less restrictive than the base zoning district. (Emphasis added.)

Considering those LMO Sections and the McCrowey case, because Parcel E is in the Waterside PD-2 Overlay District, Ms. Dixon was required to look to the controlling density limitations of the LMO's overlay district regulations, and not to the density provisions of the underlying RD District. Ms. Dixon admitted that if the PD-2 Overlay District density requirements control, then the 15.1 acres in the Waterside PD-2 Overlay District are already over the overall maximum permitted density level for the 15.1 acres, and she would have to rescind her Notice of Action on the DPR Application.

A complete review of the record reveals the flaw in the process used by Ms. Dixon to review and approve the DPR Application: she looked at Parcel E as a stand-alone parcel in the RD District, and therefore not subject to the PD-2 Overlay District limitation. The Appellants contend that the correct process for Ms. Dixon to have followed was to look at Parcel E not only as a parcel in the RD District, but also as a parcel located in the Waterside PD-2 Overlay District, and therefore subject to the requirements of all parcels in any PD-2 Overlay District.

The McCrowey case stands for the proposition that the Town staff is not free to pick and choose which PD-2 Overlay District requirements will be applied to any particular proposed development of a tract located in a PD-2 Overlay District, such as Parcel E. Instead, all applicable requirements of the LMO must be taken into account by the Town staff when they review an application such as the DPR Application. Ms. Dixon admitted that she did not do so as to the PD-2 Overlay District's density limitations.

The Appellants submit that the Court should overturn the portion of the Determination Letter that states that the development of Parcel E as proposed in the DPR Application “meets all current LMO requirements”.

E. THE DETERMINATION

The BZA voted 4-2 to simply deny the Appeal. Unless this Court intervenes, that means that the Determination Letter will be upheld as it is written.

Ms. Dixon’s determination was that Parcel E can properly be developed as proposed in the DPR Application as long as it does not exceed (i) what was permitted under the 1987 Conceptual Master Plan, or (ii) what is permitted by the current LMO. However, Ms. Dixon agreed at the hearing on the Appeal that Parcel E cannot be developed as provided for in the 1987 Conceptual Mater Plan. Therefore, Ms. Dixon’s testimony and admissions at the hearing on the Appeal contradict part of her determination.

The Appellants submit that this Court should overturn that portion of the Determination Letter that approves the development of Parcel E under the provisions of the 1987 Conceptual Master Plan for the Waterside PD-2 Overlay District.

F. THE NOTICE OF ACTION

The Appellants received a Notice of Action of the BZA’s decision on the Appeal by certified mail dated November 30, 2016. A copy of that Notice of Action is attached as Exhibit 2. It does not contain any Findings of Fact or Conclusions of Law.

Section 6-29-800(F) of the S.C. Code Annotated, requires that all final decisions and orders of the BZA must be in writing and be permanently filed in the office of the BZA as a public record, and that all findings of fact and conclusions of law must be separately stated in final decisions or orders of the BZA, which must be delivered to parties of interest by certified mail. Further, LMO Section 16-2-103.T.4.d.ii, regarding appeals of administrative decisions and written interpretations of the LMO to the BZA, requires that the BZA’s final decision on an appeal “shall be in writing and shall include findings of fact and conclusions of law separately stated.”

The motion by Mr. Cutrer, seconded by Mr. Wilson, to uphold the Determination Letter, did not include any reference to findings of fact or conclusions of law (Transcript p. 116-117), and the Notice of Action likewise does not. Therefore, on its face, the Notice of Action is legally defective, and is insufficient to document the BZA's decision on the Appeal.

The Appellants deserve to know, and have the right to know, the facts and law that form the basis of the BZA's decision to uphold the Determination Letter. Because the BZA overlooked its obligation to state the required findings of fact and conclusions of law necessary to support its decision to uphold the Determination Letter in the Notice of Action, or misinterpreted its obligation to do so, the Appellants ask that this Court reverse the BZA's upholding of the Determination Letter.

G. THE DEVELOPER DOES NOT OWN THE PROPERTY

Although the court reporter inadvertently transposed certain letters in the Transcript of Record on this issue, it is undisputed that the developer that has made the initial application for construction of the Welcome Center here at issue is the recently joined Defendant SDC Properties, Inc. (also referred to as "Spinnaker"). The Deed to the property was identified by Mr. Halterman and is attached to the Transcript as Exhibit B. As the Proffer of Evidence from Thomas C. Taylor to Chairman Stanford dated November 29, 2016 establishes, the property here at issue was owned in 1999 by Pope Avenue Associates, a South Carolina partnership, and was transferred on July 14, 1999 to the legal entity SCD Properties, Inc. Because the developer SDC Properties, Inc. does not own the property, and because the legal entity SCD Properties, Inc., which actually owns the property, has not appeared in this matter and has not applied for development of the property, this Court must reverse the BZA's denial of the appeal. A true and correct copy of the written Proffer of Evidence is attached to the original Notice of Appeal and Petition dated and filed December 30, 2016, as Exhibit 3.

Conclusion

This case is the perfect storm of various mistakes by the Defendant applicant SDC Properties, Inc. and the Town staff coming together to overwhelm the members of the Board of Zoning Appeals with more than 1000 pages of documents and confusing testimony as to

controlling principals and law. Somehow lost in the storm was the central issue of whether or not there is sufficient density remaining in the 15.1 acre tract to support further development on the property of a new Welcome Center and still comply with the average density requirements of the underlying base zoning tract. By clear and convincing evidence, the Appellants showed the BZA (and now show this Court) that the proposed addition of the new Welcome Center development would exceed the allowable density under the LMO. The staff and even the developer's land planner agreed under oath that if you take into account the existing density in the entire tract, the Spinnaker application would have to be denied. But for some unfathomable reason, the staff has chosen—without any legal basis or precedent—to evaluate the new proposed development as a “stand alone” proposal, which flies in the face of the LMO, the case law, and appropriate land planning.

WHEREFORE, based on all of the reasons set out above, the Appellants pray that the Court inquire into the issues presented and request that the Court:

1. Hold that the certified record is insufficient for review because it does not contain any evidence addressing the Appellants/Petitioners' contention that the Developer does not own the property and thus pursuant to S.C. Code Annot. Section 6-29-840, remand this case to the Board of Zoning Appeals for a rehearing on the issue of whether the Developer owns the property at issue in this appeal.
2. Hold that the decision of the BZA to uphold the August 23, 2016 Determination Letter is incorrect as a matter of law;
3. Hold that the BZA, in upholding the August 23, 2016 Determination Letter, acted arbitrarily, capriciously, and without reasonable relation to a lawful purpose;
4. Reverse the BZA decision and its upholding of the August 23, 2016 Determination Letter;
5. Specifically rule that the Notice of Action dated November 30, 2016, be invalidated and voided;

6. Award Appellants/Petitioners their costs of this action pursuant to Section 6-29-840(A) of the Code of Laws of South Carolina (1976), as amended; and,
7. Issue such other and further relief as is just and proper.

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

July 24, 2017
Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-2712
	)	
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC	)	
	)	
APPELLANTS,	)	
vs.	)	RESPONDENT'S ANSWER
	)	TO THE SECOND AMENDED NOTICE
THE TOWN OF HILTON HEAD	)	OF APPEAL AND PETITION
ISLAND AND/OR THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS	)	
	)	
RESPONDENT.	)	
_____	)	

COMES NOW, the Respondent Board of Zoning Appeals Town of Hilton Head Island, reserving all rights to amend this Answer within thirty (30) days pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure and reserving all rights to include in the Answer any defenses and/or objections under Rule 12 of the South Carolina Rules of Civil Procedure, and reserving all rights to make any motions under Rule 12 of the South Carolina Rules of Civil Procedure, answering the Second Amended Appeal and Petition of the Appellant as follows:

FOR A FIRST DEFENSE
(General Denial)

a. Any allegation(s), paragraph(s), or statement(s) not hereinafter expressly admitted, qualified, or explained is/are deemed to be denied, and Respondent demands strict proof thereof.

b. That the Respondent is not required to respond to any administrative paragraph(s) that re-allege(s) foregoing paragraphs or allegations, but, in the event Respondent is required to make such a response, Respondent hereby denies the same and demands strict proof thereof.

c. That the Respondent is not required to respond to any administrative paragraph(s) that does not set out facts or demand relief but, in the event Respondent is required to make such a response, Respondent hereby denies the same and demands strict proof thereof.

d. That the Respondent is not required to respond to any paragraph(s) that state(s) a legal conclusion but, in the event Respondent is required to make such a response, Respondent hereby denies the same and demands strict proof thereof.

e. Respondent hereby denies each allegation(s), paragraph(s), or statement(s) in the Complaint that state(s) any legal conclusion(s) and, to the extent an answer is required to the same, Respondent hereby denies said allegation(s), paragraph(s), or statement(s) and demands strict proof thereof.

SPECIFIC ALLEGATIONS

1. The Appeal filed by the Appellant contains administrative paragraph(s) only, and therefore, do not require a response from Respondent. However, if Respondent is required to make such a response, Respondent hereby denies the same and demands strict proof thereof.

FOR A SECOND DEFENSE (Failure to State a Claim)

2. The foregoing denials, admissions, and affirmative allegations are re-alleged, as

if fully repeated herein.

3. The Appeal of the Appellant fails to set forth a claim upon which relief can be granted because Appellant alleges only that it disagrees with the Board's conclusion, and requests an appeal and judicial review, not that the Board acted in an arbitrary and erroneous manner.

FOR A THIRD DEFENSE
(Decision Supported by Some Evidence)

4. The foregoing denials, admissions, and affirmative allegations are re-alleged, as if fully repeated herein.

5. The Court has the power to review the appeal and determine whether the board made the correct decision as a matter of law. The Courts have found that “the factual findings of the jury will not be disturbed unless a review of the record discloses that there is *no evidence* which reasonably supports the jury’s findings.” Vulcan Materials Company v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) Therefore, in review of zoning appeals under § 6-29-840, the circuit court must defer to the factual findings of the board unless there is “no evidence” to support that lower body’s conclusion.

6. In the instant case, the Board of Zoning Appeals Town of Hilton Head Island had ample evidence to uphold the Determination Letter and the Court should uphold the Board of Zoning Appeals Town of Hilton Head Island’s decision.

WHEREFORE, having fully answered the Appeal of the Appellant, the Respondent prays that:

- a) The Appeal be dismissed, with prejudice.
- b) For the Respondent to be reimbursed for the costs and disbursements of this action.
- c) And for all other and further relief as this Honorable Court may deem just and proper.

ALFORD LAW FIRM, LLC

By: /s/ Gregory M. Alford
Gregory M. Alford (6932)
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Attorneys for the Respondent

Dated this 8th day of August, 2017
Hilton Head Island, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	ANSWER OF RESPONDENT/
Appellants/Petitioners,	)	DEFENDANT SDC PROPERTIES, INC.
	)	TO AMENDED APPEAL AND PETITION
vs.	)	OF THE APPELLANTS/ PETITIONERS
	)	
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS, and SDC	)	
PROPERTIES, INC.	)	
	)	
Respondents/Defendants.	)	
	)	

The Respondent/Defendant SDC Properties, Inc. ("Property Owner"), fully answers the Amended Notice of Appeal and Petition of the Appellants/Petitioners and, respectfully, would show unto this Honorable Court as follows:

BACKGROUND

1. The instant action is an appeal of Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (collectively, "Beachwalk") from certain decisions of the Town of Hilton Head Island and/or the Town of Hilton Head Island Board of Zoning Appeals ("BZA Board"), recently made, concerning determinations by the Town of Hilton Head LMO Official incidental to the Town's approval for Property Owner to develop its real property at 30 Waterside Drive, in the Town of Hilton Head Island, County of Beaufort, South Carolina, known as the "Spinnaker Welcome Center" ("Site").

2. The Town of Hilton Head Island, through its Staff Case Manager, Nicole Dixon, on July 28, 2016 issued its "Notice of Action" on Property Owner's application to develop this Site as the "New Spinnaker Resort Welcome Center" (Application DPR-001056-2016), which Notice constituted a permit authorizing such development of that Site by Property Owner.

3. Thereafter counsel for Beachwalk raised certain questions with the Town's Staff Case Manager and the Town's LMO Official, which resulted in certain determinations by the Town's LMO Official ("Determinations").

4. Those Determinations were the subject of an "Application for Appeal", in case number APL-001515-2016, brought by Beachwalk before the Town of Hilton Head Island's BZA Board.

5. The BZA Board at its meeting on November 28, 2016, denied the appeal of Beachwalk.

6. Counsel for Beachwalk then filed their Petition for Reconsideration by the BZA Board of its November 28, 2016 denial of the appeal of Beachwalk. The BZA Board convened on January 23, 2017, considered the Petition for Reconsideration, and denied it.

7. Beachwalk then appealed to the Circuit Court, in the instant case.

8. Property Owner, as the owner of the Site, has an interest – the economic interest of ownership - relating to the Site and to the Town of Hilton Head Island's development permitting of the Site, relating to the Determinations, and relating to the denial by the BZA Board of the appeal of Beachwalk regarding that permitting and those Determinations. The interest of Property Owner in the Site concerns Property Owner's pecuniary and property rights.

9. Property Owner is so situated that the disposition of this action may as a practical matter impair or impede its ability to protect its interests.

10. The interest of Property Owner cannot be adequately represented by the other parties to the action.

11. Property Owner is a necessary party to an appeal of its permit.

**FOR A FIRST DEFENSE
(General Denial)**

12. The foregoing background, and denials, admissions, and affirmative allegations are re-alleged, as if fully repeated herein.

13. All allegations contained within the Amended Notice of Appeal and Petition, not hereinafter expressly admitted, are denied by Property Owner, and Property Owner demands strict proof thereof, including but not limited to, all declarations, statements and allegations contained in the portions of the Amended Notice of Appeal by Beachwalk entitled "Introduction", "The Appeal", "Issues on Appeal", "Applicable LMO Provisions", "Testimony at the BZA Hearing", "The BZA Members' Discussion", "Compliance with Current LMO Requirements", "The Determination", "The Notice of Action", and "The Developer Does Not Own the Property".

**FOR A SECOND DEFENSE
(Failure to State a Claim)**

14. The foregoing background, and denials, admissions, and affirmative allegations are re-alleged, as if fully repeated herein.

15. The appeal and petition of Beachwalk fails to set forth a claim upon which relief can be granted and therefore these claims of Beachwalk should be dismissed, pursuant to Rule 12(b)(6), *SCRCP*.

**FOR A THIRD DEFENSE
(BZA Board's Decision Reasonably Supported by Some Evidence)**

16. The foregoing background, and denials, admissions, and affirmative allegations are re-alleged, as if fully repeated herein.

17. The appellate standard of review of the record of the BZA Board includes that its factual findings will be treated the same as those of a jury, and will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the factual findings of the BZA Board, even if the reviewing Court disagrees with decisions of the BZA Board.

18. The BZA Board's decision is reasonably supported with ample factual evidence, requiring this Court to defer to the BZA Board and uphold its decision in this case.

FOR A FOURTH DEFENSE
(BAZ Board's Decision is Correct as a Matter of Law)

19. The foregoing background, and denials, admissions, and affirmative allegations are re-alleged, as if fully repeated herein.

20. The BZA Board's decision is not incorrect as a matter of law and, therefore, it is correct as a matter of law, even if the Circuit Court were to disagree with the reasoning by which the BZA Board reached its decision.

WHEREFORE, having fully answered the Amended Appeal and Petition of the Appellants/Petitioners Beachwalk, the Respondent/Defendant SDC Properties, Inc. prays that:

- a) Beachwalk's Appeal and Petition be denied; and
- b) For the grant by this Court to SDC Properties, Inc. of all such other and further relief as this Honorable Court may deem just and proper.

[Signature appears on following page.]

Respectfully submitted,

JOHNSON & DAVIS, PA

/s/Barry L. Johnson

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June 27, 2017

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, and
SDC Properties, Inc.

Respondents/Defendants.

APPELLANTS/PETITIONERS'
BRIEF IN REPLY TO COURT'S
QUESTIONS

Introduction

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

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

added to the case. Following briefing by all parties and the submission to the Court of a certified copy of the proceedings held before the Board of Zoning Appeals, including the hearing by the BZA on Application for Appeal APL-001673-2016 on November 28, 2016 and the hearing before the BZA on the Appellants' Petition for Reconsideration on January 23, 2017, a hearing pursuant to S.C. Code Annot. Section 6-29-840 was held before the Hon. Marvin E. Dukes, III, sitting as a Special Circuit Judge, on December 18, 2017. Following the Hearing, Judge Dukes requested that counsel for each party provide the Court with their position on whether the BZA heard, properly considered, and addressed three questions:

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

Argument

The Appellants/Petitioners contend that the transcripts of the BZA hearing of November 28, 2016 and the Appellants/Petitioners' Petition for Reconsideration of January 23, 2017, clearly and convincingly show that while neither the developer nor the Town staff realized that Parcel E was in a PD-2 Overlay District when the DPR Application was made, by the time of the November 28, 2016 BZA hearing, all agreed it was, and is, in a PD-2 Overlay District. Further, the transcripts show that there was no legitimate reason proffered for the Town staff's opinion that the staff did

not need to consider the overall average density of the 15.1 acres included in the Waterside (Town Centre) PD-2 Overlay District, as required by LMO Section 16-3-16.G.4.a. In fact, such consideration and analysis is plainly called for under the LMO. And finally, the transcripts show that an objective analysis of the average density limitations of the PD-2 Overlay District applied to the entire 15.1 parcel, prohibits development of Parcel E as proposed in the DPR Application because such development exceeds the LMO's density limitations.

To provide the Court with specific references to the questions, the Appellants/Petitioners direct the Court's attention to the following exchanges from the transcripts, which are attached as Exhibit 1 (original BZA Hearing of November 28, 2016) and Exhibit 2 (BZA hearing on Petition to Reconsider of January 23, 2017):

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

Todd Theodore (who in addition to being the developer's land planner, sits on the Town's Planning Commission) (Exhibit 1, p. 25, lines 1-2) testified:

- A. That when he submitted the DPR Application on behalf of the developer, he was not aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District, nor was he aware that the properties comprising the Waterside PD-2 Overlay District were the subject of the 1995 Categorical Exemption. Exhibit 1, p. 25, lines 11-16 and pp. 25-26, lines 25-4.
- B. That he acknowledged and agreed that Parcel E is part of the property included in the Waterside PD-2 Overlay District. Exhibit 1, p. 26, lines 5-15, and p. 32, lines 9-13.

- C. That there is no question that Parcel E is in a PD-2 overlay. Exhibit 1, p.32, lines 9-13.

Nicole Dixon, Development Review Administrator for the Town, acknowledged in her 23 August 2016 letter (the Determination Letter that is the subject of the appeal) to Chester C. Williams, that Parcel E is part of the Waterside (Town Center) PD-2 Overlay. In addition, she testified:

- A. That when she began her review of the DPR Application, she was not aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District, nor was she aware that the properties comprising the Waterside PD-2 Overlay District were the subject of the 1995 Categorical Exemption. Exhibit 1, p. 68, lines 3-6 and p. 67, lines 14-20.
- B. That she learned that Parcel E was part of the property included in the Waterside PD-2 Overlay District and that the Waterside PD-2 Overlay District was the subject of the 1995 Categorical Exemption when informed of those facts by counsel for the Appellants. Exhibit 1, p. 68, lines 3-6 and p. 67, lines 14-20.
- C. That she approved the DPR Application after she was aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District and that the Waterside PD-2 Overlay District was the subject of the 1995 Categorical Exemption. Exhibit 1, p. 68, lines 7-13.
- D. That she does not deny that Parcel E is part of the 15 acre Waterside PD-2 Overlay District. Exhibit 1, p. 109, lines 4-7.
- E. That the property is part of the PD-2 Overlay District. Exhibit 1, p.111, line 6.

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

Mr. Theodore testified:

- A. That he did not take the LMO's current PD-2 Overlay District regulations into account when preparing the DPR Application. Exhibit 1, p. 38, lines 21-25.
- B. That if he had known that Parcel E was in a PD-2 Overlay District when he filed the DPR Application, he would have checked the PD-2 requirement. Exhibit 1, p. 38, lines 21-25; also Exhibit 1, p. 55, lines 5-24.
- C. That he did not look at or apply the PD-2 requirements for the development of Parcel E. Exhibit 1, p.41, lines 9-14.
- D. That any development of Parcel E must comply with the base zoning district and also must comply with the PD-2 Overlay District requirements. Exhibit 1, p. 43, lines 22-25, and p. 44, lines 1-18.
- E. That in preparing the DPR Application, he did not check to see if the overall density for the 15.1 acres in the Waterside PD-2 Overlay District was in conformance with the maximum density limitation of the PD-2 Overlay District. Exhibit 1, p.55, lines 5-24.

Ms. Dixon testified:

- A. That in reviewing the DPR Application, she did not check to see if the overall density for the 15.1 acres in the Waterside PD-2 Overlay District was in conformance with the maximum density limitation of the base Resort Development District (the "RD District"), and that she only reviewed the DPR

Application for conformance of Parcel E by itself with the density requirement of the RD District. Exhibit 1, p. 69, lines 5-13.

- B. That if the development of Parcel E must conform to the current LMO requirements for a PD-2 Overlay District, then the density calculation for the 15.1 acres in the Waterside PD-2 Overlay District set forth on Page 13 and 14 of the narrative attached to the BZA Appeal application are correct. Exhibit 1, pp. 70, lines 17-25 and p.71, lines 1-10.
- C. That the 1995 Categorical Exemption states that after its expiration on March 3, 2000, any future development of the properties in the Waterside PD-2 Overlay District “shall be subject to the provisions of the LMO in effect at that time.” Exhibit 1, p. 73, lines 22-25, and p. 74, lines 1-13.
- D. That she based her decision to approve the DPR Application on the expiration of the 1995 Categorical Exemption freeing Parcel E from the requirement of compliance with the current LMO’s PD-2 Overlay District regulations. Exhibit 1, p. 74, lines 14-25.
- E. That the PD-2 Overlay District is still applicable to Parcel E, but, in her opinion, the Town staff does not now have to go back and look at the overall average density of the 15.1 acres in the Waterside Overlay District, as required by LMO Section 16-3-16.G.4.a. Exhibit 1, p. 77, lines 10-16.
- F. That the PD-2 Overlay District requirements of LMO Section 16-3-106.G are part of the current LMO requirements. Exhibit 1, p. 88, lines 2-7.

Also, *see also*, Chester C. William's statement at original hearing, Exhibit 1, p.113, lines 7-21.

The Petition for Reconsideration reviewed LMO Sections 6-1-106.A.1, 16-1-106.A.2, 16-3-101.A, 16-3-101.B, and 16-3-102.C, which require that any proposed development on Parcel E comply with all of the LMO's PD-2 Overlay District requirements, including the PD-2 Overlay District's density requirements and limitations, which control over the underlying base RD District's density requirements and limitation. *See*, Petition for Reconsideration, p.9. The Petition for Reconsideration also reviews the McCrowey v. BZA of City of Rock Hill case, 360 S.C. 301, 599 S.E.2d 617 (2004) (copy attached as Exhibit 3), which makes it clear *that Ms. Dixon had no authority to alter or waive those density requirements.* (Emphasis added.) Petition for Reconsideration, pp. 4 and 10. *See also*, Mr. Williams' discussion during the hearing on the Petition for Reconsideration, Exhibit 2, p. 14, line 18 through p.16, and line 19.

Note that Mr. Cutrer's motion to deny the appeal was based on Ms. Dixon's statement that the PD-2 density requirements do not apply to Parcel E. That, we contend, is a mistake of law. *See* Mr. Williams' discussion of that issue at Exhibit 2, p. 13, line 21 through p.14, line 8.

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

Mr. Theodore testified that he did not take the LMO's current PD-2 Overlay District regulations into account when preparing the DPR Application. Exhibit 1, p. 38, lines 21-25.

Also, note the admissions Mr. Williams elicited from Mr. Theodore at Exhibit 1, p. 32, line 4 through p. 37, line 20.

Ms. Dixon testified:

- A. That if the average density limitations of the PD-2 Overlay District are applied to the entire 15.1 acres in the Waterside PD-2 Overlay District, then the existing development in place exceeds the LMO's density limitations. Exhibit 1, p. 70, lines 17-24.
- B. That the development of the 15.1 acres in the Waterside PD-2 Overlay District as a new PD-2 Overlay under the current LMO requirements could not be permitted with the development densities that currently exist on the 15.1 acres in the Waterside PD-2 Overlay District. Exhibit 1, p. 72, lines 4-25 and p. 73, lines 1-10; also, p. 107, lines 21-25 and p. 108, lines 1-19.
- C. That the 1995 Categorical Exemption states that after its expiration on March 3, 2000, any future development of the properties in the Waterside PD-2 Overlay District "shall be subject to the provisions of the LMO in effect at that time." Exhibit 1, p. 73, lines 22-25 and p. 74, lines 1-13.

Notwithstanding Mr. Theodore's and Ms. Dixon's agreement that Parcel E is definitely in the Waterside PD-2 Overlay District, Ms. Dixon asserted that the Town staff does not agree that the requested development of Parcel E must comply with the average density requirements of the LMO's PD-2 Overlay District provisions in LMO Section 16-3-106.G.4.a. Exhibit 1, p. 77, lines 10-16. This is a wholly unsupportable position under the LMO and runs contra to both the letter and spirit of McCrowey: [T]he zoning

administrator did not have the authority to alter or waive the zoning ordinance....”360 S.C. at 306. Such an unsupported position on Ms. Dixon’s part is arbitrary and capricious, and the BZA should have so concluded.

Conclusion

The transcripts of the BZA hearing of November 28, 2016 and the Appellants/Petitioners’ Petition for Reconsideration of January 23, 2017, clearly and convincingly show that Parcel E is in a PD-2 Overlay District. The transcripts show that there was no legitimate reason proffered for the Town staff’s opinion that the staff did not need to consider the overall average density of the 15.1 acres, as required by LMO Section 16-3-16.G.4.a. In fact, such consideration and analysis is plainly called for under the LMO. And finally, the transcripts show that an objective analysis of the average density limitations of the PD-2 Overlay District applied to the entire 15.1 parcel, prohibit further development in the parcel because the existing development currently exceeds the LMO’s density limitations.

The Appellant/Petitioners respectfully request that the Court recognize Ms. Dixon’s arbitrary and capricious decision and mistake of law, and the BZA’s mistake of law in upholding her Determination, and either (1) reverse the BZA’s finding of November 28, 2016 denying the appeal to the BZA, or (2) in the alternative, remand this matter back to the BZA with instructions to supplement the record of this appeal in order to specifically answer the three questions posed by the Court. A careful reading of the actual motion to deny the appeal made by BZA Member Cutrer at the end of the hearing shows just how mistaken the BZA was as to the sworn testimony elicited over the course of the prior two and one half hours:

“I move to deny the appeal. I believe I’ve heard Ms. Dixon say that those requirements that were in that PD-2 density don’t apply. The property meets the

current LMO standard. The results of the determination letter way back in 1987 said all that expired in 2000. It is expired. I heard testimony from the staff that says this property would comply with current LMO, so I move to deny the appeal.”

Exhibit 1, p. 116, lines 20-25, through p. 117, lines 1-6.

Parcel E is in a PD-2 Overlay District, specifically, the Waterside (Town Centre) PD-2 Overlay District. The LMO’s PD-2 Overlay District density requirements do apply to Parcel E. And the development of Parcel E as proposed in the DPR Application would violate the current LMO. That is what the sworn testimony in this case, as set forth above, shows. The motion by Mr. Cutrer to deny the appeal to the BZA having been based clearly on a mistake of law or a misunderstanding of the evidence, the BZA’s ruling must be overturned.

Respectfully submitted,

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CONDOMINIUMS ASSOCIATION, INC.
and BEACHWALK HILTON HEAD, LLC

February 28, 2018
Hilton Head Island, South Carolina

Exhibit 1

Page 1	Page 3
1 BEFORE THE BOARD OF ZONING 2 APPEALS OF THE TOWN OF HILTON HEAD ISLAND 3 STATE OF SOUTH CAROLINA 4 COUNTY OF BEAUFORT 5 6 7 BEACHWALK HOTEL & CONDOMINIUMS 8 ASSOCIATION, INC. AND 9 BEACHWALK HILTON HEAD, LLC. 10 2016-CP-07-1294 11 12 APPLICATION FOR APPEAL NUMBER 13 APL-001673-2016 14 15 16 17 18 The hearing in front of the Hilton Head 19 Island Board of Zoning Appeals, was taken 20 pursuant to Notice and agreement, before Amanda 21 Bowen, Stenographic Reporter and Notary Public, 22 at the Hilton Head Library, 11 Beach City Road, 23 Hilton Head Island, South Carolina, on the 28th 24 day of November 2016, commencing at or about the 25 hour of 3:15 p.m.	1 INDEX 2 3 PAGE 4 EXHIBIT INDEX ----- 4 5 6 OPENING REMARKS AND STIPULATIONS: 7 By Mr. Stanford ----- 5 8 By Mr. Williams ----- 5 9 10 EXAMINATION OF CURTIS COLTRANE: 11 By Mr. Taylor ----- 16 12 BY Mr. Currer ----- 23 13 EXAMINATION OF TODD THEODORE: 14 By Mr. Williams ----- 24 15 By Mr. Currer ----- 48 16 By Mr. Johnson ----- 52 17 By Mr. Fingerhut ----- 55 18 EXAMINATION OF CHARLIE HALTERMAN: 19 By Mr. Taylor ----- 60 20 By Mr. Stanford ----- 65 21 By Mr. Currer ----- 65 22 23 EXAMINATION OF NICOLE DIXON: 24 By Mr. Williams ----- 66 25 By Mr. Stanford ----- 78 26 By Mr. Fingerhut ----- 80 27 By Mr. Currer ----- 82 28 By Mr. Stanford ----- 84 29 By Mr. Currer ----- 86 30 By Mr. Laudermilch ----- 86 31 By Mr. Williams ----- 87 32 33 STATEMENT FROM COUNSEL OF SPINNAKER: 34 By Mr. Johnson ----- 89 35 QUESTIONS FROM THE BOARD OF MR. JOHNSON: 36 By Various Members ----- 95 37 38 CERTIFICATE ----- 120 39
Page 2	Page 4
1 APPEARANCES OF COUNSEL: 2 FOR THE APPELLANTS: 3 THOMAS C. TAYLOR, ESQUIRE 4 Law Office of Thomas C. Taylor, L.L.C. 5 22 Bow Circle 6 Suite A 7 Hilton Head Island, South Carolina 29928 8 843.785.5050 9 tom@thomastaylorlaw.com 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 19 ALSO PRESENT: 20 Board Members 21 Barry Johnson, Esquire 22 23 24 25	1 DOCUMENTARY EVIDENCE 2 NUMBER DESCRIPTION PAGE 3 EX-1 Ordinance 16 4 EX-B Deed 63 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

ELECTRONICALLY FILED - 2018 Mar 02 5:20 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

Page 5	Page 7
1 MR. STANFORD: Next on our agenda 2 is a request for an appeal from Chester 3 Williams on behalf of Beachwalk Hotel & 4 Condominiums Association, Inc. and 5 Beachwalk Hilton Head, LLC. The 6 appellant is appealing staff's 7 determination dated August 23, 2016, 8 that the proposed development of the 9 Spinnaker Welcome Center at 30 10 Waterside Drive is permitted as 11 proposed with the Development Plan 12 Review, which is the Application Number 13 DPR-001056-2016. This is the 14 identification number 1673-2016. And 15 so we would like to hear from the town 16 in conjunction with that. 17 MS. DIXON: The staff suggests 18 that the appellant go first since it's 19 their request for the appeal. 20 MR. STANFORD: I think that is 21 sensible since he is rooting to 22 overturn your actions. 23 Mr. Williams. 24 MR. WILLIAMS: Mr. Chairman. 25 MR. STANFORD: We normally have a	1 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
Page 6	Page 8
1 20-minute period of time. If you need 2 to extend beyond that, please do so as 3 succinctly as possible. 4 MR. WILLIAMS: We'll do our best. 5 For the record Chester Williams. I'm a 6 local attorney on Hilton Head Island. 7 I'm here today as counsel for Beachwalk 8 Hotel & Condominium Association, Inc. 9 and Beachwalk Hilton Head, LLC. Here 10 today also with me is my co-counsel, 11 Tom Taylor. What I like to do with 12 you, Mr. Chairman, is go through some 13 background information. We subpoenaed 14 a few witnesses, so we have some 15 questions for the witness and some 16 questions for Nicole Dixon, and I'll go 17 through the substance of our arguments. 18 Acceptable? 19 MR. STANFORD: That's fine. 20 MR. WILLIAMS: I have had the 21 opportunity to review the application 22 and the narrative in it. I tried to 23 set out in sufficient detail what is 24 going on here. The history of the 25 property. This particular tract and	1 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

Page 9 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 --	Page 11 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 --
Page 10 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.	Page 12 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.

Page 13 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	Page 15 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.
Page 14 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?	Page 16 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.

Page 17

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

Page 18

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

Page 19

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

Page 20

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

Page 21 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	Page 23 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.
Page 22 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:	Page 24 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.

Page 25	Page 27
1 Q Do you sit on any town boards? 2 A I sit on the planning commission. 3 Q Is it accurate to state that your job 4 is basically to help landowners to get permits 5 -- apply for and obtain permits for the town? 6 A Yes. 7 Q And in that process, I assume, you're 8 familiar with the provisions in the LMO. Is 9 that important for your job? 10 A Yes. 11 Q When you submitted the development 12 review plan for the Spinnaker Welcome Center, 13 did you note that their property was subject to 14 the March 3rd, 1995, categorical exemption 15 letter? 16 A No, I did not. 17 Q Have you had a chance to review that 18 categorical exemption letter since then? 19 A I did somewhat. I got the notice to 20 subpoena on Saturday, so I had a short time to 21 prepare for this. 22 Q Would you agree that it expires on 23 March 3rd, 2000? 24 A That is what I read, yes. 25 Q When you submitted the development	1 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
Page 26	Page 28
1 review application for the Spinnaker Welcome 2 Center, did you know it was part of the 3 Waterside PD-2 overlay district? 4 A No, I did not know that. 5 Q Is there any question in your mind now 6 that Parcel E is part of the Waterside PUD 7 district and subject to the PUD overlay 8 regulations? 9 A What threw us off and maybe threw the 10 town off as well is the PUD 2 zoning map that is 11 available on the website that we use for the 12 land zoning and the PD-2 had that parcel 13 excluded from PD-2. It was highlighted as not 14 being part of a PD-2, so we indicated as the 15 underlying district, which was RD. 16 Q All right. Again, I like to do sort of 17 theoretical plan exercise with you and what I 18 like you to -- let's assume you have a client 19 that owns an undeveloped tract of land on Hilton 20 Head Island located in the RD, the resort 21 development. And he takes 15.1 acres and also 22 let's assume it is in the PD overlay district. 23 The RD district, and correct me if I'm wrong. 24 You probably know this stuff better than I do. 25 The RD district allows development at 16 units	1 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

Page 29 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?	Page 31 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
Page 30 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	Page 32 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

Page 33

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 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.

Page 34

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

Page 35

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

Page 36

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

Page 37 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	Page 39 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.
Page 38 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.	Page 40 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

Page 41 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,	Page 43 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?
Page 42 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	Page 44 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.

Page 45 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,	Page 47 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.
Page 46 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	Page 48 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.

Page 49

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

Page 50

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

Page 51

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

Page 52

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

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

6 THE WITNESS: Okay.

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

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

12 MR. JOHNSON: I have a question.

13 MR. STANFORD: Yes.

14 EXAMINATION

15 BY MR. JOHNSON:

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

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

Page 53 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, not withstanding 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.	Page 55 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
Page 54 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.	Page 56 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.)

Page 57 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	Page 59 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
Page 58 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 you. "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	Page 60 1 Halterman, Your Honor, for a brief -- 2 Mr. Chairman, for a brief question. 3 MR. STANFORD: Okay. 4 State your name, please, sir. 5 THE WITNESS: Charlie Halterman. 6 CHARLIE HALTERMAN, 7 a witness herein, having been duly sworn, 8 testified upon his oath as follows: 9 THE WITNESS: I do. 10 EXAMINATION 11 BY MR. TAYLOR: 12 Q Mr. Halterman, where are do live, sir? 13 A Hilton Head Island, Sea Pines Golf 14 Course. 15 Q What do you do for a living? 16 A I'm the construction manager for 17 Spinnaker and owner representative. 18 Q How long have you been employed with 19 Spinnaker Resorts? 20 A Fourteen years, June of 2004. 21 Q Mr. Halterman, what specific level of 22 administrative capacity do you hold? Are you 23 like a vice president of Spinnaker or anything 24 like that? 25 A No. Just construction manager and

Page 61 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.	Page 63 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?
Page 62 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	Page 64 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.

Page 65 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 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.	Page 67 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
Page 66 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	Page 68 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

Page 73	Page 75
1 planner. You would be the one to review this 2 application. I've got a 15.1 acre tract. It's 3 in a RD base zoning district. I developed 198 4 residential units. I developed the commercial 5 space. I developed a hotel -- I guess the 6 question is could I develop the hotel and come 7 in for Parcel E, could you do that starting 8 fresh under the current code requirements? 9 A Under the current code requirements, 10 yes. 11 MR. STANFORD: Let's move it 12 along, Mr. Williams. 13 BY MR. WILLIAMS: 14 Q In your determination letter, you 15 acknowledge the categorical exemption expired in 16 -- on March 3rd of 2000, correct? 17 A (Nods head.) 18 Q Okay. 19 MR. STANFORD: Answer is yes? 20 THE WITNESS: Yes, sir. 21 BY MR. WILLIAMS: 22 Q I'm reading from the second page of 23 your letter. "The categorical exemption 24 certificate was valid for five years and expired 25 March 3, 2000. After the expiration of the	1 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
Page 74	Page 76
1 certificate, any future developments of the 2 property shall be subject to the provisions of 3 the LMO in effect at that time." 4 A Correct. 5 Q "They must conform to the standards of 6 the current LMO." 7 A Any future developments. It doesn't 8 mean go back and look at everything that is 9 there. 10 Q But isn't that what the PD-2 11 requirements call for? That you can't exceed -- 12 A Staff doesn't agree with that. That's 13 why we're here. 14 Q Let me put it this way? They had their 15 cake with the PD-2 before and now they want to 16 eat it. They already developed more than what's 17 allowed in the current code requirements and not 18 withstanding the expiration of the categorical 19 exemption letter, it is still your position that 20 they can rely on the densities and uses of the 21 1987 master plan? 22 A They didn't develop the property to the 23 capacity that was allowed under the PD-2. They 24 didn't exceed what was allowed at that time. 25 They didn't fully develop it.	1 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

Page 77 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.	Page 79 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
Page 78 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	Page 80 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

Page 81	Page 83
1 future development has to comply with the 2 current LMO, and this was considered future 3 development but I also didn't exceed what was on 4 the original concept plan. 5 Q Did you do the analysis of units and 6 square footage and units and acreage that we've 7 been talking about here, did you do a separate 8 analysis to make sure -- 9 A No. What I did was I looked at the 10 table that was in the master plan that allowed 11 for -- it was 23,360 square feet of retail -- 12 Q Table in which master plan? 13 A I was looking at the table that was 14 approved by the planning commission with the May 15 6, 1987 date. 16 Q So not this one? 17 A The table was in the documentation. It 18 was just the actual plan was not in there. So 19 the table indicates how much square footage for 20 commercial, retail and residential and open 21 space. So when I did my review, there was no 22 retail out there currently, so because the 23 proposal does not exceed that or well below that 24 amount, I felt it was compliant with that and 25 because it meets the current LMO requirements, I	1 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
Page 82	Page 84
1 did not see a reason to deny the application. 2 Q Okay. But just to -- I hate to repeat 3 the question, but did you do the analysis that 4 was discussed earlier, in other words, to see if 5 there was enough acreage not only what was there 6 and proposed to be there? 7 A You mean the math that Chet was talking 8 about? 9 Q Yes. 10 A Adding what was out there and -- 11 Q Sure. 12 A No, I did not. I looked up what was on 13 the original master plan and what was allowed in 14 the current LMO and it meets both of those, so 15 that's what I based my approval on. 16 MR. STANFORD: Other questions? 17 EXAMINATION 18 BY MR. CUTRER: 19 Q If I understand what you're saying, in 20 the minutes of the planning commission was a 21 table -- 22 A Yes. 23 Q -- that addressed the development of 24 this property on a square footage basis -- 25 A Yes, it does.	1 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

Page 85 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:	Page 87 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
Page 86 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	Page 88 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.

Page 89	Page 91
1 Mr. Johnson, do you have anything 2 to present in conjunction with this? 3 MR. JOHNSON: Just a little bit 4 briefly, sir. 5 MR. STANFORD: Thank you. 6 MR. JOHNSON: For the record, I'm 7 Barry Johnson, local attorney. I 8 didn't come prepared to make a 9 presentation today because of the rules 10 of the board, which I respect. 11 MR. STANFORD: Thank you, sir. 12 MR. JOHNSON: But I thank you for 13 the opportunity to say just a couple 14 things. The planning commission 15 minutes that were alluded to a few 16 minutes ago and because these do not 17 have Bates stamps, I don't know how to 18 identify them to you, but in your 19 materials we have the Town of Hilton 20 Head Island Planning Commission May 6, 21 1987, meeting that's either one or two 22 days after the date of the drawing that 23 is on the screen and in these minutes 24 there is approval of the plan that was 25 discussed with modifications and those	1 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
Page 90	Page 92
1 modifications appear in some tables 2 that are attached to those minutes in 3 these plans, and I believe that they 4 significantly re-enforce what Ms. Dixon 5 has said. 6 I think what Mr. Theodore has 7 calculated and everybody has talked 8 about - I don't know if it's 9 specifically in evidence, but I think 10 it is part of the submission Ms. Dixon 11 made to you, but there is approximately 12 nine or nine and a half acres of open 13 space on this property according to Mr. 14 Theodore's calculations out of the 15.1 15 acres overall. That clearly 16 demonstrates that the 1.3 acres 17 required by the planning commission in 18 this 1987 document have been met, and 19 you have to recall that at that time 20 nothing had been built. 21 Now, if you - I think we all 22 understand what the appellant is trying 23 to argue. I would submit to you a 24 couple things in that regard. One is 25 that the people that fought to get	1 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

Page 93 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	Page 95 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
Page 94 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.	Page 96 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.

Page 97	Page 99
1 MR. JOHNSON: Yes, sir. 2 MR. CUTRER: Am I correct or am I 3 wrong that all that 1987 stuff is kind 4 of irrelevant at this point? 5 MR. JOHNSON: I believe it became 6 irrelevant on March 3rd, 2000. 7 MR. CUTRER: So if all this 8 discussion of 1987 action by the town 9 is irrelevant because that exemption 10 expired, then today we're bound or 11 governed by the current LMO? 12 MR. JOHNSON: Correct. 13 MR. CUTRER: And I believe I heard 14 Ms. Dixon say that her interpretation 15 was that under the current LMO this 16 property could be developed as being 17 proposed? 18 MR. JOHNSON: That's correct. 19 MR. STANFORD: But the application 20 was not made based upon the current LMO 21 rather it was based on the 1987 master 22 concept plan as I understand it. 23 MS. DIXON: No, it was not. 24 MR. JOHNSON: I don't have all the 25 details about think, but I think that	1 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
Page 98	Page 100
1 is entirely accurate. I think that was 2 just a component of the history. 3 MR. STANFORD: Nicole, can you 4 straighten me out? 5 MS. DIXON: When the application 6 was submitted it was initially reviewed 7 under the current LMO. It wasn't until 8 Chet brought to my attention the PD-2 9 that applied to this property, that I 10 started doing all that determination to 11 Chet. But all along I was reviewing 12 the application under the current LMO 13 and after reviewing the PD-2 documents 14 still did not find a reason to deny the 15 application, and the application met 16 current LMO requirements and approved 17 it, so that's what the application 18 approval is based on is the current 19 LMO. 20 MR. STANFORD: I like to hear from 21 the appellant on that narrow point, how 22 is the application made and how should 23 have the application been considered? 24 MR. WILLIAMS: The application 25 form, itself, does not refer to a PD-2	1 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

Page 101 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	Page 103 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
Page 102 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	Page 104 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

Page 105	Page 107
1 boundaries of the PD-2 district as 15.1 2 acres. 3 MR. FINGERHUT: I think that is 4 excellent idea maybe for a slightly 5 different reason. Looking at what the 6 appellant is asking for holding the 7 development of the Waterside district 8 including the limitation of the 9 purposed Spinnaker Welcome Center must 10 comply with the current LMO. I would 11 certainly move we still hold that. 12 Number 2, that the average density 13 provision in the LMO section -- I'm not 14 going to read the whole thing now -- 15 would apply. I would move that and I 16 would actually move to reverse and 17 remand. 18 MR. STANFORD: Reverse or remand? 19 MR. FINGERHUT: Reverse and remand 20 for analysis of the average density 21 because I don't believe that was done. 22 I think that's what I'm hearing here. 23 I don't know that we heard enough here 24 to rule whether on the average 25 densities that counsel is making, but I	1 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 somehow 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
Page 106	Page 108
1 think we did hear enough that it was 2 not done by applicant or by the town 3 and I didn't view -- 4 MR. STANFORD: We don't have the 5 motion on the table at the moment. 6 This is just a discussion. 7 MR. FINGERHUT: Yeah. 8 MR. STANFORD: And I'm interested 9 in the points of view of the other 10 members of the board. 11 MS. LAUDERMILCH: I heard two 12 different interpretations now of this 13 latest parcel how the density issue is 14 analyzed. Is it based on the parcel 15 solely or is it based on the entire 16 PUD? 17 MR. STANFORD: Yes. 18 MS. LAUDERMILCH: And I've heard 19 two different opinions which creates 20 confusion and I don't feel prepared to 21 make a decision. 22 MR. WILSON: Mr. Chairman, I have 23 another thought. I like to know 24 whether or not these discussions about 25 this part of your suggesting that	1 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.

Page 109 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	Page 111 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,
Page 110 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	Page 112 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

Page 113

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

Page 114

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.

Page 115

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.

Page 116

1 MR. CUTRER: Against the motion.
2 MS. HALEY: Ms. Laudermilch.
3 MS. LAUDERMILCH: For the motion.
4 MS. HALEY: Mr. Johnson.
5 MR. JOHNSON: Against the motion.
6 MR. STANFORD: Motion fails. So
7 we are ready to proceed forward. Thank
8 you, gentlemen.
9 MR. TAYLOR: Mr. Chairman.
10 MR. STANFORD: We need another
11 motion. Somebody who feels otherwise.
12 The motion failed. I'm spinning
13 right now.
14 MR. FINGERHUT: It's late.
15 MR. STANFORD: Does someone care
16 to make a motion? The other two
17 motions available to us are either
18 remand or to deny or overrule the
19 appeal.
20 MR. CUTRER: I move to deny the
21 appeal. I believe I've heard Ms. Dixon
22 say that those requirements that were
23 in that PD-2 density don't apply. The
24 property meets the current LMO
25 standard. The results of the

BEACHWALK HOTEL & CONDOMINIUMS ASSOCIATION HEARING

Pages 117 to 120

Page 117 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.	Page 119 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.)
Page 118 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 --	Page 120 1 CERTIFICATE 2 3 STATE OF SOUTH CAROLINA: 4 BEAUFORT COUNTY: 5 6 I, Amanda Bowen, Court Reporter 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 counsel to 18 either party, nor interested in the event of 19 this cause. 20 21 22 Amanda Bowen 23 Court Reporter 24 Notary Public 25 Beaufort, South Carolina

Exhibit 2

1
ELECTRONICALLY FILED - 2018 Mar 02 5:20 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

1 TOWN OF HILTON HEAD ISLAND
BOARD OF ZONING APPEALS
2 STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
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15 -----/
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.

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19

20 - - -
I N D E X

21		PAGE
22	EXHIBIT INDEX -----	3
23	OPENING REMARKS AND STIPULATIONS -----	4
24		
25	CERTIFICATE -----	23

1	D O C U M E N T A R Y E V I D E N C E		
2	NUMBER	DESCRIPTION	PAGE
3	EX-1	Proffer of Evidence To The Appeal	4
4		Application of Beachwalk Hotel &	
5		Condominiums Association, Inc.	
6		and Beachwalk Hilton Head, LLC	
7	EX-2	Letter dated 11/29/16 to Hon.	4
8		C. Glenn stanford from	
9		Thomas C. Taylor	
10	EX-3	Board of Zoning Appeals Notice of	19
11		Action in Case Number	
12		APL-1673-2016	
13	EX-4	Petition For Reconsideration	19
14		Applicable LMO Provisions	
15			
16			
17			
18			
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21			
22			
23			
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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

360 S.C. 301
599 S.E.2d 617

Kevin McCROWEY, Appellant,
v.
The ZONING BOARD OF
ADJUSTMENT OF THE CITY OF ROCK
HILL, South Carolina, Respondent.

No. 3845.

Court of Appeals of South Carolina.

Submitted May 13, 2004.

Decided July 12, 2004.

[360 S.C. 302]

R. Chadwick Smith, of Rock Hill, for
Appellant.

W. Mark White, of Rock Hill, for
Respondent.

PER CURIAM:

Kevin McCrowey ("Appellant") appeals a circuit court ruling sustaining the decision of the Zoning Board of Adjustment of Rock Hill ("Respondent"), which found Appellant's business to be in violation of local zoning ordinances. We affirm.¹

FACTS

Kevin McCrowey is the owner of property ("the Property") located at 1151 Saluda Street in Rock Hill. On March 24, 1998, Appellant submitted an application for a Certificate of Occupancy along with a diagram of the building located on the Property. In March 1999, Rock Hill granted Appellant a Certificate of Occupancy for the operation of a pool hall.

[360 S.C. 303]



At the time Appellant submitted the application, he was leasing the Property. Appellant later subleased the Property to Carlonzo Brown, who was granted a Commercial Zoning Permit to operate a game room on October 29, 1999. In February 2000, Appellant purchased the Property. On October 20, 2000 Appellant obtained a Certificate of Zoning Compliance for the operation of a sports bar under the name of Infinity 2000 Sports Lounge.

One of Rock Hill's inspectors noted on the Application for Certificate of Zoning Compliance that the parking lot did not conform to the zoning code's design standards, as it appeared the Property did not have enough parking spaces available to accommodate a nightclub. This notation also requested the submission of a parking plan for the site. Appellant submitted the requested parking plan and an additional notation was later added by Rock Hill's zoning administrator stating that the application was "[a]pproved for zoning compliance per plan revised [November 10, 2000]."

However, despite this apparent approval, the same zoning administrator who approved Appellant's parking plan issued a Notice of Violation to Appellant on September 6, 2001, which stated that the parking area and signs located on the Property were in violation of Rock Hill's Zoning Code. Appellant filed a notice of appeal on September 21, 2001 and a hearing was held before the Rock Hill Board of Zoning Appeals ("the Board") on November 20, 2001.

Despite the fact that he previously found Appellant's parking plan in compliance with the applicable zoning ordinance, the zoning administrator stated at the hearing that the Property did not currently, nor did it ever, comply with the zoning ordinance since the nightclubs were first opened on the property in 1998. On January 11, 2002, the Board issued a letter denying Appellant's appeal and

ELECTRONICALLY FILED - 2018 Mar 02 5:20 PM - BEAUFORT - COMMON PLEAS - CASE#2016CPO702712

affirming the decision of the zoning administrator.

Accordingly on February 8, 2002, Appellant appealed the Board's decision to the circuit court pursuant to S.C.Code Ann. § 6-29-820 (Supp.2002).⁴ At the hearing before the

[360 S.C. 304]

circuit court, Appellant argued that Respondent should be estopped from finding the Property in violation of the zoning ordinances based on its earlier conduct. Appellant offered this argument, in part, based on the fact that nightclubs have operated on the Property since 1998 without incident and all with approval of Respondent. In addition, as noted above, the zoning administrator who issued the Notice of Violation previously approved Appellant's parking plan. Therefore, Appellant averred he relied on this past conduct to his detriment when he decided to purchase the Property.

Relying on several South Carolina authorities, Respondent averred that under the facts of this case, the doctrine of equitable estoppel should not be applied. By order dated May 23, 2002, the trial court agreed with Respondent and affirmed the Board's decision.

STANDARD OF REVIEW

Because Rock Hill enacted the zoning ordinance in question pursuant to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, the scope of review is governed by statute. See S.C.Code Ann. §§ 6-29-310 — 1200 (Supp.2002). Accordingly, as stated in Section 840, "[t]he findings of fact by the board of appeals shall be treated in the same manner as a finding of fact by a jury." S.C.Code Ann. § 6-29-840 (Supp.2002); see also *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct.App.2001). Furthermore, "[i]n determining the questions presented by the appeal, the court shall

determine only whether the decision of the board is correct as a matter of law." *Id.*

It is important to note "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (citation omitted). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no

[360 S.C. 305]

reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.*

LAW/ANALYSIS

Appellant argues the trial court erred in finding the doctrine of equitable estoppel not applicable because the zoning administrator erroneously issued a certificate of zoning compliance. We disagree.

Typically, equitable estoppel is found to exist when the following elements are present:

- (1) [C]onduct by the party estopped which amounts to a false representation or concealment of material facts or which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party subsequently attempts to assert;
- (2) the intention or at least expectation that such conduct shall be acted upon by the other party;
- (3) knowledge, actual or constructive, of the true facts;
- (4) lack of knowledge or the means of knowledge of the facts by the other party;
- (5) reliance upon the conduct by the other party; and
- (6) a detrimental change of position by the other party because of his reliance.



Oswald v. Aiken County, 281 S.C. 298, 305, 315 S.E.2d 146, 151 (Ct.App.1984) (citing *Frady v. Smith*, 247 S.C. 353, 147 S.E.2d 412 (1966)).

However, it is generally held that "[n]o estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of ... one of its officers or agents...." *DeStefano v. City of Charleston*, 304 S.C. 250, 257-258, 403 S.E.2d 648, 653 (1991) (quoting *Farrow v. City Council of Charleston*, 169 S.C. 373, 382, 168 S.E. 852, 855 (1933)) (further citations omitted). See also *South Carolina Coastal Council v. Vogel*, 292 S.C. 449, 452, 357 S.E.2d 187, 189 (Ct.App.1987) (holding that the doctrine of equitable estoppel cannot be used to deprive the State of the due exercise of its police power or to frustrate its application of public policy).

Significantly, in spite of this general rule, South Carolina courts have held that "[a] governmental body is not immune

[360 S.C. 306]

from the application of equitable estoppel where its officers or agents act within the proper scope of their authority." *South Carolina Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct.App.1987) (citing *Oswald v. Aiken County*, 281 S.C. 298, 315 S.E.2d 146 (Ct.App.1984)).

Although Appellant acknowledges the general rule, he argues the zoning administrator was acting within the proper scope of his authority, and thus, the doctrine should be applicable. Specifically, Appellant avers that in the current case "the Zoning Administrator acted within his proper authority when he concluded that [his] parking area met Rock Hill's zoning requirements." The Appellant goes on to state "the decision of whether a piece of property

conforms to zoning compliance is a determination the zoning administrator would appear to have authority to make."

However, the zoning administrator did not have the authority to alter or waive the zoning ordinance in question. Rock Hill's Zoning Code gives zoning administrators the power to administer and enforce the Zoning Code. Rock Hill's Zoning Code does not grant power to an administrator to alter, modify, or waive provisions contained in the Zoning Code. Further, the zoning administrator was not granted with the authority to grant a variance. The Zoning Code only grants the Zoning Board of Appeals the discretion of whether and when to grant a variance. Because the parties do not dispute that the Property did in fact violate the zoning ordinance, the zoning administrator exceeded his authority when he approved Appellant's parking plan in October 2000. As the zoning administrator's actions in approving Appellant's parking plan were in error, the trial court did not err in concluding, based on the authority cited above, that equitable estoppel could not be applied to frustrate the attempts by Rock Hill to enforce its zoning code as written.

CONCLUSION

Accordingly, based on the foregoing, the decision of the trial court is

AFFIRMED.

HEARN, C.J., ANDERSON and BEATTY, JJ., concur.

Notes:

1. Because oral argument would not aid the court in resolving the issues on appeal, we



decide this case without oral argument pursuant to Rules 215 and 220(b)(2), SCACR.

2. A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

S.C.Code Ann. § 6-29-820 (Supp.2002).

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	RESPONDENT'S/DEFENDANT'S SDC
Appellants/Petitioners,	)	PROPERTIES, INC.'S BRIEF IN REPLY
	)	TO COURT'S POST-HEARING
vs.	)	QUESTIONS
	)	
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS, and SDC	)	
PROPERTIES, INC.	)	
	)	
Respondents/Defendants.	)	

INTRODUCTION

Respondent/Defendant SDC Properties, Inc. ("SDC") accepts the Introduction provided by the Appellants/Petitioners ("Beachwalk") in their Brief in Reply to Court's Questions, filed March 02, 2018. However, in so doing, SDC would point to the full record of this case, as established before the BZA, and to the applicable Standards of Review, and to the materially-relevant case law. In so doing, SDC respectfully asserts that this Court should dismiss the appeal of Beachwalk and, thereby, uphold the decision of the Board of Zoning Appeals ("BZA") of the Town of Hilton Head Island (sometimes, hereinafter, "Town") and, thereby, avoid the result urged by Beachwalk that SDC's property is "unbuildable" and without economic utility.

STANDARDS OF REVIEW

In South Carolina, boards of zoning appeals, in the exercise of their duties, have the powers, *inter alia*, (1) to hear and decide appeals wherein it is alleged there is an error in a determination made by an administrative official in the enforcement of the zoning ordinance; (2)

in appropriate circumstances, to determine if the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property. See S.C. Code § 6-29-800 (2003).

“In determining the question presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law.” Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001), as cited with approval in McCrowey v. The Zoning Board of Adjustment of The City of Rock Hill, South Carolina, 360 S.C. 301, 304, 599 S.E.2d 617 (Ct. App. 2004).

“It is important to note “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” Restaurant Row Assocs. V. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 ((1999) (citations omitted). “However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.* at 305).

In making such determinations, the court must give a zoning ordinance a practical, reasonable, and fair interpretation consonant with the purposes, design and policy of the lawmakers. Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2d 76 (Ct. App. 2004), rehearing denied, and certiorari granted, affirmed 372 S.C. 230, 642 S.E.2d 565 (2007). Therein, the Court of Appeals also held that “[f]ew restrictions encumber the scope of the Board’s authority.” *Id.* at 465, 602 S.E.2d at 79. “[A] local zoning board’s] construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor”, Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A).

A court will uphold the decisions of a reviewing body if there is evidence in the record to support its decision. See Historic Charleston Found. V. Krawcheck, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994).

ISSUES

The below Issues developed by this Court are elements of the Court's analysis, subject to the above Standards of Review, of whether the BZA acted within its powers to determine if the subject Development Approval, and related Staff Determination, comply with the Town's zoning ordinance (LMO). Parcel E is a mere 1.068-acre portion of a 15.1-acre PUD, formerly named Town Center PUD, now called the Waterside PUD. Parcel E is proposed to be the site of a welcome center including space for sales and tours. (BZA Tr., Mr. Halterman, p. 66, ll. 1 – 7), and the development application shows it as a 7,500 square foot building on the 1.068-acre site.

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

Response:

Parcel E is in the RD base zoning district. (BZA Tr., BZA Member Cutrer and Attorney Williams, p. 14, l. 23 – p. 15, l. 8.) When the subject application was filed with the Town of Hilton Head, the Town's website contained the PD 2 Overlay District Map which excluded Parcel E from the PD-2 Overlay District. (BZA Tr., Mr. Theodore, p. 26, ll. 5-15.)

Parcel E is now understood to be also in the PD-2 Overlay District. [See Staff Determination Letter, Nicole Dixon, dated August 23, 2016 (Exhibit 1 to Notice of Appeal and Petition); see also BZA Tr. (Mr. Theodore), p. 43, ll. 10 – 21.]

The Town's purpose with PD-2 Overlay District is "to encourage creativity in design and planning in the development of parcels between five and 249 acres by allowing greater design flexibility than the underlying base zoning district so that natural features may be protected and development concentrated in more suitable or less environmentally sensitive areas." (BZA Tr., Attorney Williams, p. 13, ll. 1-16.)

A method of accomplishing the purpose of a PD-2 Overlay District is found in the uses of Open Space. When Beachwalk raised its concerns, Todd Theodore calculated the Open Space in the Town Center PUD site (the subject of this PD-2 Overlay District) and determined that, even with the requested development of Parcel E, "[a]ll the open space is well within the original calculations in the original (Town Center PUD)". (BZA Tr., Theodore, p. 29, ll. 5-11.)

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

Overlay District Regulations?

Response:

Parcel E is in a PD-2 Overlay District, and is subject to the LMO's PD-2 Overlay District Regulations.

The "devil is always in the details", and the question for this Court, as it was for the BZA, involves, given the 30-odd year history of this PUD (including Parcel E), how to determine the correct application of the Overlay District's Regulations with the RD Base District, and the current LMO, taking into account that history and the existing development within that PUD, and the current LMO.

C. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other

parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E?

Response:

The answer to this question is complicated and points up the fundamental ambiguities in the LMO as applicable to Parcel E. Both Town Staff (Nicole Dixon), in its determinations, and the BZA, in considering the Beachwalk appeal, had to resolve those ambiguities as part of their duties of interpretation of the LMO. Given the applicable Standards of Review, the BZA has made no error of law and has not acted in any way in an arbitrary or capricious manner. There are multiple ambiguities and most of them are dealt with in the following discussions and report of elements from the BZA record. The result of the BZA hearing was approval of the Staff Determination and Development Approval for Parcel E, in all of which the BZA – as did Town Staff – acted completely and reasonably within their discretionary responsibilities to interpret, apply and enforce the Town’s zoning law.

AMBIGUITY No. 1:

The first material ambiguity may be described as whether Parcel E remained a part of the Waterside PUD after March 3rd, 2000, to wit:

(BZA, Tr., Attorney Williams and Mr. Theodore, p. 40, ll. 9-14.):

Question (Williams): “The 1987 master plan was the subject of the 1995 categorical exemption?”

Answer (Theodore): “Correct.”

Question (Williams): “It expired on March 3rd, 2000?”

Answer (Theodore): “Then there you go. Then it is an RD piece of property.”

AMBIGUITY No. 2:

The second material ambiguity may be described as whether the calculation of open space as now affecting Parcel E and the PD-2 Overlay District is done by accepting the prior Waterside calculations as controlling, or are those now to be ignored by all charged with interpreting the current LMO?

(BZA, Tr. BZA Chair Stanford and Mr. Theodore, p. 41, l.12 – p. 42, l. 7):

Answer (Mr. Theodore): “But that’s where I think we were in a warp zone. We are stuck in a PD-2 and we are stuck in the current (LMO).”

Question (Chair Stanford): “What applies? Is it RD or PD-2 or both in your opinion?”

Answer (Mr. Theodore): “I believe it is the RD. It is the underlying district. The PD-2 allows flexibility as time goes on which is what this property has done. The PD-2 allows room for flexibility when you are outside the gate and share buffers and open space and things like that. This one even meets its open space criteria on sight (*sic*, site), so it can almost stand independently on its property boundaries rather than even relying on the rest of the (Waterside PUD) property to count for open space and impervious permits and calculations as well, so it was intended to stand on its own.

(BZA, Tr. BZA Member Johnson, Mr. Theodore, Attorney Taylor, and Attorney Williams, p. 52, l. 16 – p. 54, l. 25):

Question (Member Johnson): “When they developed this 198 residential, would they not have been required at that time to incorporate the open space into that design, or did they say, oh, we will get it someday with the other parcels?”

Answer (Mr. Theodore): “The intent of the PD-2 is to spread that out. And that becomes part of the lagoons, there is marshes, there is recreation area, all that counts as

open space criteria. I was looking at the 1987 approved modified PD-2 plan said there was office was 21, 913 square feet, 1.4 acres, retail was 3 acres at 16,279 square feet, hotel was 94 rooms, open space was 1.3 acres and residential was 200 DUs on 7.6 acres as what I can recall in here. So as part of the PD-2 when this was being developed, it was really under density. They really didn't do any commercial or --

Question (Attorney Taylor): "Mr. Chairman, I object to that because we don't have the document that he is testifying to us in front of us."

Question (Attorney Williams): "Right. And again I think it is a factually inaccurate statement. Those densities are far in excess of what the code allowed at that time, but they were approved and there again is the reason for the categorical exemption. Categorical exemption letter in 1995 said property owners -- yeah -- we will let you develop what the master plan says, notwithstanding the fact that it is far in excess what our current code requires or allows, but you have to do so in five years. That is 16 years after the permit was issued. Do it or don't."

Question (Chair Stafford): "Mr. Johnson, did that answer your question?"

Answer (Member Johnson): "Somewhat."

Question (Attorney Williams): "Well, please tell me what you still have unclear in your mind."

Question (Member Johnson): "I just question whether there is open space on this 198 residential area?"

Answer (Attorney Williams): "There is clearly some open space there. But the PD-2 requirements under the current code requires to (*sic*) common open space and the open space that is back there is Spinnaker that is not common. That is Spinnaker's open space."

Answer (Mr. Theodore): “But that is part of the PUD.”

Question (Attorney Williams): “Absolutely. No question about that. And it was developed under that code. The current code requirements though refer to common open space.”

[For the Court’s consideration at this point in the Brief, Barry L. Johnson comment in this Brief – not commented to the BZA: It is apparent that two interpretations of “common open space” were before the BZA. One interpretation was that the open space is “common” to the PUD and therefore “common” within the PD-2 Overlay District, and the other that it was not shared with the rest of the PUD, but had to be looked at site-specific on Parcel E, alone, but subject to Beachwalk’s interpretations of PD-2 Overlay District Regulations. See statement by BZA Member Cutrer, BZA Tr., p. 57, l. 25 – p. 58, l. 9: “. . . it seems to me that we’re applying this word ‘common’ one way when it suits us and one when it doesn’t. You would argue – you’re arguing that any open space associated with Spinnaker doesn’t apply to the whole parcel because it is not common open space and yet we’re throwing in the (Beachwalk) hotel to come up with the common parcel when trying to compute the density.”]

AMBIGUITY No. 3:

The third material ambiguity is this: Since the Open Space requirements under the Town Center/Waterside PUD have been fully satisfied, as noted above, what is the motivation of Beachwalk to even be concerned about Parcel E?

First, note that all of the rest of the land in the PUD/PD-2 Overlay District has already been developed or committed to Open Space, and all Open Space requirements of the PUD have been fully satisfied. (BZA Tr. (Mr. Theodore), p. 29, ll. 5-11.)

Second, note the colloquy of BZA Member Wilson and BZA Chair Stanford, with Mr. Williams (BZA Tr., Wilson and Williams, p. 47, l. 9 -25):

Question (Member Wilson): “No, no. I’m suggesting -- I like to know what the motivation of your client is other than seeing that the town code is enforced. Is there some other motivation?”

Answer (Attorney Williams): “I’m not sure that that’s germane to the appeal even if the decision that was made is correct or not, but my client owns – if my client is entitled as the property owner in this PUD to maintain that area as open space, then it has the right to do so and this is the process to do that.”

Question (Member Wilson): “I’d like to know the motivation.”

Question (Chair Stanford): We may hear more about that as the hearing proceeds.”

And, following on that point:

(BZA Tr. (Mr. Theodore): p. 50, l. 21 – p. 51, l. 21):

Answer (Mr. Theodore): “If we’re going to get technical with that, wouldn’t you say that hotel (the Beachwalk property) has been vacated for a whole number of years. It has been basically moth balls. The stairs have been taken off. It has been boarded up. It has been trying to avoid condemnation It is a vacant. It is an eyesore. I’m surprised it never went to the design review board to approve the boarding up of that building. I’m sure Spinnaker folks love driving by there all the time and having the tape around it and the barricades and the painted plywood boards and all that stuff. But my question is I think there is duration of time that is more than 18 months that this building hasn’t been utilized as it’s intended and it’s not being maintained.”

AMBIGUITY No. 4:

The fourth material ambiguity is whether the Applicant's application for Development Plan Review (DPR) Approval for Parcel E was in conflict with the PD-2 Overlay District.

The Town's Development Review Administrator, Nicole Dixon, testified that the Applicant's application for DPR Approval was not in conflict with the PD-2 Overlay District, BZA Tr. (Dixon), p. 68, l. 11 – p. 73, l. 20, as follows in colloquy with Attorney Williams, with follow-up statement by BZA Chair Stanford:

Answer (Ms. Dixon): "I did all of my research and determined as you see in my staff determination that the proposed DPR was not in conflict with the (PD-2 Overlay District)."

Question (Attorney Williams): "And when you reviewed that, did you look at the overall density of the 15.1 acres on the entire PD-2 Overlay District and determined whether or not that exceeded the maximum density in the RD District?"

Answer (Ms. Dixon): "I looked at everything that pertained to the PD-2 (Overlay District); density, open space. The PD-2 developed under a different LMO. So, looking at what is developed out there now and looking at the density, no, I did not see it was in conformance with that. The RD District – I checked the conformance of the subject property against the RD and it does meet that."

Question (Attorney Williams): "When you say that, you're talking about just Parcel E; is that correct?"

Answer (Ms. Dixon): "Correct."

Question (Attorney Williams): "So you did not check the overall density on the 15.1 acres to see if the additional development of the Parcel E caused the overall average density to exceed what is permitted in the underlying RD District; is that correct?"

Answer (Ms. Dixon): "That is correct because Staff does not (think) that is the intent of how you are interpreting the LMO."

Question (Attorney Williams): "Okay."

Answer (Ms. Dixon): "When the PD-2 was -- when the conceptual plan was approved -- "

Question (Attorney Williams): "When you say 'conceptual', can you give us the date?"

Answer (Ms. Dixon): "1984 and then reviewed 1987."

Question (Attorney Williams): "The one that we can't find?"

Answer (Ms. Dixon): "We have May 6th of 1987."

Question (Attorney Williams): "Isn't it dated February?"

Answer (Ms. Dixon): "The second page of that shows this plan. There is a revised date of May 4th. Let me think. May 4th, 1987 is the most recent.

Question (Attorney Williams): "Which was prior to the planning commission's review and approval of the amendment of the master plan, correct?"

Answer (Ms. Dixon): "Two days prior."

Question (Attorney Williams): "Correct. So --"

Answer (Ms. Dixon): "There was nothing in the planning revision that indicates that the layout was changed."

Question (Attorney Williams): "But you don't have access to -- you didn't have an opportunity to review the approved 1987 master plan?"

Answer (Ms. Dixon): "I did not."

Question (Attorney Williams): "Okay. You heard our discussion with Mr. Theodore about our theoretical plan process."

Answer (Ms. Dixon): "You're not going to ask me to do all of that."

Question (Attorney Williams): "On pages 13 and 14 of our narrative of the application, we basically go through that entire process. Did you have an opportunity to review those figures?"

Answer (Ms. Dixon): "I did."

Question (Attorney Williams): "Are they accurate?"

Answer (Ms. Dixon): "if you're looking at as you're interpreting it, yes. The way see it is that when the PD-2 was originally approved, it was based on a different LMO and right now when the DPR was submitted for the welcome center, I don't think that the PD-2 should have to comply. We are not changing the PD-2, so the density has to comply with the current resort development (RD) density standards. Most of the PD-2 Waterside exists today, what they're proposing does comply with that. That is what the LMO requires, any future development has to comply with the current LMO."

Question (Attorney Williams): "Okay. Let me ask you this: Going through the process that we went through with Todd (Theodore), if you had 15.1-acre tract and you have 198 residential units by Spinnaker, and you had 52 whatever the figure is commercial and the 91 hotel units, could you approve that development under a PD-2 with the current code requirements?"

Answer (Ms. Dixon): "If you're coming in starting from scratch today then that would be brought to the planning commission and that flexibility would be (looked) at that time."

Question (Attorney Williams): "I'm not sure. Why would the planning commission be involved?"

Answer (Ms. Dixon): "Well, the PD-2 has to go for rezoning."

Question (Attorney Williams): "You're talking about --"

Answer (Ms. Dixon): "You're starting from scratch, yeah I would apply the LMO density standards."

Question (Attorney Williams): "Okay. Let me be more clear. The process that we went through with Mr. Theodore assumed that there was an existing PD-2 Overlay on the 15.1 acres and it was undeveloped."

Answer (Ms. Dixon): "Okay."

Question (Attorney Williams): "So no need for a rezoning and change in the PD-2. Could you develop that property with the densities that are already there plus the density for Parcel E under the current code requirements?"

Answer (Ms. Dixon): "I think so because they were not exceeded what was originally intended and what is in the LMO."

Question (Attorney Williams): "I'm not being very clear."

Answer (Ms. Dixon): "We obviously disagree. That's what we are here for today."

Question (Attorney Williams): "A new PD-2 -- okay -- a new Pd-2 Overlay, not the 1987 not the 1984, a new PD-2 Overlay under current code requirements, could you develop those?"

Answer (Ms. Dixon): "But we're not talking about that."

Question (Attorney Williams): "This is a theoretical. You're a planner. You would be the one to review this application. I've got a 15.1-acre tract. It's in a RD base zoning district. I developed 198 residential units. I developed commercial space. I developed a hotel – I guess the question is could I develop the hotel and come in for Parcel E, could you do that starting fresh under the current code requirements?"

Answer (Ms. Dixon): "Under the current code requirements, yes."

Statement by Chair Stanford: "Let's move it along, Mr. Williams."

And, the colloquy continued between Attorney Williams and Ms. Dixon, substantively at BZA Tr., p. 75, l. 20 – p. 76, l. 12, as follows:

Question (Attorney Williams): "Okay. So, what you're saying is town staff's position notwithstanding the categorical exemption, the property owner still has a right to rely on the densities and uses provided for the 1987 master plan notwithstanding the fact that they do not comply with current code requirements?"

Answer (Ms. Dixon): "I'm saying that regardless of the fact that the developer did not develop fully to their potential at that time, yes, the categorical exemption did expire, that's what I reviewed it under the current RD District for that property and it does not exceed the open space. It meet(s) all LMO requirements. I do not believe that just because the categorical exemption expired, the vacant areas of that property are no longer to be built on. I don't agree with that."

Then, BZA Chair Stanford further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, as set forth in the BZA Tr., p. 78, l. 11 – p. 80, l. 2, as follows:

Question (Chair Stanford): "I don't understand how you can make the decision to grant this application."

Answer (Ms. Dixon): "I spent weeks reading through all the documentation that went along with the categorical exemption, the conditional use permit, the special exception, the original master plan documentation. I spent way too many hours in trying to understand it and there was nothing in that documentation that indicated that that parcel was going to be dedicated to open space. There was a revision in 1987. I have this plan that you see up on the screen that was dated May 4th (1987) before the planning commission approved it. What they did is they changed the boundary to allow for a better design of the hotel property and reconfigure some of the parking areas and they permitted an increase in the hotel rooms from 50 to 94 and a reduction – a corresponding reduction of residential to retail space. That is all it says. There was nothing in the documentation that indicated that lot (Parcel E) should be designated as open space. All along it said it was commercial retail. The only notation about the open space says that there had to be 1.3 acres of open space, but it could be spread out the PD-2."

Question (Chair Stanford): "I understand."

Answer (Ms. Dixon): "I got documentation from Mr. Theodore that the open space for the entire PD-2 was well over 1.3 acres. I think it averaged nine acres, so reading through all of that, and yeah, I don't have the conceptual plan referred to in the letter dated May 7th, 1987. I do have the one dated May 4th (1987) and it looks very close to the original one from 1984. I did not find any reason to deny the (DPR) application (for Parcel E).

Statement (Chair Stanford): "I acknowledge that you've made a very strong, thorough investigation of the records, and we appreciate that and I believe that this concept master plan (May 6th, 1987) probably could not be found for whatever reason."

Then, BZA Member Fingerhut further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, as set forth in the BZA Tr., p. 80, l. 18 – p. 82, l. 15, as follows:

Question (Member Fingerhut): "Nicole, when you were doing your analysis did you apply the LMO in effect at the time of the master plan or the current LMO?"

Answer (Ms. Dixon): "When I was reviewing the DPR?"

Question (Member Fingerhut): "Yes."

Answer (Ms. Dixon): "I reviewed what was in the PD-2 documents and then I also made sure it met the current LMO. In that letter it stated any future development has to comply with the current LMO, and this was considered future development but I also didn't exceed that was on the original concept plan."

Question (Member Fingerhut): "Did you do the analysis of units and square footage and units and acreage that we've been talking about here, did you do a separate analysis to make sure –"

Answer (Ms. Dixon): "No. What I did was I looked at the table that was in the master plan that allowed for – it was 23,330 square feet of retail –"

Question (Member Fingerhut): "Table in which master plan?"

Answer (Ms. Dixon): "I was looking at the table that was approved by the planning commission with the May 6, 1987 date."

Question (Member Fingerhut): "So not this one?"

Answer (Ms. Dixon): “The table was in the documentation. It was just (that) the actual plan was not in there. So, the table indicates how much square footage for commercial, retail and residential and open space. So, when I did my review, there was no retail out there currently, so because the proposal does not exceed that or (is) well below that amount, I felt it was compliant with that and because it meets the current LMO requirements, I did not see a reason to deny the application.”

Question (Member Fingerhut): “Okay. But just to – I hate to repeat the question, but did you do the analysis that was discussed earlier, in other words, to see if there was enough acreage not only (for) what was there and proposed to be there?”

Answer (Ms. Dixon): “You mean the math that Chet (Attorney Williams) was talking about?”

Question (Member Fingerhut): “Yes.”

Answer (Ms. Dixon): “Adding what was out there and – ”

Question (Member Fingerhut): “Sure.”

Answer (Ms. Dixon): “No, I did not. I looked up what was on the original master plan and what was allowed in the current LMO and it meets both of those, so that’s what I based my approval on.”

Then, BZA Member Cutrer further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, as set forth in the BZA Tr., p. 82, l. 19 – p. 83, l. 24, as follows:

Question (Member Cutrer): “If I understand what you’re saying, in the minutes of the planning commission was a table –”

Answer (Ms. Dixon): “Yes.”

Question (Member Cutrer): “ – that addressed the development of this property on a square footage basis –”

Answer (Ms. Dixon): “Yes. It does.”

Question (Member Cutrer): “– rather than a per units basis like the other calculations we’re (referring to Attorney Williams’ calculations) doing.”

Answer (Ms. Dixon): “I’m not sure what attachment it is. It was in your packet.”

Question (Member Cutrer): “Honey, there was a thousand pages in there. I looked at every one of them, but I don’t remember many of them. Let me ask my question again.”

Answer (Ms. Dixon): “Okay.”

Question (Member Cutrer): “In the minutes of the planning commission, May whatever, it was 1987, that approved the master plan that we can’t find the drawing of, but in the minutes of the planning commission is this table –a”

Answer (Ms. Dixon): “Yes, sir.”

Question (Member Cutrer): “—which limits development or specified what can be developed on a square footage basis?”

Answer: (Ms. Dixon): “Correct.”

Question (Member Cutrer): “Using that and the current LMO, you’ve made the determination that this development is permitted?”

Answer (Ms. Dixon): “Correct.”

Statement (Member Cutrer): “Thank you.”

Then, BZA Member Lauder milk further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, followed by a statement of Chair Stanford, as set forth in the BZA Tr., p. 86, l. 12 – p. 87, l. 9, as follows:

Question (Member Lauder milk): "I have a question and it's kind of this whole process again. But if we had that master plan document, however the categorical exemption has expired, now as you look at a new application, most of – well, I guess all, but the existing improvements on the various parcels within the (Waterside) PUD were built under different LMO requirements. So now that there is an application submitted for a specific undeveloped parcel, do you need to take into account the entire PUD under the current LMO or do you just look at that parcel?"

Answer (Ms. Dixon): "Staff believes that you look at that parcel. The original concept plan was based under a different LMO, and so to go back now this PD-2 doesn't meet the LMO, well, obviously, it doesn't. The LMO says any further development has to meet the criteria of the current LMO standards and that is what the applicant did. It meets all current LMO standards. I could not find a reason to deny the application."

Statement (Chair Stanford): "Thank you very much."

Then, the undersigned counsel for the Applicant, SDC Properties, Inc., Barry L. Johnson, engaged in the following colloquy with Members of the BZA, as set forth in the BZA Tr., p. 89, l. 14 – p. 98, l. 19:

Statement (Attorney Johnson): "The planning commission minutes that were alluded to a few minutes ago, and because these do not have Bates stamps, I don't know how to identify them to you, but in your materials we have the Town of Hilton Head Island Planning Commission May 6, 1987 meeting, that's either one or two days after the date of the drawing that is on the screen, and in these minutes there is approval of the plan that was discussed with modifications and those modifications appear in some tables that are attached to these minutes in these plans, and I believe that they significantly re-enforce what Ms. Dixon has said.

"I think that what Mr. Theodore has calculated and everybody has talked about -- I don't know if it's specifically in evidence, but I think it is part of the submission Ms. Dixon made to you, but there is approximately nine or nine and a half acres of open space this property according to Mr. Theodore's calculations out of the 15.1 acres overall. That clearly demonstrates that the 1.3 acres required by the planning commission in this 1987 document has been met, and you have to recall that at that time nothing had been built.

"Now, if you -- I think we all understand what the appellant (Beachwalk) is trying to argue. I would submit to you a couple of things in that regard. One is that the people that fought to get their vested right validated or verified, I think was the word that Curtis (Coltrane) used, intended to fully develop their property under their constitutional rights. That's why they went to significant expense and trouble to get these rights validated. They disagreed with the time limits on a very narrow point, the court said five years is good enough for the continuation of those rights.

"But if you just look not only to that cluster of (a) dozen or so of them and I represented at least half of those people that got those exemptions at that time, none of them will ever comply with the current LMO, so the theory that my friend, Chet (Williams), and my friend, Tom (Taylor) are arguing to you is that none of these undeveloped properties anywhere on the Island in PD-2 Overlays are ever going to get developed. That is the practical effect.

"And the zoning law requires that if you give people the opportunity to have a reasonable use of their property and a reasonable use of this property is certainly to comply with the applicable site standards for RD for those 1.086 or 68, whatever it is acres and it does comply. Otherwise, what you have effectively done is condemn the property as a Town action and that becomes a different conversation. But it may have

effect on any other properties out there that so far undeveloped residuals from PUDs that met the categorical exemption standards that expired all of them in or about March of 2000 because they issued the letter about the same date if not the same date and are now sitting here saying, "is the property worth zero because you can't do anything with it or does it have a reasonable and fair zoning which the municipality has obligation to provide to it. Staff has (made) a determination of how to interpret the LMO that is reasonable and fair and is consistent with the obligations of the municipality regarding zoning and resulting uses and densities.

"I would also like to say one more thing and then I'll sit down. Some of you and I don't know – I understand Mr. Stanford has legal background. I apologize – Mr. Fingerhut does too. I don't know, unfortunately, all you people and I apologize for that. The law is South Carolina where there is ambiguity regarding restrictions, and I think it's generally the law in the country. It is derivative of constitutional rights for property ownership. Where there is ambiguity, the law favors the unrestricted use of the property rather than the restricted use of the property.

"If you heard earlier, Mr. Coltrane, his association and law partnership with Jim Herring back in the mid-80's. Mr. Herring had a case that went to the South Carolina Supreme Court called Hamilton versus CCM. It is Hilton Head based case. It has to do with the plats around Harbour Town and the documents related to the cemetery and some other land over there and the question was whether or not the absence of designation of use on the plats made it open space. And the court very convincingly ruled that it doesn't say, therefore it is not expressly restricted to open space, and you can't have that by implication because the law favors the free and unrestricted use of the property where this is (ambiguous).

“So, if you find some ambiguity about the 1987 July master plan, which merely implemented what Nicole (Dixon) said, the May 1987 plat and the adjustments to that made by the planning commission at their meeting on May 6th, then I would suggest to you that is an ambiguity that supports the conclusion the staff has come to and I would encourage you in that decision.

“I will answer any questions I can.”

Question (Chair Stanford): “I continue to have trouble moving forward from the 1987 concept master plan, which is the core zoning document for this parcel as well as the balance of the 15 acres. That would have been the core zoning document there and we’re moving forward based on that, but we don’t have that document.”

Answer (Attorney Johnson): “Right.”

Question (Chair Stanford): “And we have to make an assumption on that. I’m very uncomfortable making an assumption.”

Answer (Attorney Johnson): “I’m suggesting that you don’t have to make that assumption. You can say the absence of that document creates an ambiguity, and there is enough documentation – I realize Mr. Cutrer?”

Statement (Member Cutrer): “Cutrer. Close enough.”

Answer (Attorney Johnson): “Cutrer. Sorry. That is was opine or said a while ago, you got thousands of pages of documents, and I appreciate you-all haven’t had time to study all that, but if you did you would find in the minutes of May 6, 1987, all the comfort you need and you would see that the July, three months later document, is the implementation of what was commanded by the Town planning commission.”

Statement (Chair Stanford): “Thank you for that able presentation, prepared or not. Any other questions.”

Question (Member Cutrer): "If I might."

Answer (Attorney Johnson): "Yes, sir."

Question (Member Cutrer): "I think I heard Nicole (Dixon) say that under the current LMO this property could be developed. All of this discussion of the 1987 master plan was part of the conditional exemption."

Answer (Attorney Johnson): "Categorical exemption."

Question (Member Cutrer): "Categorical exemption."

Answer (Attorney Johnson): "Yes, sir."

Question (Member Cutrer): "Which expired in 2000."

Answer (Attorney Johnson): "Yes, sir."

Question (Member Cutrer): "Am I correct or am I wrong that all that 1987 stuff is kind of irrelevant at this point?"

Answer (Attorney Johnson): "I believe it became irrelevant on March 3rd, 2000."

Question (Member Cutrer): "So if all this discussion of 1987 action by the Town is irrelevant because that exemption expired, then today we're bound or governed by the current LMO?"

Answer (Attorney Johnson): "Correct."

Question (Member Cutrer): "And I believe I heard Ms. Dixon say that her interpretation was that under the current LMO this property could be developed as being proposed?"

Answer (Attorney Johnson): "That's correct."

Question (Chair Stanford): "But the application was not made based upon the current LMO, rather it was based on the 1987 master concept plan as I understand it."

Answer (Ms. Dixon): "No, it was not."

Answer (Attorney Johnson): "I don't have all the details about (that), but I think that is entirely accurate. I think that was just a component of the history."

Question (Chair Stanford): "Nicole (Dixon), can you straighten me out?"

Answer (Ms. Dixon): "When the application was submitted it was initially reviewed under the current LMO. It wasn't until Chet (Williams) brought to my attention the PD-2 that applied to this property, that I started doing all that determination to Chet (Williams). But all along I was reviewing the application under the current LMO and after reviewing the PD-2 documents still do not find a reason to deny the application, and the application met current LMO requirements and (I) approved it, so that's what the application approval is based on is the current LMO."

In the BZA meeting there then followed various discussions around the proper legal interpretation to be accorded the LMO, site specific to Parcel E in the RD District, and regarding the PD-2 Overlay District. The point was crystalized in this answer by Ms. Dixon, BZA Tr. p. 109, l. 4-p. 113, l.3 and following colloquy therein, with and among the members of BZA, as follows:

Answer (Ms. Dixon): "I'm not denying it is part of the 15-acre PD-2. I'm not denying that it is not part of that anymore. It is still part of that PD-2, but as you know – as you said that categorical exemption expired. They're not tied to the original density allowed, so as long as they meet the current density that is allowed on that tract, then it should be approved and that is what I based my decision on."

"So, you can either agree with my determination or not agree with it and I would have to (rescind) my notice of action."

Statement (Member Wilson): "I think that is part of the responsibility of the board because there is this dispute including with Mr. Williams' client and between our Town."

Question (Member Fingerhut): "So you're concurring that his (Mr. Williams') math is correct?"

Answer (Ms. Dixon): "I concur his math is correct, but I don't interpret the LMO that way."

Statement (Member Fingerhut): "That is fine. Just speaking for myself that is a correct finding because I wasn't following all the math."

Answer (Ms. Dixon): "I just interpret the LMO differently and that is not what I based my approval on. But the math that he (Mr. Williams) had Mr. Theodore come up with earlier, that is correct."

Statement (Chair Stanford): "I think the motion of remand probably is not a good motion at this point, so we are looking for a motion either to grant the appeal, which means to reverse the action of the Town, or affirm the action of the Town and denying the appeal."

Question (Member Cutrer): "Can I ask Ms. Dixon one more question?"

Answer (Chair Stanford): "Sure."

Question (Member Cutrer): "If I'm interpreting what you are saying correctly that the PD-2 Overlay no longer applies or it does apply?"

Answer (Ms. Dixon): "I think the PD-2 Overlay is always going to be. It was approved in that (the PD-2 boundary exists. That property is part of that PD-2."

Question (Member Cutrer): "To create a total picture?"

Answer (Ms. Dixon): "Correct."

Statement (Member Cutrer): "Okay."

Answer (Ms. Dixon): "I do not think we have to go back and make sure all the densities in that development complies to the current LMO. I don't think that

was the intent of the language in the LMO and I don't think that (they) should have an unbuildable lot."

Question (Mr. Cutrer): "So we take the parcel today, how does this application comply with the current LMO and how does it comply with the PD-2 Overlay?"

Answer (Ms. Dixon): "The PD-2 is always going to be there. Now, as far as them being tied to the density that was shown on the original conceptual plan, they don't have to be tied to that. They have to be tied to the current LMO standards."

Question (Member Cutrer): "So how does that proposed development comply with the current LMO?"

Answer (Ms. Dixon): "How does it?"

Question (Member Cutrer): "How does it?"

Answer (Ms. Dixon): "They demonstrated that their density meets the current density standards and current open space."

Statement (Member Cutrer): "That's what I needed to hear."

Question (Member Johnson): "Can I ask a quick question? This master plan if it were to appear, does it have any bearing on what we're talking about?"

Answer (Ms. Dixon): "It does not."

Statement (Chair Stanford): "We talked 45 minutes ago about that."

Answer (Ms. Dixon): "It is just a diagram (of) what was approved by the planning commission, and I just looked back when you were talking earlier, and that table is listed in Attachment H in the documents I gave you, and that is (the) planning commission minutes from the May 6th meeting."

CONCLUSION

Without in detail rehashing the foregoing many pages of testimony and commentary derived from the BZA hearing, it is apparent that all parties received a full, detailed and fair hearing and that the Members of the BZA were attentive and fully engaged in the matter. There were five Members of the BZA present at that hearing and the BZA Transcript show clearly that all five Members fully engaged in asking questions, making comments, discussing and deciding the case.

The BZA, as was the case with Ms. Dixon of the Town staff, dealt with some ambiguities in the Town's zoning law. Ms. Dixon well explained and supported her interpretation of the Town zoning law in regard to those ambiguities. The BZA denied the Beachwalk appeal, and in so doing upheld Ms. Dixon's interpretation of the Town zoning law.

Much of what else we would argue in our Conclusion to this Brief is found in the remarks and colloquy of SDC Properties, Inc.'s counsel (the undersigned Barry L. Johnson) with Members of the BZA, as above quoted from the BZA Tr., p. 89, l. 14 – p. 98, l. 19, here fully incorporated by reference.

Ms. Dixon, on behalf of the Town was mindful that the interpretation of the ambiguities in the Town's zoning law, if interpreted as urged by Beachwalk, would render SDC Properties, Inc.'s Parcel E as "unbuildable" (BZA Tr., p. 111, ll. 14-17.) The spectre of the Lucas case (Lucas v. South Carolina Coastal Council, 55 U.S. 1003 (1992)) would make any governmental body (such as the BZA) and responsible public official (such as Ms. Dixon) shudder at the thought of, by regulation, making a private property "unbuildable" and therefore, by regulation, rendering that property void of economic utility and value. Ms. Dixon, acting on behalf of the Town, was well guided in her interpretation of the Town's zoning law, as was the BZA in denying the Beachwalk appeal. We hope this Court will be similarly mindful.

Although the principles of legal construction favoring the freer and less restricted use of real property in South Carolina are well-established, please note the above-referenced case, Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980).

No argument or showing has been made by Beachwalk that the proposed development of Parcel E would inappropriately impact “natural features” or “environmentally sensitive areas”, a point of concern for PD-2 Overlay Districts (BZA Tr., Attorney Williams, p. 13, ll. 1-16).

Application of the foregoing Standards of Review, indicate that the decision of the BZA, in denying the Beachwalk appeal, was made with an extensive factual review and basis, and an extensive inquiry into the applicable law. This record clearly shows that the BZA decision was not controlled by any error of law, nor could it possibly be characterized as arbitrary or capricious, nor can it be fairly stated that the BZA’s decision had no reasonable relation to a lawful purpose, nor that the BZA abused its discretion. Moreover, it is apparent that the BZA gave a practical, reasonable, and fair interpretation of the Town’s zoning law, consonant with the purposes, design and policy of the Town’s lawmakers. The courts must uphold the decision of the BZA in this case, because there is evidence – indeed, more than ample evidence, in the BZA record to support its decision.

Thus, there is no cogent reason for the courts to overrule the BZA decision here appealed from. The BZA complied with the controlling SC statute, S.C. Code § 6-29-800 (2003), by ruling to prevent the interpretation of the Town’s zoning law which would effectively prohibit or unreasonably restrict the utilization of the property. The courts in reviewing the BZA decision should refrain from substituting judicial judgment for the BZA’s judgment, even if the courts disagree with the BZA decision. Thus, the courts must surely agree that the BZA’s decision was correct as a matter of law.

The full and proper application of the Standards of Review not only suggest, but in all respects mandate, that the BZA's denial of the Beachwalk appeal should be upheld by the courts.

Respectfully submitted,

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Bluffton, SC
March 12, 2018

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 &
Condominium 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, and SDC
Properties, Inc.

Respondents/Defendants

**APPELLANTS'/PETITIONERS'
RETURN TO
THE COURT'S QUESTIONS**

Introduction

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

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

The Court's Questions

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

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

Following further briefing by the Appellants and SDC¹ and a telephone conference among Judge Dukes and counsel for all parties on December 18, 2017, Judge Dukes issued an Order on April 20, 2018 in which he found that the record of the proceedings before the BZA was unclear and insufficient for review, and that he required further information from the BZA for his consideration. That Order states, in pertinent part, as follows:

Despite extensive presentations and questioning at the hearing before the BZA on November 28, 2016, I find the record is unclear as to certain issues that I believe are important for appropriate judicial review of this appeal, including the basis for the BZA's decision. Thus, I determine that the certified record of the proceedings before the BZA in Application for Appeal APL-001673-2016 is insufficient for review, and I hereby remand this

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

matter to the BZA for a rehearing and direct the BZA to specifically focus upon and answer the following questions for the Court's further consideration:

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

Remand to the BZA for Rehearing on the Court's Questions

It is clear from the Court's Order that the BZA was instructed to answer the Court's three questions "for the Court's further consideration" in connection with further "appropriate judicial review of this appeal." While BZA Chairman David Fingerhut stated in his opening remarks at the August 27, 2018 hearing that the parties to this appeal agreed that this appeal would be given a full rehearing in addition to answering the Court's questions,² it is evident from the Court's Order that the Court did not remand this appeal to the BZA for reconsideration, or *de novo* review, of Application for Appeal APL-001673-2016, but rather for a "rehearing" in order to give all parties an opportunity to be heard in connection with the BZA answering the three questions posed by the Court.

Prior to the BZA's hearing on the three questions posed by Judge Dukes, Ms. Dixon, on behalf of the Town, provided the BZA with a Memorandum dated

² On further reflection and review of the Court's Order, the Appellants believe that the parties to this appeal cannot agree among themselves to change the Court's Order. Once the BZA's November 28, 2016 decision to deny this appeal was further appealed to the Circuit Court, the BZA no longer had jurisdiction to make any further decisions on this appeal, other than as specifically directed in the Court's Order.

August 1, 2018 (the “Town’s Memorandum”)³ that included the Town’s position on the answers to those three questions. Thereafter, the Appellants submitted a Memorandum on Remand to the BZA on August 9, 2018 (the “Appellants’ Memorandum”),⁴ and SDC submitted a Memorandum on Remand Hearing to the BZA on August 13, 2018 (the “SDC Memorandum”), in which it essentially adopted the Town Staff’s position on the three questions.⁵

In their respective memoranda to the BZA, all parties agreed that Parcel E is in a PD-2 Overlay District established by the LMO, and that Parcel E is subject to the LMO’s PD-2 Overlay District regulations; however, as to the third question, while the Appellants argued that the existing development on the other parcels within the PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E, the Town and SDC argued that the existing development on the other parcels within the PD-2 Overlay District does not have to be taken into account in connection with any proposed development of Parcel E.

The crux of the Town’s argument in support of its position on the answer to the third question posed by Judge Dukes to the BZA was that, notwithstanding its admission that Parcel E is subject to the LMO’s PD-2 Overlay District regulations, Parcel E is not subject to **ALL** of the LMO’s PD-2 Overlay District regulations. As Ms. Dixon stated in the Town’s Memorandum, the Town Staff does not “believe” that the PD-2 Overlay District’s average density regulations in LMO Section 16-3-106.G.4 apply to Parcel E, and the Town Staff’s “interpretation of the LMO” requires that, for density purposes, the development of Parcel E is governed solely by the regulations applicable to the base zoning district, and not by the average density regulations applicable to all PD-2 Overlay Districts.⁶ Instead, the Town’s Memorandum argued that the PD-2 Overlay District average density regulations in LMO Section 16-3-106.G.4.a, apply only “when creating a new plan for a PD-2 [Overlay District]”, and not to “a PD-2 [Overlay District] that has been previously approved

³ A copy of the Town’s Memorandum, without the six attachments (all of which are already included in the record of this appeal), is attached hereto as Exhibit A.

⁴ A copy of the Appellants’ August 9, 2018 Memorandum on Remand to the BZA is attached hereto as Exhibit B.

⁵ A copy of SDC’s August 13, 2018 Memorandum on Remand Hearing to the BZA is attached hereto as Exhibit C.

⁶ See the first and third paragraphs of Ms. Dixon’s response to the Court’s third question in the Town’s Memorandum.

through prior regulations and substantially constructed.” Ms. Dixon cited no authority in the LMO, or otherwise, for this position, either in the Town’s Memorandum or at the August 27, 2018 BZA hearing.⁷

The Town’s position on the Court’s third question is grounded solely and completely on the Town Staff’s “belief” and an “interpretation” of LMO Section 16-3-106.G.4.a that results in a limitation on applicability that is not evident in the plain text of the LMO, and that flies in the face of the LMO’s provisions that say that if a tract of land is located in a PD-2 Overlay District, as is Parcel E, then the LMO’s regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district.⁸ Because the term “shall” is mandatory, there is no limitation of the applicability of the LMO’s PD-2 Overlay District regulations to Parcel E, and neither Teri B. Lewis, AICP, the Town’s LMO Official, Ms. Dixon, nor any other member of the Town Staff has the authority, latitude, or freedom to “believe” or to decide otherwise.⁹

Our South Carolina courts have consistently held that when construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.¹⁰ Here, the Town Staff has done the opposite, “interpreting” LMO Section 16-3-106.G.4 to include a non-existent limitation on applicability to only new PD-2 Overlay Districts.

The Town Staff’s position on the Court’s third question was a tortured “interpretation” of the LMO that allowed the Town Staff to disregard a mandatory provision of the LMO’s PD-2 Overlay District regulations, and it

⁷ A subpoena issued at the request of the Appellants by the BZA Chairman Fingerhut to Teri B. Lewis, the Town’s LMO Official, seeking any documents from any past, similar determinations by the Town Staff resulted in an admission by Mrs. Lewis that there were no such documents. Mrs. Lewis also admitted that there is no precedent for the Town Staff’s “belief” or “interpretation” of the inapplicability of LMO Section 16-3-106.G.4 to the development of Parcel E. See the transcript of the August 27, 2018 hearing, beginning at Page 44, Line 24 through Page 49, Line 19. A copy of the subpoena is attached to the transcript of the August 27, 2018 BZA hearing as Exhibit 1.

⁸ See LMO Sections 16-3-102.C and 16-3-106.D.

⁹ See, *McCrowey v. Zoning Board of Adjustment of the City of Rock Hill*, 599 S.E. 2d 617 (SC App. 2004), a copy of which was included with the Petition for Reconsideration of this appeal filed with the BZA on December 12, 2016, and with the Appellants’ Memorandum.

¹⁰ See, *City of Myrtle Beach v. Juel P. Corporation*, 543 S.E.2d 538 (S.C. 2001), a copy of which was attached to the Appellants’ Memorandum.

cannot be reconciled in any way with Ms. Dixon's agreement that Parcel E is subject to the LMO's PD-2 Overlay district regulations.

The BZA's Rehearing on the Court's Questions

On August 27, 2018, in response to the Court's Order, the BZA held a further hearing on this appeal to answer the Court's three questions.¹¹ During a hearing that lasted for over five hours, and after presentations by the Appellants, SDC, and the Town, the BZA, on several motions each duly made and seconded with regard to the Court's questions, voted to answer the Court's questions¹² as follows:

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

Answer: The BZA unanimously voted to "affirm that Parcel E is in a PD-2 Overlay District established by the LMO."¹³

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

Answer: The BZA unanimously voted "that Parcel is subject to the LMO's PD-2 Overlay District regulations."¹⁴

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

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

¹¹ A copy of the transcript of the BZA's August 27, 2018 hearing on the remand of this appeal is attached hereto as Exhibit D for filing in this appeal.

¹² See the August 31, 2018 Notice of Action by the BZA on the remand of this appeal, a copy of which is attached hereto as Exhibit E for filing in this appeal.

¹³ See the BZA's Notice of Action, and the transcript of the August 27, 2018 hearing, beginning at Page 213, Line 3 through Page 214, Line 5.

¹⁴ See the BZA's Notice of Action, and the transcript of the August 27, 2018 hearing, beginning at Page 214, Line 6 through Page 215, Line 17.

existence of the PD-2 Overlay District and its regulations as we consider development for Parcel E”; and “that the existing development on the other parcels within that PD-2 Overlay District must be taken into account with any proposed development for Parcel E.”¹⁵

Ms. Dixon testified during the August 27, 2018 BZA hearing that the only real difference between the Town’s position and the Appellants’ position in this appeal is on the issue of the applicability of the PD-2 Overlay District’s average density regulations in LMO Section 16-3-106.G.4.a to the proposed development of Parcel E.¹⁶ She also testified that LMO Section 16-3-106.G.4 contains no language that limits its effect to only new PD-2 Overlay Districts.¹⁷

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

A substantial portion of the discussion by and among the members of the BZA and the parties to this appeal during the August 27, 2018 hearing focused on what effect the existing development on the other parcels within the Waterside PD-2 Overlay District has on the proposed development of Parcel E, and whether or not the PD-2 Overlay District average density regulations in LMO Section 16-3-106.G.4.a are applicable to the proposed development of

¹⁵ See the BZA’s Notice of Action, and the transcript of the August 27, 2018 hearing, beginning at Page 243, Line 24 through Page 244, Line 24, and beginning at Page 248, Line 7 through Page 249, Line 7.

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

¹⁷ See the transcript of the August 27, 2018 hearing, beginning at Page 189, Line 25 through Page 190, Line 9.

Parcel E. The competing results of the Appellants' position and the Town's and SDC's position on this issue are clear: On the one hand, if the PD-2 Overlay District's average density regulations are applicable to the development of Parcel E, then development on Parcel E is foreclosed, because there is already more density on the various tracts in the Waterside PD-2 Overlay District than is now permitted under current LMO regulation.¹⁸ On the other hand, if the PD-2 Overlay District's average density regulations are not applicable to the development of Parcel E, then further development is possibly permitted on Parcel E.

By unanimously agreeing that Parcel E is subject to the LMO's PD-2 Overlay District regulations and that the existing development on the other parcels in the Waterside PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E, the BZA must have relied on LMO Sections 16-3-101.B and 16-3-301.B, which say that if any land is located in an overlay district, then the LMO's regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district, and also on LMO Sections 16-3-102.C and 16-3-106.D, which say that the standards governing an overlay zoning district **shall** control over the base zoning district regulations, whether they are more restrictive or less restrictive than the base zoning district.

¹⁸ The transcript of the BZA's hearing on August 27, 2018 shows there was some sentiment among the Town Staff and some members of the BZA that following the requirements of the current LMO, in particular the PD-2 Overlay District average density regulations of LMO Section 16-3-106.G.4.a, makes Parcel E "unbuildable" or "worthless", a position fostered by Barry L. Johnson, Esq., counsel for SDC. For example, see (1) the comment by Gregory M. Alford, Esq., counsel for the Town, that it "Puts the Town in a tough spot" at Page 146, Lines 9-10 of the transcript of the August 27, 2018 hearing; (2) BZA member Robert Johnson's comments beginning on Page 174, Line 12 through Page 175, Line 5 of the transcript; (3) Page 189, Lines 21-22 of the transcript, where Ms. Dixon states, "And staff does not think we can determine that the lot [referring to Parcel E] is unbuildable."; and (4) the last paragraph of BZA Member Jerry Cutrer's motion in the Notice of Action and beginning at Page 251, Line 22 through Page 252, Line 2 of the transcript, in which he refers to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Appellants respectfully remind the Court that the record clearly shows that Parcel E could have been developed by the SDC's predecessor in title to Parcel E, and also by SDC itself, pursuant to the vested use and density rights recognized by the March 3, 1995 Categorical Exemption before the Categorical Exemption expired on 3 March 2000. The fact is, SDC, for reasons unknown to the Appellants, chose not to develop Parcel E prior to the expiration of the Categorical Exemption, and thus SDC assumed the risk of not relying on the "use it or lose it" benefit conferred on Parcel E by the Categorical Exemption". Taken in this context, any inability to further develop Parcel E is not a harsh result, but rather is a self-inflicted predicament.

The BZA's response to the Court's three questions provides the Court with the information it needs in order to complete its judicial review of this matter.¹⁹

**There is only One Possible Result to this Appeal Based on the BZA's
Answers to the Court's Questions**

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

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

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

There is only one method under the LMO's PD-2 Overlay District regulations to take the existing development on the other tracts in the Waterside PD-2 Overlay District into account when considering the proposed development of Parcel E, and that is by use of the average density regulations of LMO Section 26-3-106.G.4.a. That is what must be done here. Ms. Dixon

¹⁹ The Appellants note for the Court's benefit that after voting to answer all of the Court's questions affirmatively, the BZA then strayed beyond Judge Dukes' remand mandate and considered a motion made and seconded to again deny the appeal and uphold Ms. Dixon's determination. After discussion, the question was called and the motion to again deny this appeal failed on a tie vote, 3 in favor, and 3 against. Thereafter, the BZA took no further action in connection with the Court's Order. In particular, the Appellants believe it is important to note that the BZA could not muster a majority vote to deny this appeal the second time around.

testified under oath during the November 28, 2016 BZA hearing that if the development of Parcel E must conform to the current LMO requirements for a PD-2 Overlay District, then the Appellants' average density calculations for the 15.1 acres in the Waterside PD-2 Overlay District set forth on Pages 13 and 14 of the narrative attached to Application for Appeal APL-001673-2016 are correct,²⁰ thereby acknowledging that the existing development in the Waterside PD-2 Overlay District already exceeds the maximum density permitted under the LMO. BZA Chairman Fingerhut noted Ms. Dixon's agreement with the Appellants' calculations of the average density for the Waterside PD-2 Overlay District during the November 28, 2016 BZA hearing,²¹ and also walked Gregory M. Alford, Esq., counsel for the Town, through the same calculations for the average density for the Waterside PD-2 Overlay District during the August 27, 2018 BZA hearing.²² Further, under questioning by BZA Member Lisa Laudermilch during the August 27, 2018 hearing, Mr. Alford reluctantly agreed that the Appellants' method of calculating the average density for the Waterside PD-2 Overlay District is correct, and that the existing density on the tracts in the Waterside PD-2 Overlay District exceeds available density for the 15.1 acres in the Waterside PD-2 Overlay District.²³

The only logical, legally supportable end result to this appeal is that since there is no remaining density available for further development of the properties in the Waterside PD-2 Overlay District, compliance with current LMO requirements results in no further development of Parcel E.²⁴

Since the BZA's answers to the Court's questions are that Parcel E is in a PD-2 Overlay District, that the PD-2 Overlay District regulations apply to Parcel E, that the LMO's PD-2 Overlay District regulations must be taken into consideration in the development of Parcel E, and that the existing

²⁰ See the transcript of the November 28, 2016 BZA hearing, at Page 70, Lines 17-25, and Page 71, Lines 1-10. Those density calculations are also included in the Appellants' Memorandum, at Pages 7-8.

²¹ See the transcript of the August 27, 2018 hearing at Page 107, Lines 7-16.

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

²³ See the transcript of the August 27, 2018 hearing beginning at Page 145, Line 22 through Page 146, Line 9.

²⁴ Again, any inability to develop Parcel E is SDC's own self-imposed hardship resulting from its decision to not avail itself of the development protections afforded by the now expired Categorical Exemption when it could have.

development on the other parcels within the Waterside PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E, it follows, as the record of this appeal establishes, that, considering the existing densities on the tracts in the Waterside PD-2 Overlay District, there is no density remaining in Waterside PD-2 Overlay District for allocation to Parcel E, and therefore Parcel E cannot be developed.

Conclusion

The Appellants submit that the BZA's answers to the Court's questions provide the factual and legal basis for the Court to grant this appeal, find that the BZA's decision on November 28, 2016 to deny this appeal was wrong as a matter of law, and overturn the BZA's decision denying Application for Appeal APL-001673-2016, and also to overturn Ms. Dixon's determination that is the basis of Application for Appeal APL-001673-2016. Therefore, the Appellants pray that the Court:

1. Hold that the decision rendered by the BZA on November 28, 2016 to uphold the August 23, 2016 Determination Letter issued by Nicole Dixon is incorrect as a matter of law;
2. Hold that the BZA, in upholding the August 23, 2016 Determination Letter, acted arbitrarily, capriciously, and without reasonable relation to a lawful purpose;
3. Reverse the decision rendered by the BZA on November 28, 2016 upholding the August 23, 2016 Determination Letter;
4. Hold that the BZA's Notice of Action dated November 30, 2016 is invalid and void;
5. Hold that the August 23, 2016 Determination Letter is incorrect as a matter of law;
6. Hold that Ms. Dixon, in issuing the August 23, 2016 Determination Letter, acted arbitrarily, capriciously, and without reasonable relation to a lawful purpose;
7. Award Appellants their costs of this action pursuant to Section 6-29-840(A) of the Code of Laws of South Carolina (1976), as amended; and

8. Issue such other and further relief as is just and proper.

Respectfully submitted this 7th day of September, 2018.

LAW OFFICE OF THOMAS C. TAYLOR, LLC

s/Thomas C. Taylor

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SC Bar No. 5499

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

September 7, 2018

Hilton Head Island, South Carolina

Exhibit A to Appellants' Return (2 pages)



TOWN OF HILTON HEAD ISLAND

Community Development Department

TO: Board of Zoning Appeals
VIA: Teri B. Lewis, AICP, *LMO Official*
FROM: Nicole Dixon, CFM, *Development Review Administrator*
DATE: August 1, 2018
SUBJECT: Rehearing of APL-001673-2016

On November 28, 2016, the Board of Zoning Appeals heard an appeal submitted by Chester C. Williams on behalf of Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC. Mr. Williams appealed staff's determination, dated August 23, 2016, that the proposed development of the Spinnaker Welcome Center at 30 Waterside Drive is permitted as proposed with Development Plan Review Application DPR-001056-2016. The Board denied the appeal and upheld staff's determination.

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

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

Due to the lengthy size of the original record, the entire original appeal record, as well as the transcript of the BZA hearing that took place on November 28, 2016, was made available to the BZA members to pick up on Monday July 30th in order to give them enough time to read through the original documentation.

At this time, staff does not have any new information to add to the record; however, in an effort to assist the BZA in answering the three questions posed by the Judge in the remand order, staff offers the following:

1. **Is Parcel E in a PD-2 Overlay District established by the LMO?** Yes, Parcel E, which is the parcel subject to the appeal and also referred to as Tract B, is in the Waterside (Town Center) PUD as shown on the attached map (Attachment C), attached 1984 Conceptual Master Plan (Attachment D), attached Waterside PUD (Attachment E) and attached 1987 Conceptual Master Plans (Attachment F). Staff has found no evidence that Parcel E was ever removed from the PD-2 Overlay District.
2. **If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations?** Yes Parcel E is subject to the LMO's PD-2 Overlay District regulations as found in LMO Section 16-3-106.G.

Town Government Center ♦ One Town Center Court ♦ Building C
 Hilton Head Island ♦ South Carolina ♦ 29928
 843-341-4757 ♦ (FAX) 843-842-8908

3. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E? The PD-2 Overlay District Regulations do not have any effect on the development of Parcel E, nor does the existing development within the PD-2 have to be taken into account with any proposed development of Parcel E. Staff believes the regulations outlined in LMO Section 16-3-106.G.4 are to be used when developing a PD-2 and doesn't apply to a PD-2 that has been previously approved through prior regulations and substantially constructed.

The appellant claims that since the parcel is subject to the LMO's PD-2 regulations, the density and development standards provided in LMO Section 16-3-106.G.4.a prohibit Parcel E from being developed. The appellant claims that the average density of what currently exists within the PD-2 exceeds the maximum density allowed in the base zoning district. Staff disagrees with this claim.

The Waterside Master Plan identified specific densities and uses that were allowed within the PUD and required a certain amount of common open space. Parcel E was identified as a developable property with up to 16,787 square feet of commercial development. The fact that Parcel E was not developed at the same time as the other developments that are part of the subject PUD, doesn't mean it is now an un-buildable lot or that this parcel now has to comply with development standards that are meant to be used when creating a new plan for a PD-2. Staff does not believe at this point the density needs to be averaged for the PD-2 since this was clearly taken into account when the Master Plan was created. The Categorical Exemption, which vested the developer for specific densities and uses as shown on their Master Plan and vested them from having to comply with subsequent amendments to the LMO, expired on March 3, 2000. Staff's interpretation of the LMO is that since they are no longer vested under the Categorical Exemption, they have to comply with the current density standards of the underlying base zoning district for that parcel. The underlying zoning of the subject parcel is RD (Resort Development).

The proposed Welcome Center is shown to be built at a maximum of 7,500 square feet. The RD District allows up to 8,000 square feet of nonresidential uses per net acre. The subject property is 1.068 acres in size, which would allow 8,544 square feet. Since the proposed Welcome Center is only 7,500 square feet in size, it is clearly less than what the LMO allows. It is also less than the 16,787 square feet originally retained for Tract B on the Master Plan.

Staff reserves the right to submit additional documents.

Please contact me at (843) 341-4686 or at nicoled@hiltonheadislandsc.gov if you have any questions.

Exhibit B to Appellants' Return (36 pages)

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

MEMORANDUM ON REMAND

This Memorandum on Remand (this "Memorandum") is provided on behalf of Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (collectively, the "Appellants") to the Board of Zoning Appeals (the "BZA") of the Town of Hilton Head Island (the "Town") in connection with remand to the BZA by the Court of Common Pleas for the Fourteenth Judicial Circuit (the "Court") of Civil Action No. 2016-CP-07-2712 (the "Circuit Court Appeal") by The Honorable Marvin H. Dukes, III, Beaufort County Master in Equity, sitting as a Special Circuit Judge ("Judge Dukes"), by his order dated 20 April 2018 (the "Remand Order").¹ By the Remand Order, Judge Dukes sent Application for Appeal APL-001673-2016 (this "Appeal") back to the BZA for further consideration.

I. INTRODUCTION

This Appeal challenges determinations made by Nicole Dixon, Development Review Administrator for the Town, in her letter of 23 August 2016 letter to counsel for the Appellants (the "Determination Letter"). The BZA heard and decided the Appeal on 28 November 2016, upholding the determinations made by Ms. Dixon in the Determination Letter, and declined to grant the Appellant's Petition for Reconsideration of that decision on 23 January 2017. Thereafter, the Appellants timely filed the Circuit Court Appeal.

As part of the Circuit Court Appeal, on 28 March 2017, a Consent Order was entered by which SDC Properties, Inc. ("SDC"), the owner of the tract that is the site of the proposed Spinnaker Welcome Center development ("Parcel E")

¹ A copy of the Remand Order is Attachment B to the 1 August 2018 Memorandum from Nicole Dixon to the BZA.



was joined as a party defendant in the Circuit Court Appeal. SDC remains a party to this Appeal.

In the Remand Order, Judge Dukes found that the certified record of the proceedings of this Appeal APL-0001673-2016 was insufficient for review by the Court, and remanded the Circuit Court Appeal back to the BZA for a rehearing, and specifically directed the BZA to "... focus upon and answer the following questions for the Court's further consideration":

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

Parcel E is 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")² that was the subject of the Determination Letter.

This Memorandum addresses each of the remanded questions in turn.

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

Parcel E, located at 30 Waterside Drive, is identified as Parcel 202 on Beaufort County Tax Map 18. Parcel E is located in the Resort Development (RD) Zoning District, and is within both the Corridor Overlay District and the PD-2 Waterside (Town Center) Overlay District (the "Waterside PD-2 Overlay District").

In her Memorandum of 1 August 2018 to the BZA (the "Staff Report"), Ms. Dixon, as she previously did in the Determination Letter, has again

² A copy of the Waterside PUD Survey is Attachment E to Ms. Dixon's 1 August 2018 Memorandum to the BZA.



acknowledged and agreed on behalf of the Town Staff that Parcel E is in the Waterside PD-2 Overlay District. The Appellants agree, and Barry L. Johnson, Esq., counsel for SDC, likewise has agreed in his Brief in Reply to Court's Post-Hearing Questions filed on behalf of SDC in the Circuit Court Appeal, as did Todd Theodore,³ SDC's land planner, in his testimony at the first BZA hearing on this Appeal,⁴ that Parcel E is in, and is part of, the Waterside PD-2 Overlay District.

In fact, there is no controversy about whether Parcel E is located in a PD-2 District and, accordingly, the first question posed by Judge Dukes in the Remand Order must be answered **YES**.

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

In the Staff Report, Ms. Dixon, again on behalf of the Town Staff, acknowledged and agreed that Parcel E is subject to the LMO's PD-2 Overlay District regulations, specifically, the provisions of LMO Section 16-3-106.G. The Appellants agree, and again likewise Mr. Johnson agreed in his Brief in Reply to Court's Post-Hearing Questions filed on behalf of SDC in the Circuit Court Appeal.

Mr. Theodore testified at the first BZA hearing on this Appeal that any development of Parcel E must comply with the base zoning district and also must comply with the PD-2 Overlay District requirements.⁵

The LMO itself is also dispositive on this question. Specifically, LMO Section 16-3-101.B says,

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

³ Mr. Theodore is also a member of the Town's Planning Commission.

⁴ See the transcript of the 28 November 2016 BZA hearing on this Appeal, at Page 26, lines 5-15, and Page 32, lines 9-13. Those two pages are highlighted and attached hereto as **Exhibit A**.

⁵ See the transcript of the 28 November 2016 BZA hearing on this Appeal, at Page 43, lines 22-25, and Page 44, lines 1-18. Those pages are highlighted and attached hereto as **Exhibit B**.



addition to the regulations governing development in the underlying base zoning district.

Further, LMO Sections 16-3-102.C and 16-3-106.D both say,

Regulations governing development in an overlay zoning district shall apply in addition to the regulations governing development in the underlying base zoning district.

It is clear from the above provisions of the LMO that the LMO intends for the Overlay District regulations to apply to land located in that overlay district.

Because Parcel E is located in a PD-2 Overlay District, specifically, the Waterside PD-2 Overlay District, it is clear that Parcel E is subject to the LMO's PD-2 Overlay District regulations. Accordingly, the second question posed by Judge Dukes in the Remand Order must be answered **YES**.

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

In the Staff Report, after acknowledging that Parcel E is subject to the LMO's PD-2 Overlay District regulations, Ms. Dixon, in response to this third question from Judge Dukes, first says, "The PD-2 Overlay District regulations do not have any effect on the development of Parcel E." Ms. Dixon goes on to say,

Staff believes the regulations outlined in LMO Section 16-3-106.G.4 are to be used when developing a PD-2 and doesn't [sic] apply to a PD-2 that has been previously approved through prior regulations and substantially constructed.

Ms. Dixon cites no authority in the LMO, or otherwise, for this position. The Appellants believe Ms. Dixon is simply wrong on this point for several different reasons.



A. PD-2 Overlay District Regulations

LMO Section 16-3-101.B says that if any land is located in an overlay district, then the LMO's regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district.

Notwithstanding LMO Section 16-3-101.B, Ms. Dixon and the Town Staff apparently believes that LMO Section 16-3-106.G.4 applies only to newly established, undeveloped PD-2 areas,⁶ and has no effect on a previously approved and substantially constructed PD-2 area. The practical effect of this "belief" is that Parcel E is not subject to all of the LMO's PD-2 Overlay District regulations. In other words, Ms. Dixon would have the BZA believe that while Parcel E is subject to the LMO's PD-2 Overlay District regulations, it's really not, at least not all of those regulations. Ms. Dixon cites no authority for this position, certainly none in the LMO, other than the Town Staff's "belief" as to when LMO Section 16-3-106.G.4 is to be applied. The Appellants assert that nothing could be further from the truth. The proposed development of the Spinnaker Welcome Center on Parcel E is nothing more than the last phase of the development of the various tracts in the Waterside PD-2 Overlay District. That is exactly the sort of scenario that LMO Section 16-3-106.G.4 addresses.

The Appellants contend that if Parcel E is subject to the LMO's PD-2 Overlay District regulations, which Ms. Dixon admits it is, then Parcel E is subject to not just some, but rather all, of the LMO's PD-2 Overlay District regulations. The Town Staff has not cited, and the Appellants cannot find, anything in the LMO that supports the Town Staff's "belief" or "interpretation" that LMO Section 16-3-106.G.4 applies only when developing, or establishing, a new PD-2 Overlay District.

If Parcel E is in the Waterside PD-2 Overlay District, which Ms. Dixon admits it is, and if the LMO's PD-2 Overlay District requirements are part of the current LMO, which Ms. Dixon also admits, then any development of Parcel E must comply with all of the LMO's PD-2 Overlay District requirements, including the PD-2 Overlay District's density requirements and limitations. In fact, and in law, LMO Sections 16-1-106.A.1, 16-1-106.A.2, 16-3-101.A, 16-3-

⁶ In the third paragraph of Section 3 of the Staff Report, Ms. Dixon, apparently with respect to the provisions of LMO Section 16-3-106.G.4, refers to "development standards that are meant to be used when creating a new plan for a PD-2."



101.B, and 16-3-102.C **require** that any proposed development on Parcel E comply with all of the LMO's PD-2 Overlay District requirements, including the PD-2 Overlay District's density requirements and limitations, which control over the underlying base RD District's density requirements and limitation.

In point of fact, the LMO includes no provisions that limit the applicability of any of the PD-2 Overlay District regulations to only "a PD-2 [Overlay District] that has been previously approved through prior regulations and substantially constructed." Further, Ms. Dixon doesn't try to define when a PD-2 Overlay District becomes "previously approved," nor does she try to describe what the "prior regulations" she refers to are, or when a PD-2 Overlay District becomes "substantially constructed." The Appellants submit that the standard relied on by Ms. Dixon is a fiction of the Town Staff, not contained in, or authorized by, the LMO, and is therefore arbitrary and capricious.

The LMO says that if a tract of land is located in a PD-2 Overlay District, as is Parcel E, then the LMO's regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district. Because the term "shall" is mandatory, there is no limitation of the applicability of the LMO's PD-2 Overlay District regulations to Parcel E, and neither Teri B. Lewis, AICP, the LMO Official, Ms. Dixon, nor any other member of the Town Staff has the authority, latitude, or freedom to decide otherwise.⁷

From the Appellants' point of view, given the clear answers to the first two questions, this third question posed by Judge Dukes in the Remand Order to the BZA must also be answered by saying that **YES**, the LMO's Overlay District regulations do effect the development of Parcel E, and **YES**, the existing development on the other parcels within the Waterside PD-2 Overlay District must be taken in to account in connection with any proposed development on Parcel E.

B. Fact versus opinion

In the second paragraph of Section 3 of the Staff Report, Ms. Dixon says that the Appellants "claim" that the average density of what is currently

⁷ See, *McCrowey v. Zoning Board of Adjustment of the City of Rock Hill*, 599 S.E. 2d 617 (SC App. 2004, a copy of which was included with the Petition for Reconsideration of this Appeal filed with the BZA on 12 December 2016. Another copy is attached hereto as **Exhibit C**.



developed in the Waterside PD-2 Overlay District exceeds the maximum density in the base zoning district, and that the Town Staff “disagrees with this claim.” However, the determination as to whether or not the existing development in the Waterside PD-2 Overlay District exceeds the average density limitation of LMO Section 16-3-106.G.4 is not a matter of opinion; instead, it is a matter of fact.⁸

LMO Section 16-3-106.G.4.a requires that “the average density for the PD-2 Overlay District shall not exceed the maximum density permitted in the base zoning district.” For Parcel E, the base zoning district is the Resort Development (RD) District.

The level of existing development on the tracts within the Waterside PD-2 Overlay District is a fact, not an opinion or a belief.

The recorded survey showing the tracts located within the Waterside PD-2 Overlay District, Attachment E to the Staff Report, shows a 15.100 acre tract subdivided into four separate parcels. Parcel E is the subject of 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.

According to the Town’s records, over the years of the development of the Spinnaker Project, Building Permits for the construction of 198 dwellings units were issued.⁹ In addition, one Building Permit for a nonresidential structure with 5,262 square feet was issued.¹⁰ Under the current RD District regulations, which allows a maximum of 16 dwelling units per net acre, the Town now requires 12.375 acres to support the existing 198 dwelling units in the Spinnaker Project, and given the RD District’s maximum nonresidential density of 8,000 square feet per net acre, the Town now requires 0.658 acre to support the existing nonresidential development that is part of the Spinnaker

⁸ Daniel Patrick Moynihan, formerly U.S. Senator from the Commonwealth of Massachusetts, is generally credited with saying, “Everyone is entitled to their own opinions, but they are not entitled to their own facts.”

⁹ See Town Building Permits 8215, B9800299, B9901068, B9902863, B0000531, B0002113, B0100890, and B0101129.

¹⁰ See Town Building Permit B0000199.



Project. Therefore, under current LMO regulations, the Spinnaker Project's existing density would take up 13.033 acres of land in the RD District.

To the Appellants' information, the Beachwalk Hotel was originally developed with 91 hotel rooms. Under the current RD Zone regulations, which allow a maximum of 35 hotel rooms per net acre, the Town now requires 2.600 acres to support the existing 91 hotel rooms on the Beachwalk Hotel tract.¹¹

Averaging the existing density of the Spinnaker Project and the Beachwalk Hotel over the entire 15.10 acres of the Waterside PD-2 Overlay District, it turns out that under current LMO requirements for the RD District, 15.633 acres must be allocated to the existing development for the Spinnaker Project and the Beachwalk Hotel, leaving no acreage in the Waterside PD-2 Overlay District available for density allocation on Parcel E.

Accordingly, given the existing development in the Waterside PD-2 Overlay District, the LMO's requirement for averaging density across the various tracts within the Waterside PD-2 Overlay District, and the LMO's limitation on maximum density to the density that is currently permitted in the RD District, there is insufficient available unallocated acreage within the Waterside PD-2 Overlay District to permit the proposed development on Parcel E.¹²

The only possible basis for Ms. Dixon and the Town Staff to get around the facts, and the law, about the existing development on the tracts within the Waterside PD-2 Overlay District is to "interpret" the LMO in a manner that says the average density requirements of LMO Section 16-3-106.G.4 simply do not apply to Parcel E. That position is a tortured interpretation of the LMO that allows the Town Staff to disregard a mandatory provision of the LMO's PD-2 Overlay District regulations, and cannot be reconciled with Ms. Dixon's agreement that Parcel E is subject to the LMO's PD-2 Overlay district regulations.

¹¹ According to the Waterside PUD Survey, the Beachwalk Hotel tract, which is Parcel A&C on the Waterside PUD Survey, is exactly 2.60 acres.

¹² Ms. Dixon so testified at the 28 November 2016 BZA hearing on this Appeal. See the transcript of that hearing, at Page 108, lines 7-18, and Page 109, line 25 through Page 110, Line 13. Those pages are highlighted and attached hereto as **Exhibit D**.



Again, given the clear answers to the first two questions, the third question posed by Judge Dukes in the Remand Order to the BZA must also be answered by saying that **YES**, the LMO's Overlay District regulations do effect the development of Parcel E, and **YES**, the existing development on the other parcels within the Waterside PD-2 Overlay District must be taken in to account in connection with any proposed development on Parcel E.

C. The 1987 Master Plan and the 1995 Categorical Exemption

In the third paragraph of Section 3 of the Staff Report, Ms. Dixon says, "Staff does not believe at this point the density needs to be averaged for the [Waterside] PD-2 [District] since this was clearly taken into account when the Master Plan was created." This statement has no basis whatsoever in fact, and the Appellants challenge Ms. Dixon to cite her basis for this statement.

The density averaging provisions of the LMO could not have had any bearing on the Conceptual Master Plan for the Town Center PUD dated 27 July 1987 (the "1987 Master Plan") because the LMO, which was first enacted by the Town on 15 January 1987, at that time had no overlay zoning district comparable to the current PD-2 Overlay District, and no requirement for density averaging as now required by LMO Section 16-3-106.G.4.¹³

The 3 March 1995 Categorical Exemption letter (the "1995 Categorical Exemption") vested the right to development the Waterside PD-2 Overlay District tracts as allowed by the 1987 Master Plan, but only until 3 March 2000. The Spinnaker Project was developed based on reliance on the 1995 Categorical Exemption. SDC Properties, Inc. acquired Parcel E in July 1999, while the 1995 Categorical Exemption was still valid. However, as both Ms. Dixon and Mr. Johnson have agreed,¹⁴ after 3 March 2000, the owner of Parcel E no longer had any right to rely on the vesting of rights under the 1995 Categorical Exemption; instead, since 3 March 2000, and continuing until now, any development on Parcel E "shall be subject to all relevant provisions of the

¹³ Any supposed density averaging under the 1987 Master Plan would have resulted in over 58,000 square feet of office and retail space being available on Parcel E, which would equate to a density of well over 50,000 square feet per acre. No one can rationally argue that level of development should now be allowed on Parcel E.

¹⁴ Mr. Johnson acknowledged at the 28 November 2016 BZA hearing on this Appeal that on 3 March 2000, the 1987 Master Plan became irrelevant, and that the categorical exemption process utilized by the Town had been upheld by the South Carolina courts.



then existing LMO.” No language could be plainer or simpler. SDC Properties, Inc. chose not to develop Parcel E before 03 March 2000, thereby forfeiting the ability to develop Parcel E without complying with the LMO’s use and density regulations. Now, any development of Parcel E for any use, including the Spinnaker Welcome Center, is subject to the provisions of the current LMO. That includes, without limitation, all (not just some) of the LMO’s PD-2 Overlay District Regulations.

However, in the third paragraph of Section 3 of the Staff Report, Ms. Dixon says,

Staff’s interpretation of the LMO is that since they [*i. e.*, SDC Properties, Inc., the owner of Parcel E] are no longer vested under the [1995] Categorical Exemption, they have to comply with the current density standards of the underlying base zoning district for that parcel.

That statement, while accurate on its face, is only a partial statement of what the 1995 Categorical Exemption says. It is the truth, but not the whole truth. The 1995 Categorical Exemption actually says that after its expiration, future development on Parcel E shall be subject to all relevant portions of the then existing LMO. For purposes of Parcel E and this Appeal, the relevant portions of the current, *i. e.*, the now existing, LMO include not only the density standards of the underlying RD Zoning District, but also LMO’s PD-2 Overlay District regulations, including the average density regulations of LMO Section 16-3-106.G.4

The Appellants submit that the stated Town Staff interpretation is an arbitrary and capricious interpretation of the LMO without any factual or legal basis. It is an “interpretation” that says Parcel E, even though it is in a PD-2 Overlay District, is not subject to the average density regulations of LMO Section 16-3-106.G.4. That is an “interpretation” that is outside the scope of the Town Staff’s authority because it absolves Parcel E from compliance with mandatory provisions of the LMO.

Considering Ms. Dixon’s answers to the first two questions and the mandatory provisions of the LMO, the third question posed by Judge Dukes in the Remand Order to the BZA must also be answered by saying that **YES**, the LMO’s Overlay District regulations do effect the development of Parcel E, and **YES**, the existing development on the other parcels within the Waterside PD-2



Overlay District must be taken in to account in connection with any proposed development on Parcel E.

V. Interpretation of the LMO

LMO Section 16-2-103.R and LMO Appendix A, Section A-1.A.3 authorize the LMO Official to make written interpretations of the LMO.

The Town Staff's entire argument in this Appeal is based on an "interpretation" of the LMO, albeit an interpretation that results in a waiver of the applicability of mandatory LMO provisions to Parcel E.

While the LMO Official may, and should, render interpretations of the LMO when there is an ambiguity or uncertainty about the provisions of the LMO, interpretation of the LMO is unnecessary, and not allowed, when the provisions of the LMO are clear and unambiguous, and not susceptible to interpretation.

Here, the applicable provisions of the LMO are clear, concise, unambiguous, and mandatory. If Parcel E is in the Waterside PD-2 Overlay District, then it is subject to the LMO's PD-2 Overlay District regulations, which include the average density regulations of LMO Section 16-3-106-G.4. Those density regulations, being part of the PD-2 Overlay District regulations, control over the base zoning district regulations.

Ms. Dixon claims to know the intent of the average density regulations of LMO Section 16-3-106.G.4 when she says, without citing any authority or basis for her knowledge, those standards "are meant to be used when creating a plan for a PD-2." However, similar average density regulations have been in the LMO for over 25 years, having been added to the LMO by Ordinance No. 93-17 adopted by the Town Council on 2 August 1993. To the Appellants' knowledge, neither Ms. Dixon, nor Mrs. Lewis, nor any other members of the Town Staff (with the possible exceptions of Stephen G. Riley and Charles F. Cousins) were even on the Town Staff when the average density regulations were first incorporated into the LMO. How do they pretend to know the intent of those regulations?

To the Appellants' knowledge, the Town Staff has never, before this Appeal, taken the position it is now taking on the applicability of LMO Section 16-3-106.G.4, as they are by this new "interpretation" of the LMO.



The Town Staff should not be allowed to justify a position it has taken, in the face of LMO provisions using the mandatory term “shall,” by a so-called “interpretation” that meets its needs. The end should not justify the means.

It seems to the Appellants that the Town Staff simply does not want to be the one who enforces the plain language of the LMO, which would require them to tell SDC that they cannot develop Parcel E as requested; instead, under the guise of an “interpretation” of the LMO, the Town Staff wants the BZA to do that job. With their “interpretation,” the Town Staff has achieved that result.

VI. Conclusion

In the Determination Letter, Ms. Dixon said that Parcel E could be developed for the proposed Spinnaker Welcome Center as long as the density does not exceed what was allowed on the 1987 Master Plan or what is permitted by the current LMO. However, at the 28 November 2016 hearing by the BZA on this Appeal, both Ms. Dixon and Mr. Johnson, representing SDC, disavowed any reliance on the provisions of the 1987 Master Plan because of the expiration of the 1995 Categorical Exemption. So, at least to the extent that the Determination Letter purports to authorize development of Parcel E as provided for in the 1987 Master Plan, the Determination Letter should be reversed by the BZA.

LMO Section 16-1-106.A.2 says that overlay district regulations control over any underlying base zoning district regulations. That much is clear.

It is also clear that Ms. Dixon and Mr. Johnson have agreed that Parcel E is located in a PD-2 Overlay District and is subject to the LMO’s PD-2 Overlay District regulations.

During the BZA’s first hearing on this Appeal on 28 November 2016, Ms. Dixon testified that the 1995 Categorical Exemption states that after its expiration on 3 March 2000, any future development of the properties in the Waterside PD-2 Overlay District “shall be subject to the provisions of the LMO in effect at that time,”¹⁵ and that the PD-2 Overlay District requirements of

¹⁵ See the transcript of the 28 November 2016 BZA hearing, at Page 73, lines 21-25, and Page 74, lines 1-4. Those two pages are highlighted and attached hereto as **Exhibit E**.



LMO Section 16-3-106.G are part of the current LMO requirements.¹⁶ However, notwithstanding the fact that Parcel E is in the Waterside PD-2 Overlay District, the Town Staff disagrees with the proposition that the proposed development of Parcel E for the Spinnaker Welcome Center must comply with the average density requirements of the LMO's PD-2 Overlay District provisions in LMO Section 16-3-106.G.4.a. Ms. Dixon has now reiterated that position in the Staff Report, without citing any basis or authority in the LMO, other than "belief" and "interpretation."

The South Carolina courts have consistently held that when construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.¹⁷ Here, the Town Staff has done the opposite, "interpreting" LMO Section 16-3-106.G.4 to include a non-existent limitation on applicability to only new PD-2 Overlay Districts.

Considering the mandatory LMO provisions applicable to PD-2 Overlay Districts, because Parcel E is in the Waterside PD-2 Overlay District, the Town is required to look to the controlling density limitations of the LMO's PD-2 Overlay District regulations, and not to the density provisions of the underlying RD District. Ms. Dixon admitted at the 28 November 2016 hearing on this Appeal that if the PD-2 Overlay District density requirements control, then the 15.1 acres in the Waterside PD-2 Overlay District are already over the overall maximum permitted density level for the 15.1 acres, and she would have to rescind her Notice of Action on the DPR Application.¹⁸

In the Appellants' view, the main flaw in the process used by Ms. Dixon to review and approve the DPR Application was that she looked at Parcel E as a stand-alone parcel in the RD District, and therefore not subject to the PD-2 Overlay District limitation. The Appellants submit that the correct process for Ms. Dixon to have followed was to look at Parcel E not only as a parcel in the

¹⁶ See the transcript of the 28 November 2016 BZA hearing, at Page 88, lines 2-7. That page is highlighted and attached hereto as **Exhibit F**.

¹⁷ See, *City of Myrtle Beach v. Juel P. Corporation*, 543 S.E.2d 538 (S.C. 2001), a copy of which is attached hereto as **Exhibit G**.

¹⁸ See the transcript of the 28 November 2016 BZA hearing, at Page 109, lines 4-19. That page is highlighted and attached hereto as **Exhibit H**. The Appellants note there is a typographical error in the highlighted portion of that transcript, in that the word "resend" should read "rescind."



RD District, but also as a parcel located in the Waterside PD-2 Overlay District, and therefore subject to the requirements of all parcels in any PD-2 Overlay District.

The *McCrowey* case stands for the proposition that the Town staff is not free to pick and choose which PD-2 Overlay District requirements will be applied to any particular proposed development of a tract located in a PD-2 Overlay District, such as Parcel E. Instead, all applicable requirements of the LMO must be taken into account by the Town staff when they review an application such as the DPR Application. Ms. Dixon admitted that she did not do so as to the PD-2 Overlay District's density limitations.¹⁹

The Appellants submit that all three questions posed by Judge Dukes in the Remand Order must be answered in the affirmative, and that compliance with the LMO precludes further development of Parcel E because its further development cannot comply with the LMO.

The Appellants ask that the BZA re-consider this Appeal, the record of this matter, the testimony and materials previously introduced, and to be introduced into the record of this Appeal at the re-hearing, and

1. Hold that Parcel E is located in a PD-2 Overlay District established by the LMO, specifically the Waterside (Town Center) PD-2 Overlay District under LMO Section 16-3-106.G;
2. Hold that Parcel E is subject to the LMO's PD-2 Overlay District regulations;
3. Hold that any proposed development of Parcel E must comply with the provisions of the current LMO, including, without limitation, all of the provisions of LMO Section 16-3-106.G regarding PD-2 Overlay Districts;
4. Hold that the average density provisions of LMO Section 16-3-106.G.4.a are applicable to any proposed development Parcel E, and that the density of the existing on the other parcels within the

¹⁹ See the transcript of the 28 November 2016 BZA hearing, at Page 69, lines 5-13. That page is highlighted and attached hereto as **Exhibit I**.



Waterside (Town Center) PD-2 Overlay District must be taken into account in connection with any proposed development of Parcel E;

5. Hold that Parcel E is no longer able to be developed as previously provided for in the Conceptual Master Plan for the Town Center PUD dated 27 July 1987; and
6. Reverse Ms. Dixon's determinations as stated in the Determination Letter.

The Appellants reserve the right to submit additional materials, documents, and information to the BZA in connection with this Appeal.

Respectfully submitted on behalf of the Appellants on 9 August 2018.



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Exhibit A (2 pages) --- Excerpt from examination of Todd Theodore during the 28 November 2016 BZA hearing

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

A No, I did not know that.

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

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

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

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

Exhibit B (2 pages) -- Excerpt from examination of Todd Theodore during the 28 November 2016 BZA hearing

1 this smaller tract within that?

2 THE WITNESS: Yes.

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

7 THE WITNESS: I don't know.

8 MR. STANFORD: Thank you.

9 BY MR. WILLIAMS:

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

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

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

(1) (A) Yes, I believe so.

(2) MR. STANFORD: The answer was yes?

(3) THE WITNESS: Yes.

(4) BY MR. WILLIAMS:

(5) (Q) And I think it was contrary when you

(6) asked the question, Mr. Stanford.

(7) And I think you are right about that.

(8) If you have a parcel in the overlay district,

(9) regardless -- well, your application says you're

(10) in the corridor district, that means you have to

(11) comply with the requirements of the corridor

(12) overlay district, correct?

(13) (A) Yes.

(14) (Q) If your application had mentioned that

(15) it is in the PD-2 overlay district, then it

(16) would have been required to comply with the PD-2

(17) overlay requirement, correct?

18 (A) Yes.

19 Q I think that's all the questions I

20 have.

21 MR. STANFORD: Any questions for

22 Mr. Theodore from the board?

23 MR. CUTRER: We've heard about

24 5,262 square feet of nonresidential

25 development.

Exhibit C (5 pages)



Court of Appeals of South Carolina.
Kevin McCROWEY, Appellant,

v.

The ZONING BOARD OF ADJUST-
MENT OF THE CITY OF ROCK HILL,
South Carolina, Respondent.

No. 3845.

Submitted May 13, 2004.

Decided July 12, 2004.

Background: Landowner appealed from decision of the Circuit Court, York County, John C. Hayes, III, J., sustaining the decision of the Zoning Board of Adjustment which found landowner's business to be in violation of local zoning ordinances.

Holding: The Court of Appeals held that, because landowner's property violated zoning ordinance, zoning administrator exceeded his authority when he approved landowner's parking plan, and because zoning administrator's actions in initially approving landowner's parking plan were in error, equitable estoppel could not be applied so as to estop Zoning Board of Adjustment from subsequently finding the property in violation of the zoning ordinance.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⚡1624

414 Zoning and Planning

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k1624 k. Decisions of
boards or officers in general. Most Cited

Cases

(Formerly 414k605)

Zoning and Planning 414 ⚡1631

414 Zoning and Planning

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k1627 Arbitrary, Capri-
cious, or Unreasonable Action

414k1631 k. Decisions of
boards or officers in general. Most Cited
Cases

(Formerly 414k610)

Zoning and Planning 414 ⚡1649

414 Zoning and Planning

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k1645 Matters of Discre-
tion

414k1649 k. Decisions of
boards or officers in general. Most Cited
Cases

(Formerly 414k621)

A decision of a municipal zoning board
will be overturned if it is arbitrary, capri-
cious, has no reasonable relation to a law-
ful purpose, or if the board has abused its
discretion.

[2] Zoning and Planning 414 ⚡1333(1)

414 Zoning and Planning

414VII Administration in General

414k1325 Boards and Officers in
General

414k1333 Power and Authority

414k1333(1) k. In general.

Most Cited Cases

(Formerly 414k353.1)

Zoning and Planning 414 ⚡1770

414 Zoning and Planning

414XI Enforcement of Regulations

414k1767 Defenses to Enforcement

414k1770 k. Estoppel or induce-

ment. Most Cited Cases

(Formerly 414k762)

(Since town's zoning code gave zoning administrator only the power to administer and enforce the code, zoning administrator did not have authority to alter or waive zoning ordinance) and because landowner's property violated zoning ordinance, zoning administrator exceeded his authority when he approved landowner's parking plan, and because zoning administrator's actions in initially approving landowner's parking plan were in error, equitable estoppel could not be applied so as to estop town's zoning board of adjustment from subsequently finding the property in violation of the zoning ordinance.

[3] Estoppel 156 ⚡52.15

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.15 k. Essential elements.

Most Cited Cases

Typically, equitable estoppel is found to exist when the following elements are present: (1) conduct by the party estopped which amounts to false representation or concealment of material facts or which is calculated to convey impression that facts are otherwise than and inconsistent with those which party subsequently attempts to assert; (2) intention or at least expectation that such conduct shall be acted upon by other party; (3) knowledge of true facts; (4) lack of knowledge or means of knowledge of facts by other party; (5) reliance upon conduct by other party; and (6) detrimental

change of position by other party because of his reliance.

****617 *302** R. Chadwick Smith, of Rock Hill, for Appellant.

W. Mark White, of Rock Hill, for Respondent.

PER CURIAM:

Kevin McCrowey ("Appellant") appeals a circuit court ruling sustaining the decision of the Zoning Board of Adjustment of Rock Hill ("Respondent"), which found Appellant's ****618** business to be in violation of local zoning ordinances. We affirm.^{FN1}

FN1. Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rules 215 and 220(b)(2), SCACR.

FACTS

Kevin McCrowey is the owner of property ("the Property") located at 1151 Saluda Street in Rock Hill. On March 24, 1998, Appellant submitted an application for a Certificate of Occupancy along with a diagram of the building located on the Property. In March 1999, Rock Hill granted Appellant a Certificate of Occupancy for the operation of a pool hall.

***303** At the time Appellant submitted the application, he was leasing the Property. Appellant later subleased the Property to Carlondo Brown, who was granted a Commercial Zoning Permit to operate a game room on October 29, 1999. In February 2000, Appellant purchased the Property. On October 20, 2000 Appellant obtained a Certificate of Zoning Compliance for the operation of a sports bar under the name of Infinity 2000 Sports Lounge.

One of Rock Hill's inspectors noted on the Application for Certificate of Zoning Compliance that the parking lot did not conform to the zoning code's design standards, as it appeared the Property did not have enough parking spaces available to accommodate a nightclub. This notation also requested the submission of a parking plan for the site. Appellant submitted the requested parking plan and an additional notation was later added by Rock Hill's zoning administrator stating that the application was "[a]pproved for zoning compliance per plan revised [November 10, 2000]."

However, despite this apparent approval, the same zoning administrator who approved Appellant's parking plan issued a Notice of Violation to Appellant on September 6, 2001, which stated that the parking area and signs located on the Property were in violation of Rock Hill's Zoning Code. Appellant filed a notice of appeal on September 21, 2001 and a hearing was held before the Rock Hill Board of Zoning Appeals ("the Board") on November 20, 2001.

Despite the fact that he previously found Appellant's parking plan in compliance with the applicable zoning ordinance, the zoning administrator stated at the hearing that the Property did not currently, nor did it ever, comply with the zoning ordinance since the nightclubs were first opened on the property in 1998. On January 11, 2002, the Board issued a letter denying Appellant's appeal and affirming the decision of the zoning administrator.

Accordingly on February 8, 2002, Appellant appealed the Board's decision to the circuit court pursuant to S.C.Code Ann. § 6-29-820 (Supp.2002).^{FN2} At the hearing before the *304 circuit court, Appellant ar-

gued that Respondent should be estopped from finding the Property in violation of the zoning ordinances based on its earlier conduct. Appellant offered this argument, in part, based on the fact that nightclubs have operated on the Property since 1998 without incident and all with approval of Respondent. In addition, as noted above, the zoning administrator who issued the Notice of Violation previously approved Appellant's parking plan. Therefore, Appellant averred he relied on this past conduct to his detriment when he decided to purchase the Property.

FN2. A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

S.C.Code Ann. § 6-29-820
(Supp.2002).

Relying on several South Carolina authorities, Respondent averred that under the facts of this case, the doctrine of equitable estoppel should not be applied. By order dated May 23, 2002, the trial court agreed with Respondent and affirmed the Board's decision.

STANDARD OF REVIEW

Because Rock Hill enacted the zoning ordinance in question pursuant to the South Carolina**619 Local Government Comprehensive Planning Enabling Act of 1994, the

scope of review is governed by statute. *See* S.C.Code Ann. §§ 6-29-310-1200 (Supp.2002). Accordingly, as stated in Section 840, “[t]he findings of fact by the board of appeals shall be treated in the same manner as a finding of fact by a jury.” S.C.Code Ann. § 6-29-840 (Supp.2002); *see also Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct.App.2001). Furthermore, “[i]n determining the questions presented by the appeal, the court shall determine only whether the decision of the board is correct as a matter of law.” *Id.*

[1] It is important to note “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (citation omitted). “However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no *305 reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.*

LAW/ANALYSIS

[2] Appellant argues the trial court erred in finding the doctrine of equitable estoppel not applicable because the zoning administrator erroneously issued a certificate of zoning compliance. We disagree.

[3] Typically, equitable estoppel is found to exist when the following elements are present:

(1) [C]onduct by the party estopped which amounts to a false representation or concealment of material facts or which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party

subsequently attempts to assert; (2) the intention or at least expectation that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the true facts; (4) lack of knowledge or the means of knowledge of the facts by the other party; (5) reliance upon the conduct by the other party; and (6) a detrimental change of position by the other party because of his reliance.

Oswald v. Aiken County, 281 S.C. 298, 305, 315 S.E.2d 146, 151 (Ct.App.1984) (citing *Frady v. Smith*, 247 S.C. 353, 147 S.E.2d 412 (1966)).

However, it is generally held that “[n]o estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of ... one of its officers or agents....” *DeStefano v. City of Charleston*, 304 S.C. 250, 257-258, 403 S.E.2d 648, 653 (1991) (quoting *Farrow v. City Council of Charleston*, 169 S.C. 373, 382, 168 S.E. 852, 855 (1933)) (further citations omitted). *See also South Carolina Coastal Council v. Vogel*, 292 S.C. 449, 452, 357 S.E.2d 187, 189 (Ct.App.1987) (holding that the doctrine of equitable estoppel cannot be used to deprive the State of the due exercise of its police power or to frustrate its application of public policy).

Significantly, in spite of this general rule, South Carolina courts have held that “[a] governmental body is not immune *306 from the application of equitable estoppel where its officers or agents act within the proper scope of their authority.” *South Carolina Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct.App.1987) (citing *Oswald v. Aiken County*, 281 S.C. 298, 315 S.E.2d 146

(Ct.App.1984)).

Although Appellant acknowledges the general rule, he argues the zoning administrator was acting within the proper scope of his authority, and thus, the doctrine should be applicable. Specifically, Appellant avers that in the current case "the Zoning Administrator acted within his proper authority when he concluded that [his] parking area met Rock Hill's zoning requirements." The Appellant goes on to state "the decision of whether a piece of property conforms to zoning compliance is a determination the zoning administrator would appear to have authority to make."

However, (the zoning administrator did not have the authority to alter or waive the zoning ordinance in question. Rock Hill's **620 Zoning Code gives zoning administrators the power to administer and enforce the Zoning Code. Rock Hill's Zoning Code does not grant power to an administrator to alter, modify, or waive provisions contained in the Zoning Code.) Further, the zoning administrator was not granted with the authority to grant a variance. The Zoning Code only grants the Zoning Board of Appeals the discretion of whether and when to grant a variance. Because the parties do not dispute that the Property did in fact violate the zoning ordinance, the zoning administrator exceeded his authority when he approved Appellant's parking plan in October 2000. As the zoning administrator's actions in approving Appellant's parking plan were in error, the trial court did not err in concluding, based on the authority cited above, that equitable estoppel could not be applied to frustrate the attempts by Rock Hill to enforce its zoning code as written.

CONCLUSION

Accordingly, based on the foregoing,

the decision of the trial court is

AFFIRMED.

HEARN, C.J., ANDERSON and BEATTY, JJ., concur.

S.C.App.,2004.
McCrowey v. Zoning Bd. of Adjustment of
City of Rock Hill
360 S.C. 301, 599 S.E.2d 617

END OF DOCUMENT

Exhibit D (3 pages) -- Excerpt from 28 November 2016 BZA hearing

108

ELECTRONICALLY FILED - 2018 Sep 07 2:42 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

1 the math and if that's how you
2 interpret the LMO and/or direct us to
3 interpret the LMO, then they are over
4 their density and remanded it back to
5 us, I think that is going to hold up
6 the process.

(7) ~~MR. FINGERHUT:~~ ~~(You would~~
(8) ~~stipulate to that the math -- I'm~~
(9) ~~sorry.) (I didn't hear that.) (You're~~
(10) ~~saying the theory is incorrect, but the~~
(11) ~~math is correct is what you're saying.~~

(12) ~~MS. DIXON:~~ ~~(If you're going to~~
(13) ~~look at the entire PD-2 and based on~~
(14) ~~their density on the current LMO, but~~
(15) ~~use what is existing out there now,~~
(16) ~~then Chet has demonstrated in his math~~
(17) ~~they would not be allowed to do what~~
(18) ~~they are proposing.)~~ Staff does not

19 interpret the LMO that way.

20 MR. STANFORD: And that's because
21 we have a new LMO that is being applied
22 to this particular smaller parcel.

23 MS. DIXON: Correct. I believe on
24 this particular piece, they are meeting
25 the current LMO.

1 MR. FINGERHUT: Not as part of the
2 new development, just as a new piece of
3 land.

4 MS. DIXON: I'm not denying it is
5 part of the 15 acre PD-2. I'm not
6 denying that it is not part of that
7 anymore. It is still part of that
8 PD-2, but as you know -- as you said
9 that categorical exemption expired.
10 They're really not tied to the original
11 density allowed, so as long as they
12 meet the current density that is
13 allowed on that tract, then it should
14 be approved and that is what I based my
15 decision on.

16 So you can either agree with my
17 determination or not agree with it and
18 I would have to resend my notice of
19 action.

20 MR. WILSON: I think that is part
21 of the responsibility of the board
22 because there is this dispute including
23 with Mr. William's client and between
24 our town.

(25) MR. FINGERHUT: (So you're

(1) (concurring that his math is correct?)
 (2) MS. DIXON: (I concur his math is
 (3) correct, but I don't interpret the LMO
 (4) (that way.)

(5) MR. FINGERHUT: (That is fine.)
 (6) (Just speaking for myself that is a
 (7) correct finding because I wasn't)
 (8) (following all the math.)

(9) MS. DIXON: (I just interpret the
 (10) LMO differently and that is not what I
 (11) (based my approval on.) (But the math)
 (12) (that he had Mr. Theodore come up with
 (13) (earlier, that is correct).

14 MR. STANFORD: I think the motion
 15 of remand probably is not a good motion
 16 at this point, so we are looking for a
 17 motion either to grant the appeal,
 18 which means to reverse the action of
 19 the town or affirm the action of the
 20 town and denying the appeal.

21 MR. CUTRER: Can I ask Ms. Dixon
 22 one more question?

23 MR. STANFORD: Sure.

24 MR. CUTRER: If I'm interpreting
 25 what you are saying correctly that the

Exhibit E (2 pages) -- Excerpt from examination of Nicole Dixon during the 28 November 2016 BZA hearing

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

A Under the current code requirements, yes.

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

BY MR. WILLIAMS:

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

A (Nods head.)

Q Okay.

MR. STANFORD: Answer is yes?

THE WITNESS: Yes, sir.

~~BY MR. WILLIAMS:~~

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

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

(4) (A) Correct.

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

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

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

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

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

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

Exhibit F (1 page) -- Excerpt from examination of Nicole Dixon during the 28 November 2016 BZA hearing

88 ELECTRONICALLY FILED - 2018 Sep 07 2:42 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

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 property¹⁹²

Exhibit G (4 pages)

▷

Supreme Court of South Carolina.
CITY OF MYRTLE BEACH, Respondent,

v.

JUEL P. CORPORATION and Gay Dolphin, Inc., Petitioners.

No. 25261.

Heard Feb. 8, 2001.
Decided March 12, 2001.

City sought injunction to require commercial property owners to remove rooftop billboard sign, alleging that sign violated city ordinance or, alternatively, that owners had abandoned sign. Owners filed counterclaim alleging a taking. The Circuit Court, Horry County, J. Stanton Cross, Jr., Master-in-equity, denied injunction, and further found that owners did not abandon sign. City and property owners appealed. The Court of Appeals, 337 S.C. 157, 522 S.E.2d 153, reversed. Owners sought certiorari review. The Supreme Court, Burnett, J., held that: (1) sign ordinance expressed no time frame for abandonment, and thus, common law would be applied to determine whether owners intended to abandon sign, and (2) there was sufficient evidence to support finding that owners did not intend to abandon their rooftop sign.

Reversed.

West Headnotes

[1] Zoning and Planning 414 ⚡337414 Zoning and Planning414VI Nonconforming Uses414k336 Discontinuance or Abandonment414k337 k. Cessation of Use. Most Cited Cases

There was sufficient evidence to support finding that commercial property owners did not intend to abandon their rooftop sign, and thus, their nonconforming use could not be deemed abandoned, even though sign remained vacant for five years, where owners continued to pay Highway Department fees and maintain electricity to the sign.

[2] Zoning and Planning 414 ⚡9414 Zoning and Planning414I In General414k7 Constitutional and Statutory Provisions414k9 k. Construction of Statutes in General. Most Cited Cases

City ordinance, providing that any sign "which advertises or pertains to a business, product, service, event, activity, or purpose ... that has not been in use for three months ... shall be deemed to be an obsolete or abandoned sign," could not be broadly construed to mean that any sign that was not in use for three months would be deemed to be obsolete or abandoned, and thus, such broad construction would not operate to provide a three-month period of abandonment for signs.

[3] Municipal Corporations 268 ⚡120268 Municipal Corporations268IV Proceedings of Council or Other Governing Body268IV(B) Ordinances and By-Laws in General268k120 k. Construction and Operation. Most Cited Cases

When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used.

[4] Statutes 361 ⚡176361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k176 k. Judicial Authority and Duty. Most Cited Cases

The determination of legislative intent is a matter of law.

[5] Statutes 361 ⚡188361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k187 Meaning of Language361k188 k. In General. Most Cited Cases

In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.

[6] Municipal Corporations 268 ⚡120268 Municipal Corporations

268IV Proceedings of Council or Other Governing Body

268IV(B) Ordinances and By-Laws in General

268k120 k. Construction and Operation. Most Cited Cases

Ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose.

[7] Zoning and Planning 414 ↪337

414 Zoning and Planning

414VI Nonconforming Uses

414k336 Discontinuance or Abandonment

414k337 k. Cessation of Use. Most Cited Cases

City ordinance providing that "any sign structure that no longer displays any sign copy ... shall be deemed to be an obsolete or abandoned sign" expressed no time frame for abandonment, and thus, common law would be applied to determine whether sign owner intended to abandon sign.

[8] Zoning and Planning 414 ↪337

414 Zoning and Planning

414VI Nonconforming Uses

414k336 Discontinuance or Abandonment

414k337 k. Cessation of Use. Most Cited Cases

In order to constitute abandonment, it must appear that there was a discontinuance of the nonconforming use with the intent to relinquish the right to so use the property; the question is largely one of intention and must be determined from all of the surrounding facts and circumstances.

****539*44** Howell V. Bellamy, Jr., and Douglas M. Zavicek, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, of Myrtle Beach, for petitioners.

Michael W. Battle, of Battle & Vaught, of Conway, for respondent.

***45 BURNETT**, Justice:

This case involves the proper construction of a Myrtle Beach city ordinance concerning abandoned and obsolete signs. Myrtle Beach Code § 902.4.7. We granted certiorari to review a decision of the Court of Appeals holding petitioners' sign could be deemed abandoned regardless of peti-

tioners' intent. City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc., 337 S.C. 157, 522 S.E.2d 153 (Ct.App.1999). We reverse.

FACTS

In the early 1970s, petitioners purchased Ed's Hobby Shop in Myrtle Beach. The shop includes a rooftop sign, which is arguably the most prominent sign location in Myrtle Beach.

In 1979, Myrtle Beach enacted a zoning ordinance which prohibited rooftop signs in certain areas of the city, including the area where petitioners' sign was located. Section 902.8.3 of the zoning ordinance provided that rooftop signs had an amortization period of three years. In 1985, after the conclusion of a lengthy legal challenge to the city's comprehensive sign ordinance, the city notified petitioners that its ordinance had been declared legal, constitutional, and enforceable, and ordered petitioners to remove the rooftop sign from Ed's Hobby Shop. Petitioners, through an agent, responded by alerting the city to former S.C.Code Ann. § 57-25-195 (Supp.1980) (repealed in 1990), which would have required the city to pay just compensation for the sign. Rather than compensate petitioners for the sign's removal, the city chose not to enforce its 1985 letter.

In 1989, in the imminence of Hurricane Hugo, petitioners removed the sign facing to minimize damage from the storm. Shortly after the storm had passed, petitioners received a letter from the city informing them the sign was more than 50% damaged and could not be restored. Petitioners asked for repair estimates from three different sign companies, all of which agreed with petitioners' estimate that the sign was only 10% damaged. Petitioners approached the city's Director of Construction Services with these estimates, and, when he refused to concede their damage estimate, presented the estimates to the city manager. Petitioners attempted to reach *46 a settlement with the city manager in which petitioners would agree to remove the rooftop sign in exchange for a permit for a unipole sign.

For the next five years, the sign remained vacant. Neither petitioners nor the city pursued formal appeals or informal negotiations. During this time, however, petitioners continued to pay Highway Department fees and maintain electri-

city to the sign. In the fall of 1994, petitioners installed new sign facing. On November 8, 1994, the city notified petitioners that the sign violated the city zoning ordinance, § 902.4.8, which prohibits rooftop signs. When petitioners did not remove the sign, the city sought an injunction. In its second amended complaint, dated September 24, 1996, the city for the first time claimed petitioners had abandoned their sign. Section 902.4.7 of the Myrtle Beach Code provides:

Any sign which advertises or pertains to a business, product, service, event, activity or purpose which is no longer conducted or that has not been in use for three months or which is no longer imminent, or any sign structure that no longer displays any sign copy shall be deemed to be an obsolete or abandoned sign.

****540** The Master-in-Equity for Horry County conducted a hearing on the city's injunction action and petitioners' takings counterclaim. The Master ruled the city could not rely on its ordinance because to do so would retroactively deprive petitioners of a vested right. He further ruled intent is a necessary element of abandonment, and found petitioners "did not simply abandon the most prominent and valuable sign in Myrtle Beach." The Court of Appeals reversed, holding a property owner's intent is irrelevant when an ordinance specifies an objective time frame after which a non-conforming use shall be deemed abandoned. City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc., 337 S.C. 157, 522 S.E.2d 153 (Ct.App.1999).

DISCUSSION

[1] Petitioners argue several issues on appeal. We decline to reach these issues because we conclude the city's ordinance does not provide an objective time frame for abandonment.

***47** [2][3][4][5][6] When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. Charleston County Parks and Rec. Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). The determination of legislative intent is a matter of law. Id. [In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation] First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226,

417 S.E.2d 592 (1992). "[O]rdinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

We read the ordinance as follows:

Any sign

[1] which advertises or pertains to a business, product, service, event, activity, or purpose

[a] which is no longer conducted or [b] that has not been in use for three months or [c] which is no longer imminent or [2] any sign structure that no longer displays any sign copy shall be deemed to be an obsolete or abandoned sign.

Myrtle Beach Code § 902.4.7. The city's proposed construction, "Any sign ... that has not been in use for three months ... shall be deemed to be an obsolete or abandoned sign," is a forced construction that would impermissibly expand the ordinance's operation. We cannot harmonize the city's interpretation with our obligation to construe the ordinance strictly.

While the intent of the city may well have been to provide a three-month period of abandonment for signs, that intent is not expressed in the language of the ordinance. Moreover, the portion of the ordinance which clearly applies to petitioners' sign—"any sign structure that no longer displays any sign copy"—contains no time provisions whatsoever.

***48** [7][8] Because the ordinance expresses no time frame for abandonment, we apply the common law. Under the common law:

In order to constitute abandonment, it must appear that there was a discontinuance of the nonconforming use with the intent to relinquish the right to so use the property. The question is largely one of intention and must be determined from all of the surrounding facts and circumstances.

Conway v. City of Greenville, 254 S.C. 96, 105, 173 S.E.2d 648, 652-53 (1970). We find abundant evidence in the record to support the Master's finding petitioners did not in-

tend to abandon their sign.

CONCLUSION

Because the city's ordinance does not provide an objective time frame for abandonment of a nonconforming use, the common law of abandonment controls. The evidence **541 supports the finding that petitioners did not intend to abandon their rooftop sign.

REVERSED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ.,
concur.

S.C., 2001.

City of Myrtle Beach v. Juel P. Corp.

344 S.C. 43, 543 S.E.2d 538

END OF DOCUMENT

Exhibit H (1 page) -- Excerpt from 28 November 2016 BZA hearing

109

ELECTRONICALLY FILED - 2018 Sep 07 2:42 PM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702712

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

Exhibit I (1 page) -- Excerpt from examination of Nicole Dixon during the 28 November 2016 BZA hearing

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.

Exhibit C to Appellants' Return (37 pages)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
	)	
Appellants/Petitioners,	)	MEMORANDUM OF
	)	RESPONDENT/DEFENDANT SDC
vs.	)	PROPERTIES, INC. ON REMAND
	)	HEARING
	)	
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF	)	[BEFORE THE BOARD OF ZONING
HILTON HEAD ISLAND BOARD OF	)	APPEALS FOR THE TOWN OF HILTON
ZONING APPEALS, and SDC	)	HEAD ISLAND, SC
PROPERTIES, INC.	)	
	)	
Respondents/Defendants.	)	APPLICATION FOR APPEAL
	)	APL-001673-2016]

Respondent/Defendant SDC Properties, Inc. ("SDC"), here submits its Memorandum on the issues raised and directed by Judge Dukes to be resolved on the Remand Hearing.

SDC supports the Staff Memorandum dated August 1, 2018 regarding this matter, a copy of which is attached hereto as **Exhibit A**.

Attached hereto as **Exhibit B** is a copy of SDC's Memorandum in Response, previously submitted to the Circuit Court. This memorandum lays out citations from prior testimony before the BZA, supporting and affirming the conclusions previously reached by the BZA, and supporting and affirming the analysis and conclusion of the Staff of the Town of Hilton Head Island as set forth in their recent Memorandum (**Exhibit A**).

Attached hereto as **Exhibit C** are three photographs of SDC's subject property, the Beachwalk property, and adjacent properties, viewed eastward to the Atlantic Ocean.

SUMMARY AND CONCLUSION

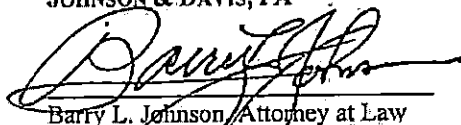
SDC respectfully asserts that the questions before the BZA, on remand, should be answered by the BZA in the manner recommended by staff in the Staff Memorandum (Exhibit A). To reach the conclusion urged by Beachwalk, as recently as in their August 9, 2018 Memorandum submitted to the BZA, would require an interpretation of the Town's zoning law so as to render the subject property of no economic utility or value – and certainly not to the level of reasonable economic or utility. The view urged by Beachwalk would require the BZA to create a regulatory taking – not for any valid public purpose – of SDC's subject property. The relief requested by Beachwalk also extends beyond the three questions of Judge Dukes in his remand order.

As the photographs (Exhibit C) demonstrate, there is no way in which the proposed SDC use of its property would be out of harmony with development in the area, and there is no way that such use by SDC of its property would harm, damage, or even presents an eyesore or traffic impediment, in any way, to Beachwalk.

SDC respectfully requests the BZA so determine.

Respectfully submitted,

JOHNSON & DAVIS, PA



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Bluffton, SC
August 13, 2018

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

EXHIBIT A



TOWN OF HILTON HEAD ISLAND
Community Development Department

TO: Board of Zoning Appeals
VIA: Teri B. Lewis, AICP, *LMO Official*
FROM: Nicole Dixon, CFM, *Development Review Administrator*
DATE: August 1, 2018
SUBJECT: Rehearing of APL-001673-2016

On November 28, 2016, the Board of Zoning Appeals heard an appeal submitted by Chester C. Williams on behalf of Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC. Mr. Williams appealed staff's determination, dated August 23, 2016, that the proposed development of the Spinnaker Welcome Center at 30 Waterside Drive is permitted as proposed with Development Plan Review Application DPR-001056-2016. The Board denied the appeal and upheld staff's determination.

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

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

Due to the lengthy size of the original record, the entire original appeal record, as well as the transcript of the BZA hearing that took place on November 28, 2016, was made available to the BZA members to pick up on Monday July 30th in order to give them enough time to read through the original documentation.

At this time, staff does not have any new information to add to the record; however, in an effort to assist the BZA in answering the three questions posed by the Judge in the remand order, staff offers the following:

1. Is Parcel E in a PD-2 Overlay District established by the LMO? Yes, Parcel E, which is the parcel subject to the appeal and also referred to as Tract B, is in the Waterside (Town Center) PUD as shown on the attached map (Attachment C), attached 1984 Conceptual Master Plan (Attachment D), attached Waterside PUD (Attachment E) and attached 1987 Conceptual Master Plans (Attachment F). Staff has found no evidence that Parcel E was ever removed from the PD-2 Overlay District.

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Hilton Head Island ♦ South Carolina ♦ 29928
843-341-4757 ♦ (FAX) 843-842-8908

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08/13/2018
Page 2

2. If Parcel E is in a PD-2 Overlay District, is Parcel E subject to the LMO's PD-2 Overlay District regulations? Yes Parcel E is subject to the LMO's PD-2 Overlay District regulations as found in LMO Section 16-3-106.G.
3. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other parcels within that PD-2 Overlay District be taken into account in connection with any proposed development of Parcel E? The PD-2 Overlay District Regulations do not have any effect on the development of Parcel E, nor does the existing development within the PD-2 have to be taken into account with any proposed development of Parcel E. Staff believes the regulations outlined in LMO Section 16-3-106.G.4 are to be used when developing a PD-2 and doesn't apply to a PD-2 that has been previously approved through prior regulations and substantially constructed.

The appellant claims that since the parcel is subject to the LMO's PD-2 regulations, the density and development standards provided in LMO Section 16-3-106.G.4.a prohibit Parcel E from being developed. The appellant claims that the average density of what currently exists within the PD-2 exceeds the maximum density allowed in the base zoning district. Staff disagrees with this claim.

The Waterside Master Plan identified specific densities and uses that were allowed within the PUD and required a certain amount of common open space. Parcel E was identified as a developable property with up to 16,787 square feet of commercial development. The fact that Parcel E was not developed at the same time as the other developments that are part of the subject PUD, doesn't mean it is now an un-buildable lot or that this parcel now has to comply with development standards that are meant to be used when creating a new plan for a PD-2. Staff does not believe at this point the density needs to be averaged for the PD-2 since this was clearly taken into account when the Master Plan was created. The Categorical Exemption, which vested the developer for specific densities and uses as shown on their Master Plan and vested them from having to comply with subsequent amendments to the LMO, expired on March 3, 2000. Staff's interpretation of the LMO is that since they are no longer vested under the Categorical Exemption, they have to comply with the current density standards of the underlying base zoning district for that parcel. The underlying zoning of the subject parcel is RD (Resort Development).

The proposed Welcome Center is shown to be built at a maximum of 7,500 square feet. The RD District allows up to 8,000 square feet of nonresidential uses per net acre. The subject property is 1.068 acres in size, which would allow 8,544 square feet. Since the proposed Welcome Center is only 7,500 square feet in size, it is clearly less than what the LMO allows. It is also less than the 16,787 square feet originally retained for Tract B on the Master Plan.

Staff reserves the right to submit additional documents.

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Please contact me at (843) 341-4686 or at nicoled@hiltonheadislandsc.gov if you have any questions.

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EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2016-CP-07-02712
BEACHWALK HOTEL &	)	
CONDOMINIUMS ASSOCIATION,	)	
INC. and BEACHWALK HILTON	)	
HEAD, LLC,	)	
Appellants/Petitioners,	)	RESPONDENT'S/DEFENDANT'S SDC
	)	PROPERTIES, INC.'S BRIEF IN REPLY
vs.	)	TO COURT'S POST-HEARING
	)	QUESTIONS
THE TOWN OF HILTON HEAD	)	
ISLAND and/or THE TOWN OF	)	
HILTON HEAD ISLAND BOARD OF	)	
ZONING APPEALS, and SDC	)	
PROPERTIES, INC.	)	
Respondents/Defendants.	)	

INTRODUCTION

Respondent/Defendant SDC Properties, Inc. ("SDC") accepts the Introduction provided by the Appellants/Petitioners ("Beachwalk") in their Brief in Reply to Court's Questions, filed March 02, 2018. However, in so doing, SDC would point to the full record of this case, as established before the BZA, and to the applicable Standards of Review, and to the materially-relevant case law. In so doing, SDC respectfully asserts that this Court should dismiss the appeal of Beachwalk and, thereby, uphold the decision of the Board of Zoning Appeals ("BZA") of the Town of Hilton Head Island (sometimes, hereinafter, "Town") and, thereby, avoid the result urged by Beachwalk that SDC's property is "unbuildable" and without economic utility.

STANDARDS OF REVIEW

In South Carolina, boards of zoning appeals, in the exercise of their duties, have the powers, *inter alia*, (1) to hear and decide appeals wherein it is alleged there is an error in a determination made by an administrative official in the enforcement of the zoning ordinance; (2)

in appropriate circumstances, to determine if the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property. See S.C. Code § 6-29-800 (2003).

“In determining the question presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law.” Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001), as cited with approval in McCrowey v. The Zoning Board of Adjustment of The City of Rock Hill, South Carolina, 360 S.C. 301, 304, 599 S.E.2d 617 (Ct. App. 2004).

“It is important to note “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” Restaurant Row Assocs. V. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 ((1999) (citations omitted). “However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.* at 305).

In making such determinations, the court must give a zoning ordinance a practical, reasonable, and fair interpretation consonant with the purposes, design and policy of the lawmakers. Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2d 76 (Ct. App. 2004), rehearing denied, and certiorari granted, affirmed 372 S.C. 230, 642 S.E.2d 565 (2007). Therein, the Court of Appeals also held that “[f]ew restrictions encumber the scope of the Board’s authority.” *Id.* at 465, 602 S.E.2d at 79. “[A] local zoning board’s] construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor”, Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A).

A court will uphold the decisions of a reviewing body if there is evidence in the record to support its decision. See Historic Charleston Found. V. Krawcheck, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994).

ISSUES

The below Issues developed by this Court are elements of the Court's analysis, subject to the above Standards of Review, of whether the BZA acted within its powers to determine if the subject Development Approval, and related Staff Determination, comply with the Town's zoning ordinance (LMO). Parcel E is a mere 1.068-acre portion of a 15.1-acre PUD, formerly named Town Center PUD, now called the Waterside PUD. Parcel E is proposed to be the site of a welcome center including space for sales and tours. (BZA Tr., Mr. Halterman, p. 66, ll. 1 – 7), and the development application shows it as a 7,500 square foot building on the 1.068-acre site.

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

Response:

Parcel E is in the RD base zoning district. (BZA Tr., BZA Member Cutrer and Attorney Williams, p. 14, l. 23 – p. 15, l. 8.) When the subject application was filed with the Town of Hilton Head, the Town's website contained the PD 2 Overlay District Map which excluded Parcel E from the PD-2 Overlay District. (BZA Tr., Mr. Theodore, p. 26, ll. 5-15.)

Parcel E is now understood to be also in the PD-2 Overlay District. [See Staff Determination Letter, Nicole Dixon, dated August 23, 2016 (Exhibit 1 to Notice of Appeal and Petition); see also BZA Tr. (Mr. Theodore), p. 43, ll. 10 – 21.]

The Town's purpose with PD-2 Overlay District is "to encourage creativity in design and planning in the development of parcels between five and 249 acres by allowing greater design flexibility than the underlying base zoning district so that natural features may be protected and development concentrated in more suitable or less environmentally sensitive areas." (BZA Tr., Attorney Williams, p. 13, ll. 1-16.)

A method of accomplishing the purpose of a PD-2 Overlay District is found in the uses of Open Space. When Beachwalk raised its concerns, Todd Theodore calculated the Open Space in the Town Center PUD site (the subject of this PD-2 Overlay District) and determined that, even with the requested development of Parcel E, "[a]ll the open space is well within the original calculations in the original (Town Center PUD)". (BZA Tr., Theodore, p. 29, ll. 5-11.)

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

Response:

Parcel E is in a PD-2 Overlay District, and is subject to the LMO's PD-2 Overlay District Regulations.

The "devil is always in the details", and the question for this Court, as it was for the BZA, involves, given the 30-odd year history of this PUD (including Parcel E), how to determine the correct application of the Overlay District's Regulations with the RD Base District, and the current LMO, taking into account that history and the existing development within that PUD, and the current LMO.

C. If Parcel E is subject to the LMO's PD-2 Overlay District regulations, what effect does that have on the development of Parcel E, and must the existing development on the other

AMBIGUITY No. 2:

The second material ambiguity may be described as whether the calculation of open space as now affecting Parcel E and the PD-2 Overlay District is done by accepting the prior Waterside calculations as controlling, or are those now to be ignored by all charged with interpreting the current LMO?

(BZA, Tr. BZA Chair Stanford and Mr. Theodore, p. 41, l.12 – p. 42, l. 7):

Answer (Mr. Theodore): “But that’s where I think we were in a warp zone. We are stuck in a PD-2 and we are stuck in the current (LMO).”

Question (Chair Stanford): “What applies? Is it RD or PD-2 or both in your opinion?”

Answer (Mr. Theodore): “I believe it is the RD. It is the underlying district. The PD-2 allows flexibility as time goes on which is what this property has done. The PD-2 allows room for flexibility when you are outside the gate and share buffers and open space and things like that. This one even meets its open space criteria on sight (*sic*, site), so it can almost stand independently on its property boundaries rather than even relying on the rest of the (Waterside PUD) property to count for open space and impervious permits and calculations as well, so it was intended to stand on its own.

(BZA, Tr. BZA Member Johnson, Mr. Theodore, Attorney Taylor, and Attorney Williams, p. 52, l. 16 – p. 54, l. 25):

Question (Member Johnson): “When they developed this 198 residential, would they not have been required at that time to incorporate the open space into that design, or did they say, oh, we will get it someday with the other parcels?”

Answer (Mr. Theodore): “The intent of the PD-2 is to spread that out. And that becomes part of the lagoons, there is marshes, there is recreation area, all that counts as

open space criteria. I was looking at the 1987 approved modified PD-2 plan said there was office was 21, 913 square feet, 1.4 acres, retail was 3 acres at 16,279 square feet, hotel was 94 rooms, open space was 1.3 acres and residential was 200 DUs on 7.6 acres as what I can recall in here. So as part of the PD-2 when this was being developed, it was really under density. They really didn't do any commercial or – ”

Question (Attorney Taylor): "Mr. Chairman, I object to that because we don't have the document that he is testifying to us in front of us."

Question (Attorney Williams): "Right. And again I think it is a factually inaccurate statement. Those densities are far in excess of what the code allowed at that time, but they were approved and there again is the reason for the categorical exemption. Categorical exemption letter in 1995 said property owners -- yeah -- we will let you develop what the master plan says, notwithstanding the fact that it is far in excess what our current code requires or allows, but you have to do so in five years. That is 16 years after the permit was issued. Do it or don't."

Question (Chair Stafford): "Mr. Johnson, did that answer your question?"

Answer (Member Johnson): "Somewhat."

Question (Attorney Williams): "Well, please tell me what you still have unclear in your mind."

Question (Member Johnson): "I just question whether there is open space on this 198 residential area?"

Answer (Attorney Williams): "There is clearly some open space there. But the PD-2 requirements under the current code requires to (*sic*)common open space and the open space that is back there is Spinnaker that is not common. That is Spinnaker's open space."

Answer (Mr. Theodore): "But that is part of the PUD."

Question (Attorney Williams): "Absolutely. No question about that. And it was developed under that code. The current code requirements though refer to common open space."

[For the Court's consideration at this point in the Brief, Barry L. Johnson comment in this Brief – not commented to the BZA: It is apparent that two interpretations of "common open space" were before the BZA. One interpretation was that the open space is "common" to the PUD and therefore "common" within the PD-2 Overlay District, and the other that it was not shared with the rest of the PUD, but had to be looked at site-specific on Parcel E, alone, but subject to Beachwalk's interpretations of PD-2 Overlay District Regulations. See statement by BZA Member Cutrer, BZA Tr., p. 57, l. 25 – p. 58, l. 9: "... it seems to me that we're applying this word 'common' one way when it suits us and one when it doesn't. You would argue – you're arguing that any open space associated with Spinnaker doesn't apply to the whole parcel because it is not common open space and yet we're throwing in the (Beachwalk) hotel to come up with the common parcel when trying to compute the density."]

AMBIGUITY No. 3:

The third material ambiguity is this: Since the Open Space requirements under the Town Center/Waterside PUD have been fully satisfied, as noted above, what is the motivation of Beachwalk to even be concerned about Parcel E?

First, note that all of the rest of the land in the PUD/PD-2 Overlay District has already been developed or committed to Open Space, and all Open Space requirements of the PUD have been fully satisfied. (BZA Tr. (Mr. Theodore), p. 29, ll. 5-11.)

Second, note the colloquy of BZA Member Wilson and BZA Chair Stanford, with Mr. Williams (BZA Tr., Wilson and Williams, p. 47, l. 9 -25):

Question (Member Wilson): "No, no. I'm suggesting -- I like to know what the motivation of your client is other than seeing that the town code is enforced. Is there some other motivation?"

Answer (Attorney Williams): "I'm not sure that that's germane to the appeal even if the decision that was made is correct or not, but my client owns – if my client is entitled as the property owner in this PUD to maintain that area as open space, then it has the right to do so and this is the process to do that."

Question (Member Wilson): "I'd like to know the motivation."

Question (Chair Stanford): We may hear more about that as the hearing proceeds."

And, following on that point:

(BZA Tr. (Mr. Theodore): p. 50, l. 21 – p. 51, l. 21):

Answer (Mr. Theodore): "If we're going to get technical with that, wouldn't you say that hotel (the Beachwalk property) has been vacated for a whole number of years. It has been basically moth balls. The stairs have been taken off. It has been boarded up. It has been trying to avoid condemnation It is a vacant. It is an eyesore. I'm surprised it never went to the design review board to approve the boarding up of that building. I'm sure Spinnaker folks love driving by there all the time and having the tape around it and the barricades and the painted plywood boards and all that stuff. But my question is I think there is duration of time that is more than 18 months that this building hasn't been utilized as it's intended and it's not being maintained."

AMBIGUITY No. 4:

The fourth material ambiguity is whether the Applicant's application for Development Plan Review (DPR) Approval for Parcel E was in conflict with the PD-2 Overlay District.

The Town's Development Review Administrator, Nicole Dixon, testified that the Applicant's application for DPR Approval was not in conflict with the PD-2 Overlay District, BZA Tr. (Dixon), p. 68, l. 11 – p. 73, l. 20, as follows in colloquy with Attorney Williams, with follow-up statement by BZA Chair Stanford:

Answer (Ms. Dixon): "I did all of my research and determined as you see in my staff determination that the proposed DPR was not in conflict with the (PD-2 Overlay District)."

Question (Attorney Williams): "And when you reviewed that, did you look at the overall density of the 15.1 acres on the entire PD-2 Overlay District and determined whether or not that exceeded the maximum density in the RD District?"

Answer (Ms. Dixon): "I looked at everything that pertained to the PD-2 (Overlay District); density, open space. The PD-2 developed under a different LMO. So, looking at what is developed out there now and looking at the density, no, I did not see it was in conformance with that. The RD District – I checked the conformance of the subject property against the RD and it does meet that."

Question (Attorney Williams): "When you say that, you're talking about just Parcel E; is that correct?"

Answer (Ms. Dixon): "Correct."

Question (Attorney Williams): "So you did not check the overall density on the 15.1 acres to see if the additional development of the Parcel E caused the overall average density to exceed what is permitted in the underlying RD District; is that correct?"

Answer (Ms. Dixon): "That is correct because Staff does not (think) that is the intent of how you are interpreting the LMO."

Question (Attorney Williams): "Okay."

Answer (Ms. Dixon): "When the PD-2 was – when the conceptual plan was approved – "

Question (Attorney Williams): "When you say 'conceptual', can you give us the date?"

Answer (Ms. Dixon): "1984 and then reviewed 1987."

Question (Attorney Williams): "The one that we can't find?"

Answer (Ms. Dixon): "We have May 6th of 1987."

Question (Attorney Williams): "Isn't it dated February?"

Answer (Ms. Dixon): "The second page of that shows this plan. There is a revised date of May 4th. Let me think. May 4th, 1987 is the most recent.

Question (Attorney Williams): "Which was prior to the planning commission's review and approval of the amendment of the master plan, correct?"

Answer (Ms. Dixon): "Two days prior."

Question (Attorney Williams): "Correct. So –"

Answer (Ms. Dixon): "There was nothing in the planning revision that indicates that the layout was changed."

Question (Attorney Williams): "But you don't have access to – you didn't have an opportunity to review the approved 1987 master plan?"

Answer (Ms. Dixon): "I did not."

Question (Attorney Williams): "Okay. You heard our discussion with Mr. Theodore about our theoretical plan process."

Answer (Ms. Dixon): "You're not going to ask me to do all of that."

Question (Attorney Williams): "On pages 13 and 14 of our narrative of the application, we basically go through that entire process. Did you have an opportunity to review those figures?"

Answer (Ms. Dixon): "I did."

Question (Attorney Williams): "Are they accurate?"

Answer (Ms. Dixon): "if you're looking at as you're interpreting it, yes. The way see it is that when the PD-2 was originally approved, it was based on a different LMO and right now when the DPR was submitted for the welcome center, I don't think that the PD-2 should have to comply. We are not changing the PD-2, so the density has to comply with the current resort development (RD) density standards. Most of the PD-2 Waterside exists today, what they're proposing does comply with that. That is what the LMO requires, any future development has to comply with the current LMO."

Question (Attorney Williams): "Okay. Let me ask you this: Going through the process that we went through with Todd (Theodore), if you had 15.1-acre tract and you have 198 residential units by Spinnaker, and you had 52 whatever the figure is commercial and the 91 hotel units, could you approve that development under a PD-2 with the current code requirements?"

Answer (Ms. Dixon): "If you're coming in starting from scratch today then that would be brought to the planning commission and that flexibility would be (looked) at that time."

Question (Attorney Williams): "I'm not sure. Why would the planning commission be involved?"

Answer (Ms. Dixon): "Well, the PD-2 has to go for rezoning."

Question (Attorney Williams): "You're talking about --"

Answer (Ms. Dixon): "You're starting from scratch, yeah I would apply the LMO density standards."

Question (Attorney Williams): "Okay. Let me be more clear. The process that we went through with Mr. Theodore assumed that there was an existing PD-2 Overlay on the 15.1 acres and it was undeveloped."

Answer (Ms. Dixon): "Okay."

Question (Attorney Williams): "So no need for a rezoning and change in the PD-2. Could you develop that property with the densities that are already there plus the density for Parcel E under the current code requirements?"

Answer (Ms. Dixon): "I think so because they were not exceeded what was originally intended and what is in the LMO."

Question (Attorney Williams): "I'm not being very clear."

Answer (Ms. Dixon): "We obviously disagree. That's what we are here for today."

Question (Attorney Williams): "A new PD-2 -- okay -- a new Pd-2 Overlay, not the 1987 not the 1984, a new PD-2 Overlay under current code requirements, could you develop those?"

Answer (Ms. Dixon): "But we're not talking about that."

Question (Attorney Williams): "This is a theoretical. You're a planner. You would be the one to review this application. I've got a 15.1-acre tract. It's in a RD base zoning district. I developed 198 residential units. I developed commercial space. I developed a hotel – I guess the question is could I develop the hotel and come in for Parcel E, could you do that starting fresh under the current code requirements?"

Answer (Ms. Dixon): "Under the current code requirements, yes."

Statement by Chair Stanford: "Let's move it along, Mr. Williams."

And, the colloquy continued between Attorney Williams and Ms. Dixon, substantively at BZA Tr., p. 75, l. 20 – p. 76, l. 12, as follows:

Question (Attorney Williams): "Okay. So, what you're saying is town staff's position notwithstanding the categorical exemption, the property owner still has a right to rely on the densities and uses provided for the 1987 master plan notwithstanding the fact that they do not comply with current code requirements?"

Answer (Ms. Dixon): "I'm saying that regardless of the fact that the developer did not develop fully to their potential at that time, yes, the categorical exemption did expire, that's what I reviewed it under the current RD District for that property and it does not exceed the open space. It meet(s) all LMO requirements. I do not believe that just because the categorical exemption expired, the vacant areas of that property are no longer to be built on. I don't agree with that."

Then, BZA Chair Stanford further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, as set forth in the BZA Tr., p. 78, l. 11 – p. 80, l. 2, as follows:

Question (Chair Stanford): "I don't understand how you can make the decision to grant this application."

Answer (Ms. Dixon): "I spent weeks reading through all the documentation that went along with the categorical exemption, the conditional use permit, the special exception, the original master plan documentation. I spent way too many hours in trying to understand it and there was nothing in that documentation that indicated that that parcel was going to be dedicated to open space. There was a revision in 1987. I have this plan that you see up on the screen that was dated May 4th (1987) before the planning commission approved it. What they did is they changed the boundary to allow for a better design of the hotel property and reconfigure some of the parking areas and they permitted an increase in the hotel rooms from 50 to 94 and a reduction – a corresponding reduction of residential to retail space. That is all it says. There was nothing in the documentation that indicated that lot (Parcel E) should be designated as open space. All along it said it was commercial retail. The only notation about the open space says that there had to be 1.3 acres of open space, but it could be spread out the PD-2."

Question (Chair Stanford): "I understand."

Answer (Ms. Dixon): "I got documentation from Mr. Theodore that the open space for the entire PD-2 was well over 1.3 acres. I think it averaged nine acres, so reading through all of that, and yeah, I don't have the conceptual plan referred to in the letter dated May 7th, 1987. I do have the one dated May 4th (1987) and it looks very close to the original one from 1984. I did not find any reason to deny the (DPR) application (for Parcel E).

Statement (Chair Stanford): "I acknowledge that you've made a very strong, thorough investigation of the records, and we appreciate that and I believe that this concept master plan (May 6th, 1987) probably could not be found for whatever reason."

Then, BZA Member Fingerhut further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, as set forth in the BZA Tr., p. 80, l. 18 – p. 82, l. 15, as follows:

Question (Member Fingerhut): "Nicole, when you were doing your analysis did you apply the LMO in effect at the time of the master plan or the current LMO?"

Answer (Ms. Dixon): "When I was reviewing the DPR?"

Question (Member Fingerhut): "Yes."

Answer (Ms. Dixon): "I reviewed what was in the PD-2 documents and then I also made sure it met the current LMO. In that letter it stated any future development has to comply with the current LMO, and this was considered future development but I also didn't exceed that was on the original concept plan."

Question (Member Fingerhut): "Did you do the analysis of units and square footage and units and acreage that we've been talking about here, did you do a separate analysis to make sure –"

Answer (Ms. Dixon): "No. What I did was I looked at the table that was in the master plan that allowed for – it was 23,330 square feet of retail –"

Question (Member Fingerhut): "Table in which master plan?"

Answer (Ms. Dixon): "I was looking at the table that was approved by the planning commission with the May 6, 1987 date."

Question (Member Fingerhut): "So not this one?"

Answer (Ms. Dixon): "The table was in the documentation. It was just (that) the actual plan was not in there. So, the table indicates how much square footage for commercial, retail and residential and open space. So, when I did my review, there was no retail out there currently, so because the proposal does not exceed that or (is) well below that amount, I felt it was compliant with that and because it meets the current LMO requirements, I did not see a reason to deny the application."

Question (Member Fingerhut): "Okay. But just to -- I hate to repeat the question, but did you do the analysis that was discussed earlier, in other words, to see if there was enough acreage not only (for) what was there and proposed to be there?"

Answer (Ms. Dixon): "You mean the math that Chet (Attorney Williams) was talking about?"

Question (Member Fingerhut): "Yes."

Answer (Ms. Dixon): "Adding what was out there and --"

Question (Member Fingerhut): "Sure."

Answer (Ms. Dixon): "No, I did not. I looked up what was on the original master plan and what was allowed in the current LMO and it meets both of those, so that's what I based my approval on."

Then, BZA Member Cutrer further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, as set forth in the BZA Tr., p. 82, l. 19 -- p. 83, l. 24, as follows:

Question (Member Cutrer): "If I understand what you're saying, in the minutes of the planning commission was a table --"

Answer (Ms. Dixon): "Yes."

Question (Member Cutrer): “ – that addressed the development of this property on a square footage basis –”

Answer (Ms. Dixon): “Yes. It does.”

Question (Member Cutrer): “– rather than a per units basis like the other calculations we’re (referring to Attorney Williams’ calculations) doing.”

Answer (Ms. Dixon): “I’m not sure what attachment it is. It was in your packet.”

Question (Member Cutrer): “Honey, there was a thousand pages in there. I looked at every one of them, but I don’t remember many of them. Let me ask my question again.”

Answer (Ms. Dixon): “Okay.”

Question (Member Cutrer): “In the minutes of the planning commission, May whatever, it was 1987, that approved the master plan that we can’t find the drawing of, but in the minutes of the planning commission is this table –a”

Answer (Ms. Dixon): “Yes, sir.”

Question (Member Cutrer): “—which limits development or specified what can be developed on a square footage basis?”

Answer (Ms. Dixon): “Correct.”

Question (Member Cutrer): “Using that and the current LMO, you’ve made the determination that this development is permitted?”

Answer (Ms. Dixon): “Correct.”

Statement (Member Cutrer): “Thank you.”

Then, BZA Member Laudermilk further questioned Ms. Dixon on these points of background, LMO provisions, and interpretations, followed by a statement of Chair Stanford, as set forth in the BZA Tr., p. 86, l. 12 – p. 87, l. 9, as follows:

Question (Member Lauder milk): "I have a question and it's kind of this whole process again. But if we had that master plan document, however the categorical exemption has expired, now as you look at a new application, most of – well, I guess all, but the existing improvements on the various parcels within the (Waterside) PUD were built under different LMO requirements. So now that there is an application submitted for a specific undeveloped parcel, do you need to take into account the entire PUD under the current LMO or do you just look at that parcel?"

Answer (Ms. Dixon): "Staff believes that you look at that parcel. The original concept plan was based under a different LMO, and so to go back now this PD-2 doesn't meet the LMO, well, obviously, it doesn't. The LMO says any further development has to meet the criteria of the current LMO standards and that is what the applicant did. It meets all current LMO standards. I could not find a reason to deny the application."

Statement (Chair Stanford): "Thank you very much."

Then, the undersigned counsel for the Applicant, SDC Properties, Inc., Barry L. Johnson, engaged in the following colloquy with Members of the BZA, as set forth in the BZA Tr., p. 89, l. 14 – p. 98, l. 19:

Statement (Attorney Johnson): "The planning commission minutes that were alluded to a few minutes ago, and because these do not have Bates stamps, I don't know how to identify them to you, but in your materials we have the Town of Hilton Head Island Planning Commission May 6, 1987 meeting, that's either one or two days after the date of the drawing that is on the screen, and in these minutes there is approval of the plan that was discussed with modifications and those modifications appear in some tables that are attached to these minutes in these plans, and I believe that they significantly re-enforce what Ms. Dixon has said.

"I think that what Mr. Theodore has calculated and everybody has talked about -- I don't know if it's specifically in evidence, but I think it is part of the submission Ms. Dixon made to you, but there is approximately nine or nine and a half acres of open space this property according to Mr. Theodore's calculations out of the 15.1 acres overall. That clearly demonstrates that the 1.3 acres required by the planning commission in this 1987 document has been met, and you have to recall that at that time nothing had been built.

"Now, if you -- I think we all understand what the appellant (Beachwalk) is trying to argue. I would submit to you a couple of things in that regard. One is that the people that fought to get their vested right validated or verified, I think was the word that Curtis (Coltrane) used, intended to fully develop their property under their constitutional rights. That's why they went to significant expense and trouble to get these rights validated. They disagreed with the time limits on a very narrow point, the court said five years is good enough for the continuation of those rights.

"But if you just look not only to that cluster of (a) dozen or so of them and I represented at least half of those people that got those exemptions at that time, none of them will ever comply with the current LMO, so the theory that my friend, Chet (Williams), and my friend, Tom (Taylor) are arguing to you is that none of these undeveloped properties anywhere on the Island in PD-2 Overlays are ever going to get developed. That is the practical effect.

"And the zoning law requires that if you give people the opportunity to have a reasonable use of their property and a reasonable use of this property is certainly to comply with the applicable site standards for RD for those 1.086 or 68, whatever it is acres and it does comply. Otherwise, what you have effectively done is condemn the property as a Town action and that becomes a different conversation. But it may have

effect on any other properties out there that so far undeveloped residuals from PUDs that met the categorical exemption standards that expired all of them in or about March of 2000 because they issued the letter about the same date if not the same date and are now sitting here saying, "is the property worth zero because you can't do anything with it or does it have a reasonable and fair zoning which the municipality has obligation to provide to it. Staff has (made) a determination of how to interpret the LMO that is reasonable and fair and is consistent with the obligations of the municipality regarding zoning and resulting uses and densities.

"I would also like to say one more thing and then I'll sit down. Some of you and I don't know -- I understand Mr. Stanford has legal background. I apologize -- Mr. Fingerhut does too. I don't know, unfortunately, all you people and I apologize for that. The law is South Carolina where there is ambiguity regarding restrictions, and I think it's generally the law in the country. It is derivative of constitutional rights for property ownership. Where there is ambiguity, the law favors the unrestricted use of the property rather than the restricted use of the property.

"If you heard earlier, Mr. Coltrane, his association and law partnership with Jim Herring back in the mid-80's. Mr. Herring had a case that went to the South Carolina Supreme Court called Hamilton versus CCM. It is Hilton Head based case. It has to do with the plats around Harbour Town and the documents related to the cemetery and some other land over there and the question was whether or not the absence of designation of use on the plats made it open space. And the court very convincingly ruled that it doesn't say, therefore it is not expressly restricted to open space, and you can't have that by implication because the law favors the free and unrestricted use of the property where this is (ambiguous).

“So, if you find some ambiguity about the 1987 July master plan, which merely implemented what Nicole (Dixon) said, the May 1987 plat and the adjustments to that made by the planning commission at their meeting on May 6th, then I would suggest to you that is an ambiguity that supports the conclusion the staff has come to and I would encourage you in that decision.

“I will answer any questions I can.”

Question (Chair Stanford): “I continue to have trouble moving forward from the 1987 concept master plan, which is the core zoning document for this parcel as well as the balance of the 15 acres. That would have been the core zoning document there and we’re moving forward based on that, but we don’t have that document.”

Answer (Attorney Johnson): “Right.”

Question (Chair Stanford): “And we have to make an assumption on that. I’m very uncomfortable making an assumption.”

Answer (Attorney Johnson): “I’m suggesting that you don’t have to make that assumption. You can say the absence of that document creates an ambiguity, and there is enough documentation – I realize Mr. Cutrer?”

Statement (Member Cutrer): “Cutrer. Close enough.”

Answer (Attorney Johnson): “Cutrer. Sorry. That is was opine or said a while ago, you got thousands of pages of documents, and I appreciate you-all haven’t had time to study all that, but if you did you would find in the minutes of May 6, 1987, all the comfort you need and you would see that the July, three months later document, is the implementation of what was commanded by the Town planning commission.”

Statement (Chair Stanford): “Thank you for that able presentation, prepared or not. Any other questions.”

Question (Member Cutrer): "If I might."

Answer (Attorney Johnson): "Yes, sir."

Question (Member Cutrer): "I think I heard Nicole (Dixon) say that under the current LMO this property could be developed. All of this discussion of the 1987 master plan was part of the conditional exemption."

Answer (Attorney Johnson): "Categorical exemption."

Question (Member Cutrer): "Categorical exemption."

Answer (Attorney Johnson): "Yes, sir."

Question (Member Cutrer): "Which expired in 2000."

Answer (Attorney Johnson): "Yes, sir."

Question (Member Cutrer): "Am I correct or am I wrong that all that 1987 stuff is kind of irrelevant at this point?"

Answer (Attorney Johnson): "I believe it became irrelevant on March 3rd, 2000."

Question (Member Cutrer): "So if all this discussion of 1987 action by the Town is irrelevant because that exemption expired, then today we're bound or governed by the current LMO?"

Answer (Attorney Johnson): "Correct."

Question (Member Cutrer): "And I believe I heard Ms. Dixon say that her interpretation was that under the current LMO this property could be developed as being proposed?"

Answer (Attorney Johnson): "That's correct."

Question (Chair Stanford): "But the application was not made based upon the current LMO, rather it was based on the 1987 master concept plan as I understand it."

Answer (Ms. Dixon): "No, it was not."

Answer (Attorney Johnson): "I don't have all the details about (that), but I think that is entirely accurate. I think that was just a component of the history."

Question (Chair Stanford): "Nicole (Dixon), can you straighten me out?"

Answer (Ms. Dixon): "When the application was submitted it was initially reviewed under the current LMO. It wasn't until Chet (Williams) brought to my attention the PD-2 that applied to this property, that I started doing all that determination to Chet (Williams). But all along I was reviewing the application under the current LMO and after reviewing the PD-2 documents still do not find a reason to deny the application, and the application met current LMO requirements and (I) approved it, so that's what the application approval is based on is the current LMO."

In the BZA meeting there then followed various discussions around the proper legal interpretation to be accorded the LMO, site specific to Parcel E in the RD District, and regarding the PD-2 Overlay District. The point was crystalized in this answer by Ms. Dixon, BZA Tr. p. 109, l. 4-p. 113, l.3 and following colloquy therein, with and among the members of BZA, as follows:

Answer (Ms. Dixon): "I'm not denying it is part of the 15-acre PD-2. I'm not denying that it is not part of that anymore. It is still part of that PD-2, but as you know – as you said that categorical exemption expired. They're not tied to the original density allowed, so as long as they meet the current density that is allowed on that tract, then it should be approved and that is what I based my decision on."

"So, you can either agree with my determination or not agree with it and I would have to (rescind) my notice of action."

Statement (Member Wilson): "I think that is part of the responsibility of the board because there is this dispute including with Mr. Williams' client and between our Town."

Question (Member Fingerhut): "So you're concurring that his (Mr. Williams') math is correct?"

Answer (Ms. Dixon): "I concur his math is correct, but I don't interpret the LMO that way."

Statement (Member Fingerhut): "That is fine. Just speaking for myself that is a correct finding because I wasn't following all the math."

Answer (Ms. Dixon): "I just interpret the LMO differently and that is not what I based my approval on. But the math that he (Mr. Williams) had Mr. Theodore come up with earlier, that is correct."

Statement (Chair Stanford): "I think the motion of remand probably is not a good motion at this point, so we are looking for a motion either to grant the appeal, which means to reverse the action of the Town, or affirm the action of the Town and denying the appeal."

Question (Member Cutrer): "Can I ask Ms. Dixon one more question?"

Answer (Chair Stanford): "Sure."

Question (Member Cutrer): "If I'm interpreting what you are saying correctly that the PD-2 Overlay no longer applies or it does apply?"

Answer (Ms. Dixon): "I think the PD-2 Overlay is always going to be. It was approved in that (the PD-2 boundary exists. That property is part of that PD-2."

Question (Member Cutrer): "To create a total picture?"

Answer (Ms. Dixon): "Correct."

Statement (Member Cutrer): "Okay."

Answer (Ms. Dixon): "I do not think we have to go back and make sure all the densities in that development complies to the current LMO. I don't think that

was the intent of the language in the LMO and I don't think that (they) should have an unbuildable lot."

Question (Mr. Cutrer): "So we take the parcel today, how does this application comply with the current LMO and how does it comply with the PD-2 Overlay?"

Answer (Ms. Dixon): "The PD-2 is always going to be there. Now, as far as them being tied to the density that was shown on the original conceptual plan, they don't have to be tied to that. They have to be tied to the current LMO standards."

Question (Member Cutrer): "So how does that proposed development comply with the current LMO?"

Answer (Ms. Dixon): "How does it?"

Question (Member Cutrer): "How does it?"

Answer (Ms. Dixon): "They demonstrated that their density meets the current density standards and current open space."

Statement (Member Cutrer): "That's what I needed to hear."

Question (Member Johnson): "Can I ask a quick question? This master plan if it were to appear, does it have any bearing on what we're talking about?"

Answer (Ms. Dixon): "It does not."

Statement (Chair Stanford): "We talked 45 minutes ago about that."

Answer (Ms. Dixon): "It is just a diagram (of) what was approved by the planning commission, and I just looked back when you were talking earlier, and that table is listed in Attachment H in the documents I gave you, and that is (the) planning commission minutes from the May 6th meeting."

CONCLUSION

Without in detail rehashing the foregoing many pages of testimony and commentary derived from the BZA hearing, it is apparent that all parties received a full, detailed and fair hearing and that the Members of the BZA were attentive and fully engaged in the matter. There were five Members of the BZA present at that hearing and the BZA Transcript show clearly that all five Members fully engaged in asking questions, making comments, discussing and deciding the case.

The BZA, as was the case with Ms. Dixon of the Town staff, dealt with some ambiguities in the Town's zoning law. Ms. Dixon well explained and supported her interpretation of the Town zoning law in regard to those ambiguities. The BZA denied the Beachwalk appeal, and in so doing upheld Ms. Dixon's interpretation of the Town zoning law.

Much of what else we would argue in our Conclusion to this Brief is found in the remarks and colloquy of SDC Properties, Inc.'s counsel (the undersigned Barry L. Johnson) with Members of the BZA, as above quoted from the BZA Tr., p. 89, l. 14 – p. 98, l. 19, here fully incorporated by reference.

Ms. Dixon, on behalf of the Town was mindful that the interpretation of the ambiguities in the Town's zoning law, if interpreted as urged by Beachwalk, would render SDC Properties, Inc.'s Parcel E as "unbuildable" (BZA Tr., p. 111, ll. 14-17.) The spectre of the Lucas case (Lucas v. South Carolina Coastal Council, 55 U.S. 1003 (1992)) would make any governmental body (such as the BZA) and responsible public official (such as Ms. Dixon) shudder at the thought of, by regulation, making a private property "unbuildable" and therefore, by regulation, rendering that property void of economic utility and value. Ms. Dixon, acting on behalf of the Town, was well guided in her interpretation of the Town's zoning law, as was the BZA in denying the Beachwalk appeal. We hope this Court will be similarly mindful.

Although the principles of legal construction favoring the freer and less restricted use of real property in South Carolina are well-established, please note the above-referenced case, Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980).

No argument or showing has been made by Beachwalk that the proposed development of Parcel E would inappropriately impact “natural features” or “environmentally sensitive areas”, a point of concern for PD-2 Overlay Districts (BZA Tr., Attorney Williams, p. 13, ll. 1-16).

Application of the foregoing Standards of Review, indicate that the decision of the BZA, in denying the Beachwalk appeal, was made with an extensive factual review and basis, and an extensive inquiry into the applicable law. This record clearly shows that the BZA decision was not controlled by any error of law, nor could it possibly be characterized as arbitrary or capricious, nor can it be fairly stated that the BZA’s decision had no reasonable relation to a lawful purpose, nor that the BZA abused its discretion. Moreover, it is apparent that the BZA gave a practical, reasonable, and fair interpretation of the Town’s zoning law, consonant with the purposes, design and policy of the Town’s lawmakers. The courts must uphold the decision of the BZA in this case, because there is evidence – indeed, more than ample evidence, in the BZA record to support its decision.

Thus, there is no cogent reason for the courts to overrule the BZA decision here appealed from. The BZA complied with the controlling SC statute, S.C. Code § 6-29-800 (2003), by ruling to prevent the interpretation of the Town’s zoning law which would effectively prohibit or unreasonably restrict the utilization of the property. The courts in reviewing the BZA decision should refrain from substituting judicial judgment for the BZA’s judgment, even if the courts disagree with the BZA decision. Thus, the courts must surely agree that the BZA’s decision was correct as a matter of law.

The full and proper application of the Standards of Review not only suggest, but in all respects mandate, that the BZA's denial of the Beachwalk appeal should be upheld by the courts.

Respectfully submitted,

JOHNSON & DAVIS, PA

/s/ Barry L. Johnson

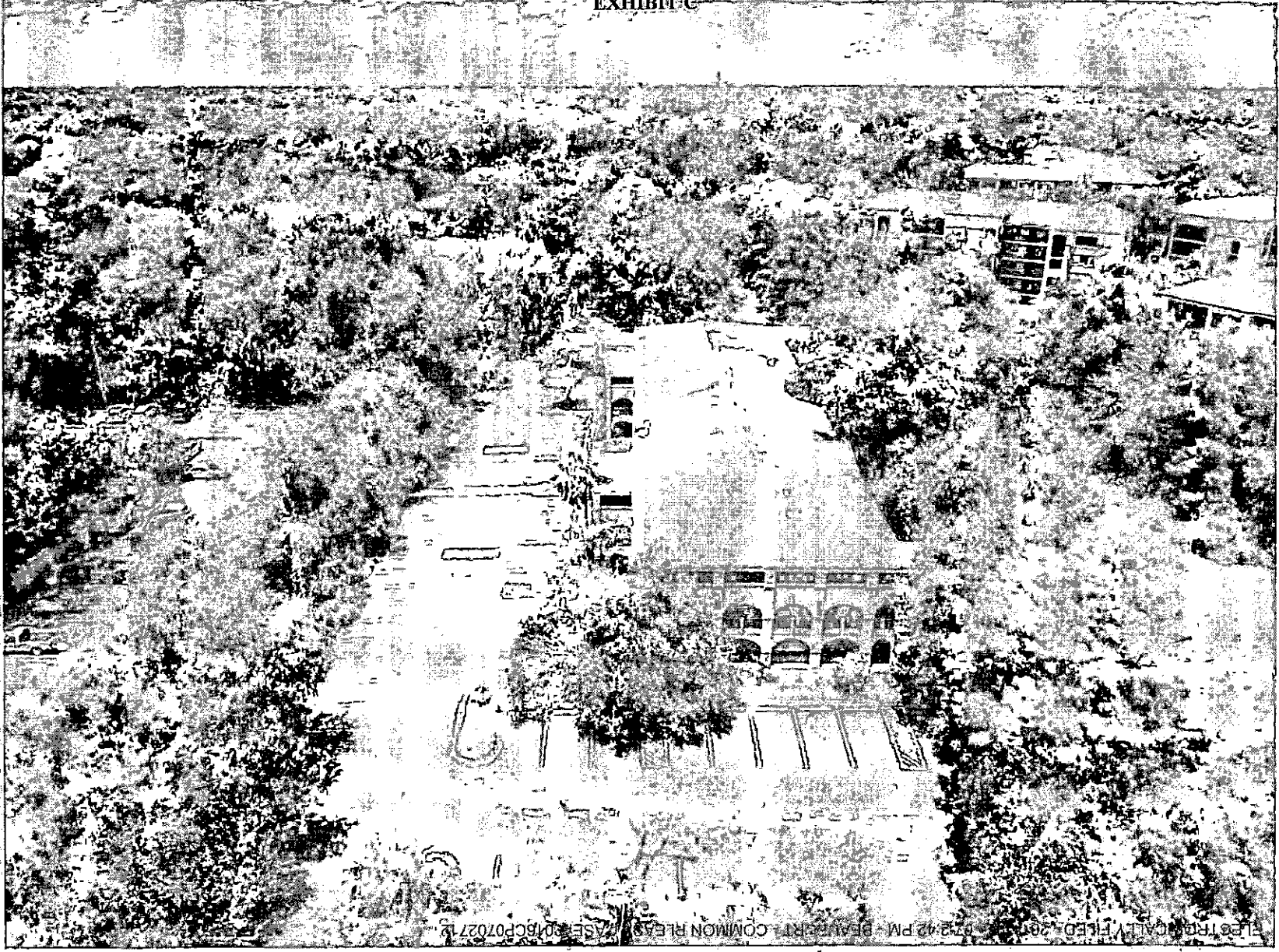
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Bluffton, SC
March 12, 2018

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

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EXHIBIT C



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EXHIBIT C



EXHIBIT C



Exhibit D to Appellants' Return (291 pages)

BOARD OF ZONING APPEALS BEACHWALK - BZA BEACHWALK TRANSCRIPT

STATE OF SOUTH CAROLINA
BEAUFORT COUNTY

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

TO THE APPEAL APPLICATION OF:
BEACHWALK HOTEL & CONDIMINIUMS ASSOCIATION,
INC., and BEACHWALK HILTON HEAD, LLC

-----/

The BOARD OF ZONING APPEALS of
BEACHWALK, a witness in the above-entitled
cause, taken pursuant to Notice and agreement,
before Kyle J. Saniga, Certified Court Reporter
and Notary Public, at the Offices of The Town of
Hilton Head Island, One Town Center Court,
Hilton Head, South Carolina, on the 27th day of
August 2018, commencing at or about the hour of
12:56 p.m.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

2

1 APPEARANCES OF COUNSEL:

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7 AND

8
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23

24

25

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

3

1		
2	I N D E X	
3		PAGE
4	EXHIBIT INDEX -----	4
5		
6	OPENING REMARKS AND STIPULATIONS -----	5
7		
8		
9		
10		
11		
12	EXAMINATION OF CURTIS COLTRANE:	
13	By Mr. Taylor -----	26
14	EXAMINATION OF TERI LEWIS:	
15	By Mr. Taylor -----	45
16	By Mr. Alford -----	51
17	By Mr. Taylor -----	52
18	EXAMINATION OF NICOLE DIXON:	
19	By Mr. Cutrer -----	150
20	By Mr. Williams -----	170
21		
22		
23		
24		
25	CERTIFICATE -----	256

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

4

1	DOCUMENTARY EVIDENCE		
2	NUMBER	DESCRIPTION	PAGE
3	EX-1	Memorandum and subpoena and Town Response	5
4	EX-2	Attachment H	5
5	EX-3	Handwritten Note	5

6
7
8
9
10
11
12
13
14
15
16
17
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19
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BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

5

1 (Whereupon, Exhibit
2 Numbers 1 through 3 were marked for
3 identification.)
4 MR. FINGERHUT: Teresa, please
5 call the roll.
6 MS. HALEY: Mr. Walczak?
7 MR. WALCZAK: Present.
8 MS. HALEY: Mr. Johnson?
9 MR. JOHNSON: Present.
10 MS. HALEY: Mr. Fingerhut?
11 MR. FINGERHUT: Present.
12 MS. HALEY: Mr. Cutrer?
13 MR. CUTRER: Present.
14 MS. HALEY: Mr. White?
15 MR. WHITE: Present.
16 MS. HALEY: Ms. Laudermilch?
17 MS. LAUDERMILCH: Present.
18 (INAUDIBLE)
19 UNIDENTIFIED SPEAKER: Yes, sir,
20 we are.
21 MR. FINGERHUT: Thank you. Before
22 we begin we're going to have a swearing
23 in of our two of our members, Jerry
24 Cutrer and Brian White. Brian
25 Hulbert's going to do it.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

6

1 (Whereupon, the above members were
2 duly sworn in.)

3 MR. FINGERHUT: Congratulations
4 gentleman. Thank you, both.

5 Welcome to the Board of Zoning and
6 Appeals.

7 A special bulletin today for
8 Councilman Ames for and on behalf of
9 members of the town council present.

10 Today we have one matter on our
11 agenda. It's the hearing of Appeal
12 Number 16732016 from the Beachwalk
13 Hotel and Condominiums regarding a
14 determination of the Town that was made
15 August 23rd 2016.

16 This appeal was first heard by the
17 BZA on November 28th 2016. The Town's
18 determination was upheld and the
19 decision was appealed to the Circuit
20 Court.

21 After consideration of the appeal
22 the Circuit Court remanded the case
23 back to the BZA for a rehearing.

24 The court ordered that the BZA
25 focus on answering the following

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

7

1 questions for the court's further
2 consideration in addition to the
3 hearing;

4 Number 1, Is Parcel E -- the PD-2
5 Overlay District established by the
6 LMO?

7 Number 2, If Parcel E is in the
8 PD-2 Overlay District, is Parcel E
9 subject to the LMO's PD-2 Overlay
10 District regulations?

11 Number 3, If Parcel E is subject
12 to the LMO's PD-2's Overlay District
13 regulations, what affect does that have
14 on the development of Parcel E?

15 And must the existing development
16 of the other parcels within that PD-2
17 Overlay District be taken into account
18 in connection with the proposed
19 development of the Parcel E?

20 Regardless of what else we do here
21 today, the Court has specifically
22 directed us to answer those three
23 questions.

24 Now on July 26th 2018 a meeting
25 was held among council for all the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

8

1 parties, town staff and meeting and the
2 following was agreed to in that
3 meeting.

4 Number 1, SDC Properties Inc.,
5 represented by Johnson and Davis is a
6 necessary party to the appeal and will
7 be entitled to be heard as such before
8 the BZA.

9 Number 2, the appeal will be given
10 a full rehearing in addition to
11 answering the court's questions.

12 And Number 3, the appellant will
13 present its case first followed by SDC
14 Properties Inc., and finally the Town.

15 All parties shall have 45 minutes --
16 or, excuse me, up to 45 minutes,
17 however, I've been encouraged to
18 explained that it's not mandatory that
19 the parties take all 45 minutes.

20 MR. WILLIAMS: Understood.

21 UNIDENTIFIED SPEAKER: Frowned
22 upon.

23 MR. FINGERHUT: The appellant will
24 be permitted rebuttal and any other
25 rebuttal will be at the discretion of

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

9

1 -- there will be no -- amongst you.

2 (Phonetic)

3 Have a motion to approve to the
4 agenda?

5 MR. CUTRER: Move to approve the
6 agenda.

7 MR. FINGERHUT: Is there a second?

8 UNIDENTIFIED SPEAKER: Second that
9 motion.

10 MR. FINGERHUT: All in favor?

11 THE BODY: I.

12 MR. FINGERHUT: Motion to approve
13 the minutes of the June 25th 2018
14 meeting.

15 MR. JOHNSON: Move for approval of
16 the minutes as written.

17 MR. FINGERHUT: Any discussion on
18 the minutes? All in favor say I.

19 THE BODY: I.

20 MR. FINGERHUT: Now, there's no
21 unfinished business on the agenda so
22 our new business is Appeal Number
23 16732016. Council.

24 MR. TAYLOR: Mr. Chairman, very
25 briefly, I am Tom Taylor. I believe

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

10

1 I've had the privilege of meeting most
2 of you but those of you who I've not,
3 welcome to the BZA and thank you for
4 your service on this board and for
5 being here today.

6 Mr. Chairman, just a couple of
7 very brief quick housekeeping matters
8 if you'd please, first.

9 The record that was forwarded to
10 the BZA for consideration, the large
11 package unbelievably did not contain
12 two things. I know y'all would find
13 that hard to believe but I want to make
14 sure the record is clear on appeal
15 first and foremost the December 2nd
16 2016 petition for rehearing was not
17 included in what was sent to you and
18 the January minutes of the January 23rd
19 2017 meeting when the rehearing on the
20 initial appeal was held and denied are
21 also not in the record --

22 MR. WILLIAMS: Reconsideration.

23 MR. TAYLOR: Reconsideration,
24 pardon me. I'm too used to being in
25 Circuit Court -- for reconsideration

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

- 11

1 and I would like to move or to hand up
2 to the clerk copies of both of those
3 documents so that they can be included
4 in the final version of this particular
5 hearing and the transcript that will
6 emanate from that.

7 MR. FINGERHUT: I have a question
8 but go ahead.

9 MR. TAYLOR: Yes, sir. And the
10 last thing, sir, I have handed to each
11 of you and have handed to opposing
12 counsel and the clerk a short
13 memorandum on subpoena and Town
14 response which I will probably address
15 in a little bit when I have the
16 opportunity but it -- basically it
17 outlines a subpoena that was issued on
18 August 1st at our request and the
19 Town's response to that and then as
20 part of our argument I will add in a
21 little bit of argumentation about that.
22 Those are just the three housekeeping
23 matters I wanted to put forth. Mr.
24 Chairman?

25 MR. FINGERHUT: Counsel, the only

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

12

1 thing that I would ask is that when we
2 met we discussed the visions and it was
3 pretty clear given the size of this
4 record that one of the things within
5 our rules which is no more than
6 four days before the hearing.

7 MR. TAYLOR: Yes, sir.

8 MR. FINGERHUT: Is -- do you
9 consider these matters crucial or
10 things that you can't supplement during
11 the hearing, itself?

12 MR. TAYLOR: No, sir.

13 MR. FINGERHUT: Since we would
14 enforce them against all the parties
15 here I would ask that you do it that
16 way instead and not give us more
17 reading.

18 MR. TAYLOR: Very good.

19 MR. FINGERHUT: Thank you.

20 MR. TAYLOR: Thank you. Mr.
21 Chairman, for the record --

22 MR. FINGERHUT: Yes.

23 MR. TAYLOR: -- Ms. Dixon did
24 refer to both of those in her memo.
25 They just simply were not made a part

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

13

1 of the record. Apparently I'm sure by
2 inadvertence and that's the only reason
3 why we wanted to put them in the record
4 today.

5 MR. FINGERHUT: Thank you,
6 counsel. Counsel?

7 MR. ALFORD: We have no objection
8 to the documents other than you'd have
9 to read them we don't object to them.

10 MR. JOHNSON: Same.

11 MR. FINGERHUT: Hearing no
12 objection from any of the parties and
13 given the brevity of the documents they
14 can come in as part of the record.

15 MR. TAYLOR: Thank you. I'll hand
16 them to the clerk, sir.

17 MR. FINGERHUT: Thank you.

18 MR. WILLIAMS: Good afternoon, Mr.
19 Chairman.

20 MR. FINGERHUT: Good afternoon.

21 MR. WILLIAMS: I'm Chester
22 Williams. Mr. Taylor's co-counsel here
23 and I appreciate y'all taking the time
24 to go back through this again. I know,
25 Mr. White, you weren't here at the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

14

1 meeting in November 2016, Mr. Walczak,
2 you weren't on the board at the time.
3 The other four of y'all heard this
4 appeal then.

5 So, for the record, Mr. Walczak,
6 Mr. White we're here on an appeal of
7 the determination letter that Nicole
8 Dixon sent to me as counsel for the
9 appellants dated August 23rd 2016.

10 In that letter Nicole said that
11 the proposed developments of the
12 Spinnaker Welcome Center -- on the
13 tract of land that's commonly referred
14 to here as Parcel E is permitted, as
15 long as it does not exceed -- and
16 allowed in the master plan and the
17 master plan for the waterside PUD --
18 permitted by the current LMO.

19 The four of y'all who were here at
20 the meeting last time may recall that
21 near the end of the meeting Ms. Dixon
22 did concede that no property owner
23 can't development the property as
24 provided for in the master plan because
25 of the expiration of a categorical

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

15

1 exemption they no longer have a right
2 to the property and Mr. Taylor will
3 address some of the issues -- Mr.
4 Coltrane in a little while.

5 MR. CUTRER: Mr. Chairman, if I
6 might, could I have direct a question
7 to Mr. Williams.

8 MR. FINGERHUT: Yes.

9 MR. CUTRER: Mr. Williams, this
10 question was asked and not answered in
11 the November 16th or November of 2016
12 hearing.

13 You represent Beachwalk Hotel and
14 Condominiums Association and the
15 Beachwalk Hilton Head, LLC. Both of
16 whom are owners of units in the
17 Beachwalk Hotel.

18 MR. WILLIAMS: Well, the owners
19 association doesn't own any of the
20 units. The association -- it's an
21 association of all the owners.

22 MR. CUTRER: But the claims do,
23 they apparently own either if not all,
24 many or most of these units and the
25 whole purpose of the hours that we

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

16

1 spent in 2016, the whole purpose of the
2 filing with the District Court and
3 remanding back to this BZA is to
4 prevent the development of this welcome
5 center on this property on Parcel E.

6 Here's my question, and this is
7 important to me, may or may not be
8 important to my fellow board members,
9 you are the -- or your clients are the
10 aggrieved party in this case. How are
11 they aggrieved? How will these parties
12 be injured if this property is
13 developed as proposed?

14 MR. WILLIAMS: Our clients are
15 owners of property that's located in
16 the waterside PUD and are such are
17 bound by all the terms of the waterside
18 PUD and all the LMO regulations that
19 govern PUD's, including the average
20 density regulations, including the open
21 space regulations, including the
22 impervious, pervious regulations.

23 In trying to figure out what our
24 clients can do with their property,
25 because sooner or later I think

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

17

1 everybody knows something's going to be
2 done with the Beachwalk Hotel. It's --
3 I can't tell you when but I suspect
4 sooner something will happen and at
5 that point it's important to understand
6 what the rules are.

7 Nicole's been through the rules
8 here with the proposed development, the
9 welcome center, and we think she got it
10 wrong, so we need to make sure that we
11 understand and protect our client's
12 interest with respect to what happens
13 in the future on the Beachwalk Hotel
14 property because it is all part and
15 parcel of the same PUD overlay.

16 MR. CUTRER: But the Beachwalk
17 Hotel property is not Parcel E.

18 MR. WILLIAMS: Correct.

19 MR. CUTRER: There are -- I assume
20 you and Mr. Taylor aren't working on a
21 pro bono basis so there've been
22 thousands of dollars of legal expenses
23 expended. The District Court has had
24 the case for a year. This body has
25 spent a number of hours plus we had the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

18

1 opportunity to read 1,098 pages
2 recently and surely there's more
3 involved here than just a citizen's
4 concern that every eye --
5 MR. WILLIAMS: I just explained,
6 we need to know what the rules are for
7 future actions with respect to other
8 properties that are in the same PUD
9 overlay, that is the Beachwalk Hotel,
10 and the only way to make sure that we
11 understand what the rules are is to
12 make sure that the Town staff has
13 applied the rules. We don't think
14 they've applied them correctly and let
15 me correct -- you said the goal of this
16 appeal was to prevent the development,
17 that's not correct.

18 The goal of this appeal is to make
19 sure that any development of Parcel E
20 is done in conformance with existing
21 LMO requirements.

22 MR. CUTRER: But your position is
23 what you've allocated if that, in fact,
24 is the case then there's no density
25 available with this Parcel E,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

19

1 therefore, it cannot be developed.

2 MR. WILLIAMS: We think that
3 follows from the application of the
4 reference of the LMO, yes.

5 MR. CUTRER: So I'm going to ask
6 you one more time and you can choose to
7 indicate or talk around it if you like
8 but how would your client be injured if
9 Parcel E is developed as proposed?

10 MR. WILLIAMS: If Parcel E is
11 developed as proposed the entire PD-2
12 Overlay District becomes nonconforming.
13 That has an adverse -- material adverse
14 affect on our clients. We're here to
15 make sure that the rules are properly
16 followed. You have oversight
17 jurisdiction on the actions of the Town
18 staff and that's why we're here.

19 MR. CUTRER: Okay.

20 MR. FINGERHUT: Mr. Williams,
21 please.

22 MR. WILLIAMS: Thank you.

23 Again, this is a -- I'd like to
24 think that, Mr. White, you and Mr.
25 Walczak read through all that thousand

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

20

1 or 1,100 pages of stuff so maybe you're
2 familiar with some of the stuff I'll go
3 over and I'll -- I have to agree, a lot
4 of that stuff really is not necessary
5 to the determination here. The Town
6 staff that was required to provide you
7 with all the documents on which the
8 decision appeal was rendered and I'm
9 not sure it was really necessary to
10 include all the permitting documents
11 but be that as it may it's all in there
12 but the waterside PUD was established
13 -- was originally permitted by the
14 Beaufort County Joint Planning
15 Commission in 1984 before the Town had
16 deregulation issues on those sorts of
17 matters. It was amended by the Town
18 most recently on -- in May of 1987 and
19 that amendment resulted in what
20 everybody commonly accepts what the
21 approved master plan is even though the
22 Town has been unable to locate a copy
23 of the master plan with that stamped
24 approval on it.

25 There are 15.1 acres in the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

21

1 waterside PUD.

2 The original approval -- excuse me
3 one second -- the approvals for the
4 county and then ultimately is revised
5 by the Town provided for 20 -- almost
6 22,000 square feet of office use. Over
7 36,000 square feet of retail use. 94
8 hotel rooms and 200 residential units.

9 When the Town was incorporated the
10 first LMO was adopted. It turns out
11 that those densities were far in excess
12 of what the Town permitted. It --
13 under the current code if someone had
14 come in to develop approvals at that
15 time and again Mr. Coltrane will
16 address some of the issues having to do
17 with categorical exemption and maybe --
18 Mr. Taylor, maybe this is a good time
19 to get Mr. Coltrane to offer his -- it
20 is important, to a large extent, you
21 understand the issues and the effect of
22 categorical exemption, so for -- I'll
23 turn things over to Mr. Taylor, for
24 just a moment.

25 MR. TAYLOR: Petitioners call as a

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

22

1 witness Mr. Curtis Coltrane, please,
2 Mr. Chairman.

3 MR. JOHNSON: Unless he's going to
4 testify to something different than
5 what he testified to that was contained
6 at length in the transcripts that are
7 before you I objects to his testimony.

8 MR. FINGERHUT: Counsel?

9 MR. TAYLOR: Your Honor, this is
10 rehearing, Your Honor -- Mr. Chairman,
11 as was decided and -- this is a
12 rehearing in toto.

13 While it's certainly appropriate
14 for this group to look at the former
15 transcript testimony it is actually
16 nothing but hearsay insofar as this
17 goes and it is important that we have I
18 believe a brief discussion which it
19 will be brief and certainly it is not
20 inappropriate in that --

21 MR. FINGERHUT: Thank you. I'll
22 overrule that objection. We'll hear
23 the witness on this.

24 MR. JOHNSON: Objection's noted
25 for the record?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

23

1 MR. FINGERHUT: Yes, indeed.

2 MR. CUTRER: May I ask a question
3 before we proceed?

4 MR. FINGERHUT: Certainly.

5 MR. CUTRER: We had a lengthy
6 discussion in the 2016 about the
7 category exemption -- categorical
8 exemption and how that went away in
9 2000 and my understanding, which may be
10 incorrect was, it no longer is
11 applicable, so could you explain to us,
12 before we get into this testimony, why
13 we need to go through this again if
14 it's no longer applicable?

15 MR. TAYLOR: Yes, sir. Because
16 for the very reason that you said and I
17 think, Mr. Cutrer, that this shows --
18 am I getting that right?

19 MR. CUTRER: Close enough. Call
20 me Jerry.

21 MR. TAYLOR: This shows a little
22 bit about the misunderstanding of --
23 some process because exactly what you
24 said is correct. It is no longer
25 applicable, which means that they may

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

24

1 not build, right now, the way they're
2 asking to build because they were
3 allowed a categorical exemption for
4 five years to do so and when they did
5 not move under that our argument is
6 that it is no longer valid and
7 therefore they have no right,
8 whatsoever, to build and argue that
9 they're entitled to build under the old
10 code provisions or to not be considered
11 -- a better way to put it is, to not be
12 considered under the current LMO which
13 is exactly what the Town staff says
14 they have the right to do is to build
15 but not be considered and controlled by
16 the current LMO provisions.

17 An understanding of the
18 categorical exemption and why the Town
19 adopted it and what it meant and what
20 rights they had and abandoned by not
21 moving forward I think is vitally
22 important to this Board, especially to
23 the two members who were not here
24 prior.

25 MR. ALFORD: Mr. Chairman. I'm

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

25

1 sorry. I would interpose an objection.

2 It's clearly not relevant. We

3 stipulate that the categorical

4 exemption is expired.

5 With respect to the conclusion

6 that Mr. Taylor draws thereafter which

7 is, well, if it's expired they can't do

8 it. I think that's the battleground

9 which really get to the question which

10 I think better suits -- however, it's

11 his case to put it up any way he wants.

12 If the Court -- I'm sorry, the

13 body would note my objection. It is --

14 it's irrelevant and it is a waste of

15 our resources but if he wants to put it

16 up and you want to let him there's no

17 objection.

18 MR. FINGERHUT: Thank you.

19 MR. TAYLOR: Mr. Chairman, I would

20 like to note for the record that we

21 couldn't even get opposing counsel to

22 agree to the two steps -- Judge Dukes

23 two steps prior to coming in here, so

24 certainly there's no been no consent

25 offered or turned down by the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

26

1 categorical exemption.

2 MR. FINGERHUT: I agree, counsel.

3 Your objection is noted but overruled.

4 This is -- looking at the document

5 filed by the Town it's clear that the

6 affect of the categorical exemption is

7 one of the issues in this case and as

8 you say and I do agree with this, it's

9 their 45 minutes, they can present it

10 any way they want.

11 MR. CUTRER: 41 minutes now.

12 MR. FINGERHUT: Counsel?

13 MR. TAYLOR: Mr. Chairman, I'd

14 like to call Mr. Coltrane. Have him

15 sworn, please.

16 CURTIS COLTRANE,

17 having been produced and first duly sworn as a

18 witness, testified as follows:

19 EXAMINATION

20 BY MR. TAYLOR:

21 Q Curtis, can you state your full name

22 for the record.

23 A For the record my name is Curtis Lee

24 Coltrane.

25 Q And Curtis, can you tell the members of

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

27

1 the BZA, please, what your background is insofar
2 as relationship with the Town especially during
3 the timeframe of 1990 through 2000.

4 A In June of 1989 I was appointed to
5 serve as the Town Attorney for Hilton Head
6 Island.

7 I served in that capacity until June of
8 2003 at which point I left to pursue other
9 things but during the period from '89 to the
10 middle of 2003 I served as Town Attorney.

11 Q And Curtis, you are a licensed lawyer
12 and have been for more than 30 years, correct?

13 A That is true.

14 Q Curtis, did you work with the Town
15 Council when they adopted the provisions
16 concerning what is now known as a categorical
17 exemption?

18 A I did.

19 Q Did you help draft that ordinance?

20 A I did.

21 Q Curtis, would you explain to the BZA
22 basically what the categorical exemption
23 ordinance was designed to do and how it
24 applied to developments?

25 MR. ALFORD: Interposing an

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

28

1 objection. The law is the law, it
2 speaks for itself with respect to --
3 and I have tremendous respect for Mr.
4 Coltrane -- but with respect to his
5 interpretation or his recollection of
6 the intent of the law is absolutely
7 irrelevant. The law says what it says
8 and that's why it's the law. We all
9 got to argue about what it meant after
10 at came in. (Phonetic)

11 MR. FINGERHUT: Counsel?

12 MR. TAYLOR: Mr. Chairman, all of
13 the provisions concerning the
14 categorical exemption have been taken
15 out of the code now so there is not a
16 categorical exemption provision for you
17 all to look at and interpret.

18 In addition, Mr. Coltrane is being
19 offered as basically an expert witness
20 to some extent because he worked with
21 the Town Council. He knew how this was
22 supposed to work and how it did work.
23 We would find -- we would argue that
24 the testimony would be entirely
25 relevant and as all testimony can be

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

29

1 considered by each council member to
2 the extent they choose to consider it.

3 MR. FINGERHUT: Thank you,
4 counsel. I overrule the objection and
5 will let it in.

6 MR. ALFORD: Thank you.

7 THE WITNESS: At the time that the
8 council considered the ordinance and
9 the procedures that became the
10 categorical exemption process there
11 were a number of permits that had been
12 issued on property on Hilton Head
13 Island that had been issued either by
14 Beaufort County or by the Town Council
15 under the first iteration of the
16 development standards organization.

17 The thought that drove the
18 creation of the ordinance was that the
19 council simply wished to get a handle
20 on what would actually be built in the
21 context of what it was trying to do
22 with respect to its decisions on
23 infrastructure for the Town, largely
24 traffic at the time, and so, the intent
25 of the council in looking at this was

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

30

1 to create a process that would allow
2 council to have some level of certainty
3 as to which of the older permits that
4 being pre-LMO permits would actually be
5 developed and which of them would not,
6 and so the framework that was developed
7 is that it was set out in the ordinance
8 and the procedures which is that permit
9 holders were given an opportunity to
10 bring their permits to the Town to
11 determine the validity of them and what
12 was allowable under them and the Town
13 would issue -- in every case that it
14 was done a categorical exemption that
15 had a life of five years and beyond
16 that. At the end of the five years the
17 landed owner was able to move forward
18 with the permit or not. If they didn't
19 move forward then as was stated in the
20 ordinance and as is stated in the
21 categorical exemption that was issued
22 with respect to the property at issue
23 here then when and if someone moved
24 forward to develop the property he did
25 so under the LMO that exists at the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

31

1 time that you actually move forward.

2 (Phonetic)

3 BY MR. TAYLOR:

4 Q Mr. Coltrane, referring to the document
5 you just mentioned, the Board of Zoning Appeals
6 has a copy in their packet but for the record
7 there was a letter apparently issued by Thomas
8 Grechco (phonetic) acting as the Chief of
9 Planning for the Town of Hilton Head Island on
10 March 3rd, 1995 to Robert L. Graves. Are you
11 familiar with that letter?

12 A I am.

13 Q All right. Have you reviewed it before
14 we came into this?

15 A Yes.

16 Q All right. And is that, in fact, what
17 would be termed in the vernacular, a categorical
18 exemption letter?

19 A Yes. It was a notification. The
20 applicant in this case had filed an application
21 for one, I suspect, through the offices of Mr.
22 Johnson and this was the Town's response to it.
23 The categorical exemption was granted, given a
24 life of five years beyond the date of it and --
25 as previously discussed.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

32

1 Q And, Mr. Coltrane, this was to be
2 applicable to what we now know as Parcel E,
3 correct?

4 MR. ALFORD: Objection, leading.

5 THE WITNESS: No, no. I think it
6 must have been -- it was a little
7 broader than that. It was -- it dealt
8 with several tracts, one of which --

9 BY MR. TAYLOR:

10 Q For several -- that was poorly worded.

11 A One of which was Parcel E.

12 Q That's what I -- excuse me.

13 Did the categorical exemption letter
14 dated March 3rd 1995 apply to Tract E and other
15 tracts that we are currently not talking about?

16 A Yes.

17 Q Okay. And by its own terms, did this
18 letter expire on March 3rd 2000?

19 A Yes and so stated on the final page.

20 Q Very good.

21 MR. TAYLOR: I don't have any
22 other questions for Mr. Coltrane.

23 MR. FINGERHUT: Counsel?

24 MR. JOHNSON: None, Mr. Chairman.

25 MR. ALFORD: No, sir.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

33

1 MR. FINGERHUT: Any questions from
2 the Town of Mr. Coltrane while he's --

3 MR. CUTRER: Sorry to be
4 asking another question but I've got to
5 understand this.

6 We have -- seems to me the real
7 issue is the PD-2 overlay or one of the
8 big -- was the PD-2 overlay created by
9 the categorical exemption or did it
10 exist prior to the categorical
11 exemption?

12 MR. COLTRANE: Standing here right
13 now I can't tell you exactly when the
14 PD-2 overlay was first adopted as a
15 part of the LMO.

16 The categorical exemption, though,
17 allowed the recipient of it to move
18 forward based on whatever prior
19 approval it had.

20 MR. CUTRER: Within a certain
21 period?

22 MR. COLTRANE: Within a certain
23 time period.

24 So irrespective of what the law
25 was on March 3rd 2005 the applicant in

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

34

1 this case was entitled to move forward
2 with its previous approval.

3 MR. CUTRER: So, with the
4 expiration March 3rd, a momentous day
5 because it's my birthday -- March 3rd
6 2000 the categorical exemption went
7 away and so the regulations are
8 constraints on this property within --
9 go back to what they were before the
10 categorical exemption with respect to
11 PD-2 and the then current LMO, is that
12 fair?

13 MR. COLTRANE: No. No, the way it
14 would work is that if the permit, the
15 previous permit wasn't executed by
16 March 3rd 2000, then any time after
17 that that the land owner wished to move
18 forward he would then move forward
19 under the terms of the LMO existing on
20 the date that he move forward.

21 MR. CUTRER: So why do I care
22 about -- as a BZA member, why do I care
23 about the categorical exemption and its
24 history?

25 MR. COLTRANE: Well our hearts --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

35

1 MR. WILLIAMS: May I -- I'll be
2 glad to address that.

3 MR. COLTRANE: -- suggest what may
4 or may not be important to you, it's --
5 I was asked to come here because I
6 think mainly for the point that
7 following the expiration of the
8 categorical exemption the property then
9 becomes bound by whatever the LMO is at
10 any point after that, you know, pegged
11 to the time that you move forward and
12 see to improve it or something.

13 MR. CUTRER: Okay.

14 MR. FINGERHUT: Any other
15 questions of Mr. Coltrane? I have one.

16 MR. COLTRANE: Okay.

17 MR. FINGERHUT: Is the -- when the
18 categorical exemption expires is there
19 any carrying over effect as a result of
20 it having been in place on a particular
21 property?

22 MR. COLTRANE: It's expired
23 without any further action having been
24 taken, meaning they haven't moved
25 forward with the development of a plan

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

36

1 approval or building permit then
2 whatever existed before that also
3 expired.

4 MR. FINGERHUT: So it's previous
5 existence would then have no effect on
6 what's happening today, is that
7 correct?

8 MR. COLTRANE: That was -- yes,
9 that is -- that was the intent in how
10 it was intended to work.

11 MR. FINGERHUT: Okay. Thank you.

12 MR. COLTRANE: Anything else? May
13 I be excused?

14 MR. TAYLOR: That was going to be
15 my question. Mr. Chairman, may he be
16 exposed?

17 MR. FINGERHUT: Absolutely. No
18 objection.

19 MR. TAYLOR: Thank you.

20 MR. WILLIAMS: One moment while
21 I -- Mr. Chairman, that's just for my
22 reference. Y'all have a copy of that
23 in your package.

24 Mr. Cutrer, your question, if I
25 may address it a little bit about the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

37

1 categorical exemption and the PD-2
2 overlay, the categorical exemption
3 letter for this particular project
4 vested the uses and densities that were
5 provided for in the previously approved
6 master plan.

7 Prior to the application for the
8 categorical exemption the structure
9 that is now Beachwalk Hotel had already
10 been built. It was commenced
11 immediately following the 1987
12 amendment to the master plan by the
13 Town's planning commission.

14 So that left what's referred to as
15 Parcel F, a 10.735-acre tract, Parcel
16 D, which is the right-of-way area
17 .697-acre tract and Parcel E, which is
18 1.068 acre which we're dealing with
19 today. The Beachwalk Hotel is
20 constructed on what's referred to as
21 Parcel A and C 2.6-acre tract, so the
22 categorical exemption -- categorical
23 exemption was designed to allow people
24 to continue to rely on previously
25 issued permits.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

38

1 MR. CUTRER: Up to a certain
2 point.

3 MR. WILLIAMS: Up to a certain
4 point, correct, so what's now the
5 Spinnaker Development, Spinnaker, that
6 was built in the line on the
7 categorical exemption and as allowed
8 under the waterside PUD Master Plan.

9 Nothing ever transpired on Parcel
10 E and the expiration date is important
11 because -- and again, this is a
12 document that's in your package. The
13 current owner of the property, Mr.
14 Johnson's client, acquired the property
15 by way of a deed recorded on July --
16 recorded on July 20th 1999 prior to the
17 expiration of the categorical
18 exemption, so when Mr. Johnson's client
19 SDC Properties acquired the property at
20 that time they could have built all
21 those huge numbers of density that were
22 referred to in the categorical
23 exemption letter. Tom, do you have a
24 copy?

25 MR. TAYLOR: I do.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

39

1 MR. CUTRER: Well, they didn't so
2 that's irrelevant.

3 MR. WILLIAMS: Right. But this is
4 goes to one of Mr. Johnson's points,
5 that if you apply all the requirements
6 of the LMO that there's no density
7 left, then that's a taking, it's simply
8 not because Mr. Johnson's client had
9 the ability to develop that property
10 with a categorical exemption at the
11 time it acquired the property and it
12 chose not to. That is one of the main
13 reasons why it's important to
14 understand what the effect the
15 expiration of the categorical exemption
16 is.

17 MR. CUTRER: It just seems to me,
18 Mr. Williams, that we would all be
19 better served if we focused on what the
20 requirements are in place today.

21 MR. WILLIAMS: I agree and --

22 MR. CUTRER: -- and moved on.

23 MR. WILLIAMS: But for Mr. White
24 and Mr. Walczak not being here for the
25 last meeting I'd be more than happy to

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

40

1 do that and if Mr. White and Mr.
2 Walczak tell me, Chet, we understand
3 all that. Let's move onto the
4 questions.

5 MR. WHITE: If that's what you're
6 looking for then let me give it to you.

7 MR. WILLIAMS: Right. So then
8 let's do this. Let's move to the order
9 from Judge Dukes and the responses.

10 Page 27 we have the hearing, first
11 hearing back in November 2016.
12 Petition for reconsideration denied in
13 January 2017 appealed in Circuit Court.
14 April of this year the Circuit Court's
15 order comes down sending -- remanding
16 it back to y'all.

17 Clearly, Judge Dukes didn't
18 understand the rationale for the
19 board's decision and so he wants me to
20 address three questions, so the first
21 question; Is Parcel E in a PD-2 Overlay
22 District established by the LMO?

23 We argued in the first hearing
24 that it was. Mr. Johnson and Nicole
25 Dixon -- both admitted that it was, so

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

41

1 I don't think there's any question that
2 the property is in a PUD Overlay
3 District.

4 Number 2; If Parcel E is in a PD-2
5 Overlay District, is Parcel E subject
6 to the LMO's PD-2 Overlay District
7 regulations?

8 We think that's readily evident as
9 was Nicole and Mr. Johnson, so, the
10 facts aren't in dispute here.

11 The only thing that's in dispute
12 is what the law is or more accurately
13 the interpretation of an unambiguous
14 provision of the LMO should be in this
15 application for this particular piece
16 of property.

17 The third question is a little
18 more difficult but we think the answer
19 follows easily for the prior two
20 questions.

21 If Parcel E is subject to the
22 LMO's PD-2 Overlay District, what
23 effect does that have on the
24 development of Parcel E, and must the
25 existing development on the other

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

42

1 parcels within the PD-2 Overlay
2 District be taken into account in
3 connection with any proposed
4 development of Parcel E?
5 Our position is the code says if
6 you're in a PD-2 Overlay District, the
7 PD-2 overlay district's off. The
8 regulations always control the base
9 zoning regulation and Nicole, in her
10 memo to you says, yes, it's in a PD-2
11 Overlay District. Yes, the regulations
12 for a PD-2 Overlay District shall apply
13 but not all of them and we're sort of
14 baffled by that position because you
15 see nothing, at all, no evidence, no
16 support for that position in the code.
17 The code doesn't carve out any
18 exceptions for the applicability of the
19 PD-2 Overlay District and that's the
20 crux of this matter here. Do the
21 average density regulations apply in
22 figuring out the development potential
23 of Parcel E or do they not? (Phonetic)
24 And I don't know that there's much
25 else to say on that point. I think I

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

43

1 pretty well went over it in my
2 memorandum on the demand for you.

3 If you have any questions about
4 any of those I'll be glad to try and
5 address those.

6 We think there's several different
7 reasons that council is wrong, Town
8 staff is wrong on that particular issue
9 and position.

10 LMO Section 16-3-1 -- says; land
11 is located in the Overlay District the
12 LMO's regulations regarding development
13 of building district shall apply in
14 addition to the regulations -- in the
15 development -- (Phonetic)

16 The Town would have you believe
17 that, well, that's not always the case
18 and they have -- I mean Nicole had
19 couched it in terms of the staff
20 believes that this provision is
21 inapplicable. It's applicable only to
22 new PD-2 Overlay District. The code
23 doesn't say that anywhere and that's
24 a -- it's a tortured interpretation of
25 the provisions of the code in order to

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

44

1 get to the point that the Town staff
2 apparently want to get to.

3 The existing development that's in
4 the PD-2 District is easy to determine,
5 198 residential, five thousand --
6 5,262 square feet of commercial space,
7 91 hotel groups. When you add all that
8 up and you average that over 15 acres,
9 15.1 acres you're at the point where
10 you require more than 15 point acres --
11 15.1 acres to support to justify that
12 development. The developers have their
13 cake and now they want to eat it, too.

14 Like I said, it seems that the
15 staff is interpreting this particular
16 provision but it seems like they are
17 doing it out of the blue.

18 Mr. Taylor, through you, Mr.
19 Fingerhut, had a subpoena issued to
20 Teri Lewis. I'd like you to address
21 those issues right now if you would.

22 MR. TAYLOR: Mr. Chairman, call
23 Teri Lewis, very briefly.

24 TERI LEWIS,
25 having been produced and first duly sworn as a

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

45

1 witness, testified as follows:

2 EXAMINATION

3 BY MR. TAYLOR:

4 Q Teri, can you state your full name for
5 the record.

6 A Sure. Teresa Lewis.

7 Q All right. And what do you do, ma'am?

8 A I am the Land Management Ordinance
9 official for the Town of Hilton Head Island.

10 Q And have you held that role during the
11 entirety of the process which we are here about
12 today?

13 A I have.

14 Q All right. Ms. Lewis, I'll show you
15 what has been previously marked and placed in
16 this -- it's previously been mark and handed up
17 as a memorandum.

18 It's called a subpoena to Teri Lewis.

19 Do you see that in front of you?

20 A I do.

21 Q Okay. It was issued or about August
22 the 3rd. Did you receive that at around that
23 timeframe?

24 A I did.

25 Q All right. And Ms. Lewis, did you read

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

46

1 it?

2 A I did.

3 Q All right. As part of your job for the
4 Town of Hilton Head, did you attempt to respond
5 to it?

6 A I did.

7 Q Okay. For the record, Mr. Chairman,
8 the subpoena required the product of the
9 following documents;

10 Any and all written interpretations of
11 or determinations under the land management
12 ordinance or other decisions of the LMO official
13 or her designee in which the LMO official or her
14 designee decided that one or more sections or
15 provisions of the LMO applied or apply only
16 prospectively to new proposed development or
17 that one or more sections or provisions of the
18 LMO did not apply or do not apply to a
19 development that was previously approved under
20 prior regulations and partially constructed.

21 Did you endeavor to search and see if
22 there were any documents in the Town's staff's
23 possession, custody or control that matched that
24 request?

25 A I did.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

47

1 Q Were there any?

2 A I did not find any.

3 Q All right. Secondly, it required the

4 production of any and all written

5 interpretations of or determinations under the

6 LMO or other decisions of the LMO official or

7 her designees to which the LMO official or her

8 designee decided that one or more provisions of

9 LMO Section 16-3-106G did not or do not apply to

10 a tract or parcel of land located in a PD-2

11 Overlay District.

12 Did you attempt to find whether there

13 were any documents that would support that

14 position had been taken previously?

15 A I did.

16 Q And did you find any?

17 A Did not.

18 Q All right. And then it provided that

19 you shall produce any and all written

20 interpretations of or determinations under the

21 LMO or other decisions of the LMO official or

22 her designees in which the LMO official or her

23 designee decided that the provisions of an LMO

24 Overlay District did not or do not control over

25 the provisions of the LMO base zoning district.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

48

1 Did you try to determine whether that
2 kind of document had ever been produced before?

3 A I did.

4 Q Okay. And did you find any?

5 A I did not.

6 Q All right. Ms. Lewis, is it a fair
7 summary from that subpoena at issue and the
8 Town's response, which was that there are no
9 documents available, to say that there has, as
10 far as you can tell as the LMO official, never
11 been an interpretation of this type of
12 categorical determination -- terribly worded
13 question -- would it be fair to say that after
14 having worked, you cannot find any former
15 decisions that are similar to the interpretation
16 being made in this case?

17 A For projects other than this one?

18 Q For projects other than this one, yes,
19 ma'am.

20 A Then yes, that's a correct statement.

21 Q Never before as far as the staff can
22 tell had that determination been made?

23 A As far as I can tell.

24 Q Ms. Lewis what happens to a developed
25 parcel when the LMO is amended in a manner and

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

49

1 that the parcel no longer complies with it -- in
2 a manner such that the parcel no longer complies
3 with it?

4 A Potentially it becomes a legally -- has
5 legal nonconformity.

6 Q It becomes nonconforming if it's
7 already there or has already been approved,
8 correct?

9 A Yes.

10 Q Okay.

11 MR. TAYLOR: Nothing further for
12 this witness.

13 MR. FINGERHUT: Any questions for
14 Ms. Lewis?

15 MR. ALFORD: No, sir.

16 MR. JOHNSON: No.

17 MR. FINGERHUT: Any questions from
18 the Board for Ms. Lewis? Sorry. No.

19 Okay. Thank you.

20 MR. TAYLOR: Mr. Chairman, I'd
21 like to move that the subpoena be put
22 into evidence. I'm not sure whether
23 your ruling earlier applied to it or
24 not.

25 MR. FINGERHUT: It's part of the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

50

1 record, isn't it?

2 MR. WILLIAMS: Out of an abundance
3 of caution we move that all the
4 information previously applies -- and
5 Nicole's memo also be included in the
6 record here because I don't think
7 anybody has moved --

8 MR. FINGERHUT: Counsel? I think
9 counsel has agreed to that already.

10 MR. ALFORD: I don't know what
11 that meant but I'll say this, I just
12 want to be clear that the response to
13 the subpoena -- maybe I should recall
14 Ms. Lewis -- the response to the
15 subpoena was we don't have anything
16 that we haven't already put in this
17 already for the -- record.

18 Not -- in other words, everything
19 we got is in the record. It wasn't
20 that it was not responsive. What's
21 responsive is already existing in the
22 record before you.

23 MR. FINGERHUT: That's not the
24 testimony that I heard but it doesn't
25 make sense. Counsel's representation

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

51

1 that --

2 MR. ALFORD: No. I think what she
3 said is, I don't have anything else
4 other than about this property, is
5 that --

6 MR. FINGERHUT: That isn't what --

7 MR. CUTRER: That's not what I
8 heard.

9 MR. FINGERHUT: Yeah, that's not
10 what I heard, either. I heard there
11 isn't a -- having to do with anything
12 other than this there isn't anything
13 else so maybe what you're saying --

14 MR. CUTRER: Call her back and
15 have her testify.

16 MR. ALFORD: I'm happy to recall
17 her at this point.

18 MR. FINGERHUT: Sure. That's
19 fine.

20 MR. ALFORD: Ms. Lewis, I'm sorry.

21 EXAMINATION

22 BY MR. ALFORD:

23 Q Ms. Lewis, you got a subpoena.

24 A Okay.

25 Q That asked you questions about similar

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

52

1 circumstances?

2 A Yes.

3 Q Okay. You didn't have anything dealing
4 with it?

5 A That's correct.

6 Q Anything that you have dealing with
7 this question is in this record?

8 A That's correct. And that was my
9 response back I was just looking at the e-mails
10 that I sent where it said everything's included
11 in the record. There wasn't anything else other
12 than this and that's why I asked for
13 clarification if we meant other than this
14 project.

15 MR. FINGERHUT: Thank you.

16 MR. ALFORD: I'm sorry if I
17 inartfully expressed that. That's what
18 I wanted to say.

19 MR. TAYLOR: Mr. Chairman, to
20 clean that up, please, sir, I think I
21 -- just one question.

22 EXAMINATION

23 BY MR. TAYLOR:

24 Q Ms. Lewis, you were looking for an
25 e-mail. I have it here. It appears and I think

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

53

1 you can look at it with me. Mr. Hulbert wrote
2 you and said, can you tell me if you have
3 located any documents related to Mr. Taylor's
4 subpoena?

5 And you wrote back and said, Brian, I
6 have consulted with Nicole and we have not
7 located any additional documents. The decisions
8 that were reached were as a result of documents
9 that already exist as part of the record.

10 A That's correct.

11 Q That's what you were looking for?

12 A That is right.

13 Q And a summation of that is that you
14 were unable to find a document ever produced by
15 the Town staff in any other matter where a
16 decision of this stature was made, only the ones
17 that relate to this particular case?

18 A That's correct.

19 MR. TAYLOR: Nothing further.

20 MR. FINGERHUT: Thank you.

21 Please, Mr. Cutrer.

22 MR. WILLIAMS: I'd rather answer
23 your questions --

24 MR. CUTRER: It's your time and
25 you use it how you want but here's my

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

54

1 question, Attachment G, which is your
2 memorandum on remand --

3 MR. WILLIAMS: Okay.

4 MR. CUTRER: -- page 7 says the
5 following -- and you just said it a
6 little while ago -- the applicable LMO
7 section requires that the average
8 density for the PD-2 Overlay District
9 shall not exceed the maximum density
10 permitted in the base zoning district.

11 For Parcel E the base zoning district
12 is the resort development district.

13 MR. WILLIAMS: Correct.

14 MR. CUTRER: The next paragraph
15 goes on and identifies five -- pardon
16 me, well, five parcels which make up
17 four developments. Parcel D is the
18 Waterside Drive right-of-way.

19 MR. WILLIAMS: Right.

20 MR. CUTRER: Parcel A and C is the
21 Beachwalk Hotel.

22 MR. WILLIAMS: Correct.

23 MR. CUTRER: F is the big
24 Spinnaker development, which includes
25 residential and 5,200 and some odd

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

55

1 square feet of commercial I guess it is
2 and then E is the subject parcel.

3 MR. WILLIAMS: Correct.

4 MR. CUTRER: What I hope you'll
5 get to either now or some point is show
6 this body your interpretation of how
7 this whole development pencils out from
8 the development standpoint and how it
9 either does or does not comply with the
10 resort development district which you
11 say is the governing document.

12 MR. WILLIAMS: On the next page,
13 on the bottom of that page continuing
14 onto the next page, the Town's records
15 show that over the years of development
16 of the Spinnaker project building
17 permits were issued for 198 dwelling
18 units.

19 In addition, one building permit
20 was issued for 5,262 square feet of
21 nonresidential, commercial space.

22 MR. CUTRER: That would be Parcel
23 F.

24 MR. WILLIAMS: Correct. So under
25 the current RD District regulations

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

56

1 which allow a maximum of 16 dwelling
2 units per acre the LMO now requires
3 12.375 acres to support the existing
4 198 dwelling units of the Spinnaker
5 project and considering the RD
6 district's 8,000 square feet per net
7 acre cap for nonresidential it requires
8 0.658 acres to support the existing
9 nonresidential development as part of
10 the Spinnaker project, therefore, under
11 the current LMO regulations the
12 Spinnaker project's existing density
13 would take about 13.033-acres of land
14 in the RD District, okay?

15 MR. CUTRER: Okay.

16 MR. WILLIAMS: All right. The
17 Beachwalk Hotel was originally
18 developed with 91 hotels.

19 MR. CUTRER: That's Parcels A and
20 C.

21 MR. WILLIAMS: That's correct.
22 Under the current LMO regulations the
23 RD District allows up to 35 hotel rooms
24 per net acre so the LMO now requires
25 2.6 acres to support the existing 91

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

57

1 hotels that are on the Beachwalk Hotel
2 tract, so we're up to 13.033 plus 2.6,
3 which is 15.633, which is more than
4 15.1.

5 MR. CUTRER: How does the Parcel D
6 right-of-way factor into that?

7 MR. WILLIAMS: There's no density
8 assigned to the Parcel D right-of-way
9 but that's included in the 15.1 acres,
10 so the density there is already used
11 up. (Phonetic)

12 MR. CUTRER: Okay.

13 MR. WILLIAMS: The point being
14 that because SDC Properties didn't
15 develop Parcel E as they could have
16 prior to the expiration of the
17 categorical exemption on March 3, 2000
18 they now have to comply with the
19 current code requirements, the average
20 density requirements of PD-2 are
21 applicable to all PD-2 districts and
22 already exceed the density, the average
23 density of the base -- zoning district.

24 MR. CUTRER: Thank you.

25 MR. WILLIAMS: Does that make

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

58

1 sense?

2 Getting back to, real quick, the
3 subpoena, what we were looking for was
4 whether or not the Town had taken a
5 similar position in any other
6 circumstance and the answer is, no, we
7 haven't.

8 So I believe this is one-off here
9 and we don't know what's driving this
10 particular intersection.

11 Teri, in response to Tom's last
12 question Teri said, well, when the code
13 changes of a previously development
14 parcel that no longer complies with the
15 current code requirement it's
16 nonconforming. Happens all the time.
17 Well, not all the time but it happens
18 not infrequently. That's exactly what
19 has happened here.

20 In fact, if you read the
21 categorical exemption letter it
22 specifically says, no, if you develop
23 everything out here under -- as you can
24 under the categorical exemption then it
25 may be nonconforming under the LMO.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

59

1 That's exactly what we ended up with, a
2 nonconforming situation and allowing
3 any development -- and keep in mind, I
4 certainly want the Town staff to check
5 my figures and the way you do that is
6 to go back and review this for
7 conformance with the PD-2 requirements
8 but if you have a nonconforming PD-2
9 overlay because it already exceeds the
10 average density for base zoning
11 district and you allow more development
12 there then you're violating the Town
13 code provisions on increasing the scope
14 of nonconforming and I don't think it
15 can be permitted and it's important
16 that we understand what the rules are
17 here and how we go about planning for
18 the future. We -- sooner or later all
19 this area's going to be redeveloped.
20 Some people might argue that Beachwalk
21 Hotel -- development.

22 At some point I would suggest that
23 Spinnaker be redeveloped and it's
24 important to understand what the rules
25 and how they apply because certainly

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

60

1 the code will change multiple times in
2 the future and you've got to play by
3 the rules that are in effect at the
4 time you file your application.

5 I think we've covered most
6 everything that we see is the issues
7 here. It's a question of
8 interpretation and -- package, City of
9 Myrtle Beach against -- Corporation.
10 The South Carolina Courts have
11 consistently held that when construing
12 a statute its words must be given their
13 plain and ordinary meaning without --
14 subtle or enforce construction to limit
15 or expand the statute's operations.

16 It seems that us at the Town staff
17 is interpreting the average density
18 provision in a manner that limits it so
19 it doesn't apply to this particular
20 PD-2 development.

21 What other PD-2 developments does
22 it apply to? Are there any others? We
23 don't know the answer to that. Town
24 staff has never addressed that issue,
25 apparently, and there's nothing, at

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

61

1 all, in the code that would lead anyone
2 to believe that there's any sort of
3 carve out for previously existing
4 substantially completed PD-2
5 developments that exempts them from
6 compliance with the average
7 density requirements.

8 This is nothing but a -- phase of
9 development of the PD-2 and,
10 unfortunately, it's all been used --
11 and unfortunately SDC Properties
12 allowed their rights to develop the
13 property lapse and they're now in a
14 position where they have to comply with
15 the current code requirements.

16 Questions? (Phonetic)

17 MR. FINGERHUT: Any questions for
18 Mr. Williams? Thank you.

19 MR. WILLIAMS: Thank you.

20 MR. FINGERHUT: Yes, sir.

21 MR. JOHNSON: Good afternoon, Mr.
22 Chairman, members of the Board.

23 My name is Barry Johnson. I'm
24 from the Bluffton firm of Johnson and
25 Davis but as was eluded to by Mr.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

62

1 Coltrane I've had an intensive role in
2 legal matters affected the Town of
3 Hilton Head Island since about the time
4 Town of Hilton Head was created
5 including the prior categorical
6 exemption process that the subject
7 property went through.

8 I'm going to get back to the
9 answer that Mr. Coltrane gave you to
10 your question, Mr. Cutrer, but I'd like
11 to do a couple of other things, first.

12 First thing I want to do is to
13 remind us that we're here for a
14 rehearing as well as to answer three
15 questions from Judge Dukes.

16 In the component of what brings us
17 here today that has to do with the
18 rehearing I just want to confirm with
19 the chair and the board that you have
20 the opportunity to affirm the appeals
21 from determination of the LMO official
22 or to modify it or to reverse it in
23 addition to answering Judge Duke's
24 three questions and when I get through
25 speaking you may find that you can

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

63

1 exercise appropriately either the
2 option to affirm the LMO official or
3 the option to modify her decision and
4 be consistent with the facts and the
5 law as I expect to lay them out for
6 you.

7 So, with that understood I'm not
8 going to waste any time on the first
9 two of Judge Duke's questions.

10 I've indicated at the last
11 hearing, in essence, answers to those
12 two questions were yes.

13 So, we're going to focus on the
14 third question and as was evident
15 through discussion about the subpoena
16 we're dealing with a novel situation
17 here. It's an issue for Town staff,
18 for you and I suspect for all the
19 lawyers first impression and as Mr.
20 Williams responded to questions nearing
21 the end of his presentation to question
22 the interpretation here.

23 So, I think that that issue, the
24 question of interpretation can lend
25 support to the idea that the LMO

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

64

1 official acted properly within her
2 authority in making a determination
3 that required her to make a
4 interpretation of the LMO and
5 apparently counsel on the other side
6 agrees that it's a question of
7 interpretation even though it is a
8 novel question of the first impression.

9 Now, I don't know that everybody's
10 been out there but I wanted to -- I
11 don't know how to work this thing
12 necessarily there.

13 MR. CUTRER: Just like that.

14 MR. JOHNSON: Just that easy. All
15 right. There's some glare up there on
16 that board but there's a parking lot
17 kind of in the center here. That's the
18 empty parking lot. The long building
19 that runs up and down across here is
20 the Beachwalk property and just for
21 your reference I believe the parking
22 lot over here to my left is a parking
23 lot around Aunt Chiladas restaurant and
24 this wooded area that is right up in
25 here is the subject property, Parcel E,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

65

1 and then there's a similar view of --
2 taken from kind of above the Aunt
3 Chiladas property with subject property
4 over here and the Beachwalk and these
5 green top buildings back here are the
6 Waterside by Spinnaker properties and
7 this is a more straight on view of what
8 it looks like from I think from the
9 edge of the -- my client's property
10 looking over at Beachwalk.

11 That's the circumstance on the
12 ground that it looks like.

13 As I have indicated in my filing
14 in the remand memorandum I take no
15 issue with the staff report of
16 August 1st by Ms. Lewis and agree with
17 it and I think that's an appropriate
18 basis on which you can affirm her
19 decision and I agree with the thrust of
20 Mr. Cutrer's question that the
21 appellants are not aggrieved parties to
22 whom any relief can be granted and I
23 won't go into this in detail but this
24 principal has been long discussed in
25 the legal circles around here going

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

66

1 back to cases related to the
2 development of Harbortown that in the
3 absence of clear restrictions and
4 covenants, plats or code statute courts
5 must interpret and I submit you
6 standing in the shoes of a court as an
7 interpretive body must interpret land
8 restrictions, land use restrictions in
9 favor of the freer less restricted use
10 of the property.

11 We can cite cases with that but
12 it's a well understood principal of
13 law.

14 Now, I'd like to get my focus on
15 Mr. Cutrer's question related to Judge
16 Duke's question, Number 3, and I think
17 you may find this is related to my
18 suggestion that upon this discussion
19 you might be able to make a decision
20 today that either affirms the decision
21 of the LMO official, the determination
22 of the LMO official or modifies it and
23 to that end I want to tell you that Mr.
24 Williams in his remand memorandum and
25 in his discussion today in answer to

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

67

1 Mr. Cutrer's question talked about the
2 averaging of the density in the balance
3 of the project and he based that
4 analysis on the calculation of how many
5 other units of residential and how many
6 of hotel and how many of commercial or
7 nonresidential and he gave you the
8 numbers and I don't have any reason to
9 disagree with the numbers. My
10 challenge has to do with his formula to
11 average density that's my challenge,
12 and I started with the proposition that
13 nowhere in the LMO do I find a
14 definition of average density.

15 But I do believe that the LMO
16 provides clear assistance in
17 determining what it is you count in
18 your formula when you average density
19 and this I think is helpful to assist
20 Mr. Williams in getting an answer to
21 his questions of what are the rules and
22 regulations and I submit this rule and
23 regulation is right here in the LMO.
24 It is found in Section 16-10-102. I
25 don't know if I can get both of these

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

68

1 up here. I've kind of overlaid them a
2 little bit and I just pulled this page
3 out of the LMO copy and it is 16-10-102
4 Sub Capital B, Density, Sub 1 Density.

5 And it might can be zoomed in on
6 where you can read it. It says -- I'll
7 let her address that -- this says, and
8 I'm quoting, "The measurement of
9 density of the development of a parcel
10 of land calculated by dividing total
11 number of dwelling units by the net
12 acreage of the parcel for residential
13 development."

14 Then it goes onto say "by dividing
15 the total number of guest rooms by the
16 net acreage of the parcel for hotel
17 development and by dividing the total
18 number of square feet of gross floor
19 area by the net acreage of the parcel
20 for other nonresidential development."

21 "In mixed use developments", in
22 this PUD, Waterside PUD is a mixed use
23 development, "acreage allocated to
24 residential use shall not be used to
25 calculate nonresidential density.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

69

1 An acreage allocated for
2 nonresidential uses shall not be used
3 to calculate other nonresidential
4 density.

5 An acreage used for other
6 nonresidential uses shall not be used
7 to calculate hotel density."

8 I put the rest in to finish
9 quoting the section but it's not
10 material to this discussion.

11 It is clear that under this
12 section if you're trying to figure out
13 the average commercial density of the
14 Waterside PUD the most you can take
15 into account is the 5,262 square feet
16 in which -- for which the Town issued a
17 building permit many years ago within
18 the PUD.

19 So where does that take us? I
20 would submit if you apply that LMO
21 section 16-10-102B1, the application of
22 that rule to determine density requires
23 you to average only, at most, and I'm
24 not sure that's even mandated by that
25 statute because it talks about you

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

70

1 don't use other nonresidential square
2 footage to calculate another one, the
3 most you could deal with is 5,262 feet
4 as existing density.

5 All right. In the RD District,
6 which is the underlying base distribute
7 here, in LMO Section 16-3-105L, capital
8 L, within the RD District an office use
9 is allowed as a by right use. Other
10 office type uses are allowed. By right
11 uses. (Phonetic)

12 Subject to this limitation the
13 maximum density for a net acre for
14 nonresidential is 8,000 square feet
15 gross floor area.

16 LMO Section 16-10-102B2 right here
17 defines gross floor area as "The area
18 within the inside perimeter of the
19 exterior walls of a building or other
20 structure with no deductions for car --
21 stairs, closets, thickness of walls,
22 columns or other features exclusive of
23 areas upon an unobstructed to the sky.
24 Unless otherwise expressly provided,
25 gross floor area is measured in square

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

71

1 feet."

2 In the record before you -- this
3 is more of a background -- and I'm
4 talking about the roughly 1,100 pages
5 there's something called Attachment H
6 and these did not get Bates numbers so
7 -- but they're marked, looks like, like
8 up at the top, I'll put it on the
9 screen. That's the Attachment H. It
10 has a number of pages. This is one of
11 the latter pages of Attachment H and
12 this is what Attachment H is and I put
13 this up to reference the fact that in
14 1987 there was a consideration by the
15 Town of an application for conditional
16 use and special exemption.

17 The background is -- and I was
18 involved in it -- a slice of -- slices
19 of land were exchanged between the
20 Waterside PUD and behind the Aunt
21 Chiladas that had the effect of
22 enlarging the available land on which a
23 hotel could be built. That hotel got
24 built. It is now called Beachwalk and
25 it increased the available density for

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

72

1 that hotel from 50 units to 94 units.

2 And the decision that's outlined
3 in the rest of Attachment H to your
4 record required corresponding reduction
5 of -- densities.

6 There's a letter from Mr. Grechco
7 who wrote my client, Mr. Graves, the
8 note of categorical exemption
9 certification related to this
10 Attachment H in which he said, what you
11 got left is what's shown on here and
12 you'll have -- you'll see PUD has
13 approved in this column, has proposed
14 in this column with the little
15 handwritten note approved on a date,
16 looks like May 6th of '87 is the date
17 of that planning commission meeting
18 where that was approved.

19 Now, the numbers there -- if you
20 can zoom in just a little more so you
21 can see those small numbers better but
22 I'm going to tell you what they say --
23 from this table the PUD's commercial
24 office density was reduced from 36,000
25 square feet to 21,913 square feet but

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT.

73

1 look at the next column in each of
2 those categories, the one that just is
3 entitled density. That did not change,
4 15,652 square feet per acre is -- was
5 the standard before and after that
6 decision.

7 The next category,
8 Commercial/Retail previously had been
9 approved for 52,000 square feet and
10 that was reduced to 36,279 square feet,
11 but again, the density per acre did not
12 change for that category. It remained
13 at 12,093 square feet.

14 All right. We understood in the
15 language of today's LMO for RD District
16 purposes that Commercial/Office and
17 Commercial/Retail would together make
18 up what is now called nonresidential.

19 I submit to you with density of
20 7,500 square feet, which is what has
21 been approved by the LMO official and
22 the Town building -- the Town staff, my
23 client's building on his one point -- a
24 little over one acre .068 acres,
25 something like that is, A, less than

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

74

1 the 8,000 square feet allowed under the
2 RD District, and B, it is considerably
3 less than the densities allowed under
4 the original plan which you could say
5 might have been either 21,913 or 36,279
6 together, 27,355 square feet.

7 We believe, very strongly, that
8 you cannot -- under the code, under
9 Section 16-10-102B1 consider anything
10 more than the other density elsewhere
11 in the PUD and if you do that, we're in
12 compliance with the code regardless of
13 the interpretation of whether --
14 whatever's left, if anything, of the
15 PD-2 Overlay District applies
16 regardless of where solely RD District
17 we comply by right with both of them
18 even as adjusted because of 16-10-102
19 we -- and the related controls for
20 gross floor area in the RD District
21 section as cited here.

22 I think that's a way that you can
23 deal with this and be operating within
24 the code and that can be a way you
25 could do it as a modification of the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

75

1 official's determination.

2 And I want to address something
3 that Mr. Williams mentioned.

4 He brought up the issue of our
5 prior representation. We've made it to
6 the Court, we made it to you,
7 previously, and we continue to believe
8 it.

9 If you accept his interpretation
10 of the zoning law, the zoning rules and
11 regulations we wind up with an
12 unbuildable piece of property.

13 The question for you, sitting as
14 the interpretive Board for the Town's
15 LMO, what do you think about that?

16 And to help you think about that I
17 want to give you some citations to
18 several South Carolina cases, one's a
19 Supreme Court, two Court of Appeals and
20 one U.S. Supreme Court case. There's
21 lots of others I could give you and it
22 goes like this.

23 The case of Byrd versus the City
24 of North Augusta, 1974, South Carolina
25 Supreme Court considered an appeal from

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

76

1 a Circuit Court decision made by the
2 Honorable Julius B. Ness Junior,
3 Circuit Judge, sitting in Aiken County,
4 Judge Ness became the Chief Justice of
5 South Carolina Supreme Court -- for
6 many years and in this case South
7 Carolina Supreme Court said the zoning
8 power must be exercised as reasonably
9 and not arbitrarily. The zoning
10 regulation is legal or valid only when
11 it is reasonable. A quote in the
12 holding of the trial judge which they
13 upheld "It appears to this court that
14 under the facts in this case the
15 rezoning of this property from
16 commercial to residential use is
17 unreasonable and arbitrary and results
18 in a deprivation of plaintiff's
19 property rights and should be declared
20 invalid."
21 And then the Supreme Court says,
22 'It is obvious to this court -- excuse
23 me, Judge Ness, a continued quote from
24 him -- "It's not up to this court to
25 allow the rezoning of this plan in

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

77

1 controversy from commercial to
2 residential as attempted under the June
3 15, 1971 ordinance enacted by the City
4 of North Augusta through the arbitrary
5 and unreasonable and deprivation of
6 plaintiff's property."

7 That's foundational principal.

8 The law of regulatory taking and
9 inverse condemnation -- has changed a
10 good bit since 1974 but the principals
11 remain substantially the same.

12 The next case I want you to refer
13 you to is a case of Hampton versus
14 Richmond County, Court of Appeals South
15 Carolina decided in 1987.

16 It held that a zoning ordinance
17 that is confiscatory that renders the
18 property of no value, quote, "of no
19 value" end of quote, is not, quote,
20 "fairly debatable" end of quote, and is
21 therefore, "clearly arbitrary,
22 unreasonable and capricious."

23 I want to go back and read you
24 the -- go on with Hampton.

25 The zoning classification of

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

78

1 property should be held -- upheld as
2 constitutional as some elements that
3 the classification is either
4 unnecessary or confiscatory. (Phonetic)

5 Then there's a case of Peterson
6 versus the City of Myrtle Beach.
7 Peterson Outdoor Advertising versus
8 City of Myrtle Beach decided in 1997 by
9 the Supreme Court of South Carolina in
10 which the court held the decision of
11 the zoning board, quote, "must be
12 decided by standards which are specific
13 in order to prevent the ordinance from
14 being invalid and arbitrary."

15 And last, I want to refer you to a
16 nationally known case originating in
17 South Carolina. The case was Lucas
18 that went to the U.S. Supreme Court and
19 that case ends with a basic
20 proposition, when all economic utility
21 has been zoned or regulated out of a
22 piece of property it has no economic
23 value and that ordinance, an ordinance
24 like that results in an inverse
25 condemnation" --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

79

1 Okay, so, between the LMO
2 official's determination that's boiled
3 down into the staff report of August 1
4 this year and your consideration of the
5 suggestions I have made to you with
6 regard to sections of the LMO that
7 others have not focused on, I
8 respectfully urge you to approve the
9 decision of the LMO official and/or
10 modify it based on the LMO sections
11 that I have provided to you and when
12 you do that, you're going to come back
13 down to Judge Duke's third question and
14 on Judge Duke's third question -- I
15 want to make sure I don't misstate
16 it -- his third question; If Parcel E
17 is subject to the LMO's PD-2 Overlay
18 District regulations -- we've all said
19 so it appears -- sub-question -- what
20 effect does that have on the
21 development of Parcel E?
22 My view of the answer to that
23 question is that the effect of the PD-2
24 Overlay District regulation of Parcel
25 B, meaning at most, depending on how

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

80

1 you interpret it, Section 16-10-102B1
2 on what you count, what you don't count
3 when you're comparing densities for
4 different types of uses is the most you
5 can consider is whether you refer for
6 the entire 15.1 one-acre tract to the
7 5,262 square feet of nonresidential
8 permits previously issued. It was not
9 issued on Parcel E, just the overlay.

10 It's not enough to take out even
11 with what we propose on Parcel E of
12 limitations of the LMO as it now stands
13 or the PD-2 Overlay District
14 interpreted under the new LMO as we've
15 discussed.

16 The second sub-question of his
17 question three is, Must the existing
18 development on the other parcels within
19 that PD-2 Overlay District be taken
20 into account in connection with any
21 proposed development of Parcel E? And I
22 believe the answer to that is the same
23 as I gave you for the first
24 sub-question, yes, but no more than the
25 5,262 feet and I can make an argument

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

81

1 that it ought to be zero under the
2 precise language of 16-10-102B1, so
3 that's where I come down.

4 I think you should affirm and/or
5 modify but in your modification you
6 ought to wind up allowing us to -- at
7 least as far as your role in this is
8 concerned -- go forward and get our
9 building built we've been trying to get
10 built for three years.

11 I don't want to be redundant. I'm
12 happy to try to answer any questions
13 you may have. If not I'll step-down.

14 MR. FINGERHUT: Any questions for
15 Mr. Johnson?

16 MR. CUTRER: You have suggested at
17 the end of your testimony I guess it's
18 testimony or argument.

19 MR. JOHNSON: Argument.

20 MR. CUTRER: Argument, that the
21 Board of Zoning Appeals might consider
22 -- it has three choices, either
23 affirming -- the two you're proposing,
24 affirming or modifying --

25 MR. JOHNSON: Yes, sir.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

82

1 MR. CUTRER: -- staff's decision.

2 Might I ask how you would propose or
3 suggest that it be modified?

4 MR. JOHNSON: I would suggest that
5 the modification take the form of -- I
6 have to do a preamble if you don't
7 mind.

8 MR. CUTRER: Sure.

9 MR. JOHNSON: Say what you're
10 going to modify, you need to say what
11 it is you're modifying, but I think
12 it's undisputed from the various
13 arguments that what we're dealing with
14 is a question of interpretation and
15 some novel question of first impression
16 here and in that the LMO official has
17 given a determination.

18 The result of that determination
19 is that my client can build its
20 building. What I'm suggesting to you
21 is some clarification of that by way of
22 modification of her decision that in
23 addition to the issues of
24 interpretation that all counsel agree
25 were there and I think you agree were

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

83

1 there and perhaps you could argue Judge
2 Dukes -- there because he didn't figure
3 out when it was up in front of him --
4 that there is this basis in the code
5 which is clearly applicable and affords
6 a direct separate rationale to get to
7 the same result the LMO originally got
8 to.

9 MR. CUTRER: This basis in the
10 code being the 16-10B1?

11 MR. JOHNSON: 16-10-102B1, yes,
12 sir.

13 MR. CUTRER: The density.

14 MR. JOHNSON: And that mechanism
15 for how you calculate density when
16 you're comparing densities, which is
17 what you're doing here, trying to
18 compare the density on the -- proposed
19 density on Parcel E to what one part of
20 the code says it's average density but
21 nowhere in the code does it define
22 average density except when you get
23 into 16-10-102B1 and then it tells you
24 what you consider and what you don't.

25 MR. CUTRER: Okay.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

84

1 MR. JOHNSON: And under that
2 formula the LMO official got to the
3 right result and we think you should
4 adopt those --

5 MR. CUTRER: Let me ask you this
6 question. If we apply -- I'm a little
7 -- still a little confused. I want to
8 pursue this more with you --

9 MR. JOHNSON: Yes, sir.

10 MR. CUTRER: -- the density
11 discussion in 16-10-102B1 if you look
12 at hotel development, residential
13 development and nonresidential
14 development and you apply this standard
15 that's set forth here, is it
16 conceivable that you could come up with
17 a calculation that would exceed
18 15.1 acres which is the --

19 MR. JOHNSON: It may be but it
20 won't exceed actual use of 15.1 acres
21 but if you -- your question assumes
22 essentially you're buying counsel's --
23 Mr. Williams' argument about how you
24 average density and I'm suggesting to
25 you that 16-10-102B1 doesn't do that.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

85

1 MR. CUTRER: No my question --
2 that was the first question. Here's
3 the real question.

4 MR. JOHNSON: Yes, sir.

5 MR. CUTRER: I'm a finance guy,
6 not a lawyer.

7 MR. JOHNSON: Yes, sir.

8 MR. CUTRER: And I like to look at
9 the numbers.

10 MR. JOHNSON: Right.

11 MR. CUTRER: So we've had an
12 argument with Mr. Williams that shows a
13 calculation that ends up with more, in
14 his term, average density
15 15.633 acres --

16 MR. JOHNSON: Right.

17 MR. CUTRER: -- that actually
18 exist. What I'd like to ask you is,
19 can you help this Board and step us
20 through how you would recommend using
21 -- how you would recommend calculating
22 the eligible density for the whole
23 property and Parcel E using the
24 constraints set forth in 16-10-102B1.

25 MR. JOHNSON: Yes, sir. I

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

86

1 understand your question I think but --

2 MR. CUTRER: One exhibit over here

3 I'd like you to have a comparable

4 exhibit.

5 MR. JOHNSON: Yes, sir. There

6 will not be a comparable exhibit

7 because the definition of difference is

8 contained in Subsection 102B1 because

9 under that subsection we don't have to

10 consider the potential impacts on the

11 whole property. We only have to

12 consider what the code says in

13 Subsection 102B1 is essentially

14 comparing like uses within a mixed use

15 development, which this is. You don't

16 compare the whole thing so you don't

17 come up with a comparable counter table

18 on the other side. You do come up with

19 one slice of it and that slice is what

20 is the LMO today calls a nonresidential

21 component which says, at least under

22 the base of zoning we cannot exceed

23 8,000 square feet per acre and we've

24 got a hair over one acre and we meet

25 that but how we relate to the PD-2

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

87

1 overlay?

2 One fair analysis is that when the
3 categorical exemption died in 2003,
4 that the PD-2 overlay while on the
5 books became utterly meaningless and I
6 subscribe to that view but that's a
7 real legal argument.

8 What the code tells us, I think,
9 is that when we compare
10 apples-to-apples, which is what the
11 density section in 102B1 requires us to
12 do, we'd only have to look at the
13 nonresidential and non-hotel use in the
14 rest of the property and that's only
15 5,262 square foot out of an allowable
16 27,355 square feet, so there's 22,000,
17 roughly, 21,000 and change square feet
18 under that formula and five, six
19 hundred square feet roughly left under
20 the RD --

21 MR. CUTRER: Let me see if I'm
22 understanding what you're telling us.

23 MR. JOHNSON: Yes, sir.

24 MR. CUTRER: There are one, two,
25 three, four, five parcels, A through F,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

88

1 B mysteriously vanished. D is the
2 Waterside right-of-way, right?

3 MR. JOHNSON: I think that's
4 right.

5 MR. CUTRER: What we've said
6 doesn't matter. A and C is the hotel.
7 F is the Spinnaker development which
8 includes 5,000 some odd square feet and
9 then E is the subject parcel, so
10 there's really only four.

11 MR. JOHNSON: Yes, sir.

12 MR. CUTRER: But we have three
13 uses within all of this property.

14 We have residential. We have
15 hotel and we have nonresidential, so am
16 I understanding you correctly that if
17 we look at -- let me -- assume for the
18 moment that the Spinnaker Welcome
19 Center is built. If we take the
20 nonresidential -- well, let's start
21 with the hotel.

22 MR. JOHNSON: Yes, sir.

23 MR. CUTRER: If we take the
24 density of the hotel, 9 -- even though
25 94 units were apparently permitted I

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

89

1 believe 91 was built.

2 MR. JOHNSON: That's right, yes,
3 sir.

4 MR. CUTRER: So if we divide 91 by
5 the units -- pardon me, the 91 hotel
6 units by the acreage for the hotel and
7 it's within the limits we're okay with
8 the hotel.

9 If we take the residential units,
10 198 I believe and divide that by the
11 number of acres that are applied for
12 nonresidential use and it does not
13 exceed the RD-2 limit of 16 per acre,
14 we're good there, and if we take the
15 5,200 and change existing
16 nonresidential and the 7,500 I believe
17 proposed square footage and we add
18 those two together, divide that by the
19 amount of acres used for nonresidential
20 we're okay there, too? Have I lost
21 you?

22 MR. JOHNSON: You might be okay
23 but the first two-thirds of that
24 summary I don't think are Germain to
25 our discussion --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

90

1 MR. CUTRER: Okay.

2 MR. JOHNSON: -- with all due
3 respect. The one place where the PUD,
4 Waterside PUD is in effect came -- PD-2
5 Overlay District is significantly
6 underdeveloped, below what was
7 permitted is actually in nonresidential
8 categories because in those categories
9 there was a total of some 27,000 square
10 feet permitted and 5,000 in change got
11 built and we're asking to build another
12 7,500. That would give you a total of
13 12, 5, 12 -- max, 13,000 square feet,
14 so, one reason things fit the way they
15 do is because you don't have the other
16 14,000 square feet of nonresidential
17 use going on on the properties.

18 MR. CUTRER: Do we know how much
19 acreage is taken up by the existing
20 nonresidential, the 52 --

21 MR. JOHNSON: I don't know. I
22 don't think it's in the record. I
23 don't think it's material because it
24 could well be that the hotel density is
25 greater than would be permitted today

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

91

1 and the Waterside by Spinnaker density
2 is greater and that nonresidential
3 that's in there is really kind of an
4 activity center. It's really a -- you
5 know, it's really part of the project.

6 MR. CUTRER: Sure. It's where
7 people check-in, I assume.

8 MR. JOHNSON: No, they check-in
9 elsewhere.

10 MR. CUTRER: Oh.

11 MR. JOHNSON: There was testimony
12 in the record of it. I forget the
13 details of it but it's a small
14 facility. They use it for storage.

15 They have some activity spaces there.

16 MR. CUTRER: I've seen it. Right
17 about the pool.

18 MR. JOHNSON: Yes, sir. So I
19 suspect that does not have a segregate
20 surveyed piece of land that goes with
21 it other than it's floor plan and I
22 suspect it is owned by the Waterside by
23 Spinnaker Property Owners Association
24 as part of the common elements of the
25 project. It's not an office or retail

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

92

1 use in the classic nonresidential
2 sense.

3 MR. CUTRER: Okay.

4 MR. JOHNSON: I mean I don't go to
5 the hotel staying -- where you come in
6 and check-in and have meals. They've
7 got a restaurant in there is anything
8 other than part of the hotel.

9 In fact, the early definitions of
10 the hotel or lodging facility in the
11 original development standards
12 ordinance and the earlier iterations of
13 the LMO required you to have those
14 facilities as part of something like
15 that.

16 MR. CUTRER: Okay. I hope some of
17 my colleagues will have some questions,
18 too. I don't mean to dominate this but
19 the third question from the Judge --

20 MR. JOHNSON: Yes.

21 MR. CUTRER: Questions -- the
22 answer to questions 1 and 2 have
23 established that, yes, Parcel E is in
24 the Overlay District and is the subject
25 property subject to the PD-2 Overlay

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

93

1 District, so let's go back to what we
2 all agree is the critical question, If
3 Parcel E is subject to PD-2 -- which we
4 determined it is -- what effect does
5 that have on the development of Parcel
6 E, and must the existing development on
7 the other parcels in the Overlay
8 District be taken into account? And I
9 believe your argument is, because of
10 16-10-102B1 about density, it doesn't
11 have an effect?

12 MR. JOHNSON: Does not have an
13 effect other than potentially to
14 include in the analysis the
15 5,262 square feet. If -- I will just
16 for discussion -- if 27,000 and change
17 square feet of nonresidential were
18 already also built out there prior say
19 to 2000 when categorical exemptions
20 expired, then you couldn't qualify
21 under it no matter what about the
22 acreage and there wouldn't be anything
23 to put on Parcel E, which still raises
24 a valid question related to a
25 confiscatory taking.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

94

1 MR. CUTRER: Right.

2 MR. JOHNSON: Because the law
3 doesn't favor making land of no
4 economic value.

5 MR. CUTRER: And then the second
6 question the Judge posed related to
7 Number 3, must the existing development
8 on the other parcels within thate PD-2
9 Overlay District be taken into account
10 in connection with any proposed
11 development of Parcel E?

12 MR. JOHNSON: Yes, sir.

13 MR. CUTRER: And your argument is?

14 MR. JOHNSON: Same thing.

15 MR. CUTRER: No, it doesn't
16 because --

17 MR. JOHNSON: Well, it's taken
18 into account only to determine what
19 other development is -- what other
20 commercial development is there and
21 given the nature of that attribute I
22 don't think it's a commercial
23 development.

24 MR. CUTRER: It's -- looks like
25 it's an ancillary use of residential.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

95

1 MR. JOHNSON: Yes, sir. I
2 would -- but at worst case you consider
3 that there's 5,262 care feet of that
4 use worst case from our perspective.

5 MR. CUTRER: I'll agree with your
6 -- if I could use that word,
7 ancillary --

8 MR. JOHNSON: Yes, sir.

9 MR. CUTRER: -- use. I spent my
10 career financing multi-family
11 properties and they rezoned
12 multi-family but you had to have a
13 leasing office and clubhouse. Nobody
14 lived in those but it was part of
15 the -- okay, so the existing
16 nonresidential you would argue is
17 actually part of the residential and
18 ancillary?

19 MR. JOHNSON: That's my first
20 argument.

21 My second argument on that is even
22 if you count it, A, it's not on our
23 one acre site and that's site specific
24 under the RD District and it's allowed
25 to have 7,500 square feet per acre --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

96

1 excuse me, 8,000 square feet per acre

2 and we've got a hair over 8,000 --

3 allowable, we're at 7,500. (Phonetic)

4 MR. CUTRER: Thank you.

5 MR. FINGERHUT: Other questions

6 for Mr. Johnson by members of the

7 Board? I have a few.

8 MR. JOHNSON: Yes, sir.

9 MR. FINGERHUT: SDC Properties
10 Inc. owns Parcel E, is that correct?

11 MR. JOHNSON: Yes.

12 MR. FINGERHUT: Does that entity
13 have any relationship to the owner of
14 Parcel F?

15 MR. JOHNSON: Parcel F is -- any
16 relationship, the answer is probably,
17 yes, but it's not as direct a
18 relationship as you might have
19 contemplated.

20 MR. FINGERHUT: Fair enough. Does
21 the S stand for Spinnaker?

22 MR. JOHNSON: SD --

23 MR. FINGERHUT: Does the S stand
24 for Spinnaker though or is for Steve,
25 something like that?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

97

1 MR. JOHNSON: I don't -- I can
2 guess the acronym but Spinnaker -- SDC
3 Properties is in a big Spinnaker family
4 of the properties. Exactly what the
5 connections are, I don't know.

6 MR. FINGERHUT: Fair enough.

7 MR. JOHNSON: But much of Parcel F
8 is owned by the POA as common property,
9 including the shell of all the
10 buildings and the footprint of the
11 buildings. The condominium owners only
12 own the space inside.

13 MR. FINGERHUT: Correct, the
14 development.

15 MR. JOHNSON: They each have an
16 undivided interest in the common
17 elements.

18 MR. FINGERHUT: Yeah.

19 MR. JOHNSON: So -- and, you know,
20 do we have some kind of connection, at
21 all, but yeah, it's not direct.

22 MR. FINGERHUT: What about with
23 the entity that developed Parcel F?

24 MR. JOHNSON: That would be
25 Waterside by Spinnaker LLC I think.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

98

1 MR. FINGERHUT: Okay. So --

2 MR. JOHNSON: And that was a
3 Spinnaker development company.

4 MR. FINGERHUT: I mean is it a
5 fair to statement, do you think, then,
6 that -- because you're talking about
7 regulatory taking which is a strong but
8 important term, but the use of Parcels
9 E and F collectively represent the sum
10 choice of the same principals at some
11 point. I mean Spinnaker did develop
12 the property and what -- your argument
13 is that the owner of Parcel E is
14 somehow being unconstitutionally or
15 unlawfully prejudiced by that.

16 MR. JOHNSON: Right.

17 MR. FINGERHUT: But the owner of
18 Parcel E is not a stranger to the
19 developer of the Parcel F.

20 MR. JOHNSON: Not a stranger. At
21 the time Parcel F was developed it may
22 have been a stranger. It was certainly
23 a stranger when the Beachwalk property,
24 whatever, it's Number A and C was
25 developed, that was originally built

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

99

1 for a group of investors and was

2 flagged as a Super 8 Motel --

3 MR. FINGERHUT: Right.

4 MR. JOHNSON: -- way, way back.

5 Mr. -- built it for them. He's a

6 builder, as well, and how it migrated

7 to Beachwalk I don't really know.

8 But, case law is clear that where

9 a rezoning has the effect of

10 confiscating the economic utility

11 that's a regulatory taking. That would

12 be zoning here. (Phonetic)

13 MR. FINGERHUT: Okay. So now,

14 let's see, Parcel E was not developed

15 but I don't think there's any

16 disagreement that it could have been

17 developed during the categorical

18 exemption, would that be correct?

19 MR. JOHNSON: It could have been

20 developed any time over the last couple

21 hundred years.

22 MR. FINGERHUT: Well, but

23 certainly during the categorical

24 exemption?

25 MR. JOHNSON: It could have been.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

100

1 MR. FINGERHUT: Is it your
2 contention that the existence of
3 categorical exemption, even though it's
4 expired, has some carry forward effect
5 on that property?

6 MR. JOHNSON: In my opinion it's
7 like a -- I would analogize it and
8 I won't go all the way through but I
9 would analogize it to the appendix in
10 the body. Nobody quite knows what it
11 does. It's been construed to create
12 some problems but I think it lost its
13 impact when the categorical exemption
14 died except it lives on in the appendix
15 of the PD-2 overlay and perhaps Town
16 council and its -- will get around to
17 just removing that overlay because it
18 really doesn't do anything anymore. If
19 they remove that overlay nobody can say
20 we can do more than what the current
21 LMO says it can do which is probably
22 where the Town really wants to be, but
23 conjecture.

24 MR. FINGERHUT: Right. Different
25 law, different result.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

101

1 MR. JOHNSON: Right.

2 MR. FINGERHUT: Okay. Now, with

3 respect to the formula for average

4 density, is it -- I guess -- hold on.

5 I want to state this correctly, I don't

6 want to confuse the question, I'm

7 sorry -- do you -- can you or do you

8 have a computation indicating that the

9 way you're viewing the LMO the density

10 calculations would come under the

11 numbers that counsel demonstrated in

12 their brief?

13 MR. JOHNSON: I think, without

14 having written it down and handed it to

15 you, I've given that calculation today

16 a couple of times and it is -- I can

17 add one more step to -- you have

18 5,232 square feet and the use that I

19 think is excessively to the condominium

20 project we're asking for 7,500, so if

21 you adds those together 12,700 and --

22 whatever it is, 12, 13,000 square feet.

23 This property was approved for -- take

24 the 13,000 square feet.

25 MR. FINGERHUT: Uh-huh.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

102

1 MR. JOHNSON: Divide that by
2 15 acres, which I have not done.

3 MR. FINGERHUT: I certainly have
4 not. I'm trying to avoid arithmetic at
5 all costs so if you could map it out
6 that would be helpful.

7 MR. JOHNSON: This gentleman here
8 could.

9 MR. WALCZAK: 40,000 per acre.

10 MR. FINGERHUT: I'm --

11 MR. WALCZAK: -- 43568.

12 MR. JOHNSON: 43,560.

13 MR. WALCZAK: Is an acre.

14 653,400-acre square feet. What do you
15 want me to divide?

16 MR. JOHNSON: By 13,000.

17 MR. CUTRER: 13,5 -- 1.9 percent.

18 (All phonetic)

19 MR. JOHNSON: We're doing this on
20 the fly. I don't know how you get
21 where you want to get to but I know
22 that the density for the use of this
23 acre is less than the LMO requires.

24 MR. FINGERHUT: Fair enough. I'm
25 just trying to understand what you're

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

103

1 asserting. I think -- let me move on.

2 I have a different -- I guess a

3 different question. It's a little

4 confusing. Are you arguing that

5 the strip application for the LMO

6 supports your decision or that the

7 stripped allocation of the LMO is

8 regulatory taking?

9 MR. JOHNSON: I'm arguing that my

10 strip interpretation of the LMO

11 supports my position.

12 The appellants arguments for --

13 strict interpretation of the LMO

14 creates a regulatory taking.

15 MR. FINGERHUT: Okay, Okay.

16 MR. ROBERT JOHNSON: Can I ask a

17 question?

18 MR. FINGERHUT: Please.

19 MR. ROBERT JOHNSON: Earlier on it

20 was mentioned by one party or the other

21 that in some circumstances there was in

22 dividing up or borrowing of pieces of

23 land to get densities and room,

24 quantities, etc. I think it's

25 pertinent to the process if the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

104

1 original owner was all Spinnaker
2 properties. In other words, if in the
3 past they were taking just for an
4 example, E and borrowing from that to
5 get more units and, you know, dolling
6 it out to increase the densities in
7 certain places, they've already used up
8 the bank and now that the bank's used
9 up they want to have their cake and eat
10 it, too, so to speak, that I think
11 should be explained.

12 MR. JOHNSON: There's nothing in
13 the record about that and I don't know
14 the answer to that but my impression
15 from all the conversations I've had
16 that that did not happen there.

17 The only time the borrowing
18 happened was when the land exchanged
19 with Aunt Chiladas resulted in having
20 more hotel rooms -- mutual and I'm not
21 aware of anything occurring that added
22 density to the condominium project
23 which is the only other real use
24 besides this one acre.

25 MR. ROBERT JOHNSON: So it's your

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

105

1 opinion that property E never came into
2 the picture as far as helping any of
3 the other properties increase their
4 densities levels during that?

5 MR. JOHNSON: That is my
6 understanding.

7 MR. ROBERT JOHNSON: Okay, thank
8 you.

9 MR. JOHNSON: But also know it's
10 not part of the record because it
11 hadn't been explored by anybody that
12 I'm aware of.

13 MR. FINGERHUT: Any other
14 questions for Mr. Johnson?

15 MR. CUTRER: Mr. Johnson, it's my
16 understanding that Parcels A and C make
17 up what we have referred to as the
18 Beachwalk Hotel.

19 MR. JOHNSON: Yes, sir, that's my
20 understanding.

21 MR. CUTRER: I am assuming that
22 the parties that have brought this
23 appeal are the owners of the Beachwalk
24 Hotel and in response to my question to
25 Mr. Williams, at the beginning, of how

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

106

1 was his clients being injured if this
2 development was permitted to which I
3 got, at least for me an unsatisfactory
4 answer, other than everybody wants to
5 make sure that the Town ordinance is
6 complied with.

7 My question to you is, in your
8 opinion, what effect would allowing
9 Parcel E development, which is your
10 property, what effect would allowing
11 Parcel E development have on the future
12 development rights -- pardon me, future
13 development rights of Parcel A and B,
14 the Beachwalk Hotel -- I'm sorry, A and
15 C.

16 MR. JOHNSON: I think I understand
17 your question. My answer is none.

18 MR. CUTRER: Okay.

19 MR. JOHNSON: Because under the
20 density definition in Subsection 102B1
21 that we've been talking about, you
22 don't compare those. Those are apples
23 and oranges. You only compare apples
24 and apples and they're not comparable.

25 MR. CUTRER: Thank you.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

107

1 MR. JOHNSON: And I would
2 reiterate the answer to that, that I
3 don't see how they're injured, at all.

4 MR. FINGERHUT: One other
5 question, I'm sorry, just a quick one.

6 MR. JOHNSON: Sure.

7 MR. FINGERHUT: In the
8 November 2016 hearing there was a
9 question asked of Ms. Dixon, obviously
10 -- disagreeing of the interpretation of
11 the law -- of The town but she was
12 asked specifically whether or not the
13 appellant's math was correct on density
14 and the answer to that yes. She agrees
15 with the meaning but the math was
16 correct on that. Do you agree that the
17 math is correct and relevant or not
18 correct?

19 MR. JOHNSON: If you posit their
20 assumption on the correct formula, the
21 average density I'm not trying to
22 retract their numbers. For example, I
23 don't know if it's 91 or 94 or 68 or 78
24 hotel rooms being built and I actually
25 don't know -- by Spinnaker there are

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

108

1 but I've got no reason to think that
2 they've got ahold of the wrong numbers.
3 They've simply got the wrong equation.
4 and therefore it's immaterial and
5 irrelevant.

6 MR. FINGERHUT: Okay. Thank you.
7 Anything else for Mr. Johnson? Thank
8 you, sir.

9 MR. JOHNSON: Thank you.

10 MR. CUTRER: I'd like to offer
11 that we have a five-minute recess.

12 (Whereupon, a short break was
13 taken.)

14 MR. FINGERHUT: Okay. We're back.
15 Mr. Alford?

16 MR. ALFORD: Good afternoon. Greg
17 Alford. I represent the Town of Hilton
18 Head Island in a courtroom recently I
19 represented a decision made by this
20 body although not all the same members.

21 You know, things get too
22 complicated, too quickly I think.
23 People over think stuff.

24 I think one of the first questions
25 asked today Mr. Cutrer was, why? Why

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

109

1 are you doing this? What's your
2 interest? Are you aggrieved? And Mr.
3 Williams' answer was well, we just want
4 to know the rules.

5 Well, then you're not aggrieved.
6 Either you're aggrieved or you're not.

7 The standing issue is this whole
8 other -- you know, you've got a right
9 to bring a claim if you're within a
10 certain geographic distance but you
11 have to be aggrieved.

12 On the record, he basically
13 conceded that they're not aggrieved.

14 I don't know the answer to the
15 question. I think there's a reason. I
16 think the reason is there's X amount of
17 density in each category;
18 nonresidential, hotel, residential.

19 You ever heard the expression
20 'built out'? Oh, that subdivision's
21 been built out. Sea Pines' built out,
22 which it's really not.

23 Take the Sea Pines master plan,
24 for example, it has an allocation of X
25 number of commercial square footage. X

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

110

1 number of residential X units, X number
2 of hotel units, okay. That's why you
3 do it.

4 So, when Mr. Williams kind made
5 this argument I had a lawyer one time
6 -- people use big words on me --
7 somebody told me I was conflating
8 something so I had to look it up, I
9 wasn't by the way, but this argument
10 right here, in your memorandum on page
11 eight, Mr. Williams' memorandum, this
12 is where you get into this conflation
13 of this density question that I think
14 all of you have asked about. You asked
15 about the bank, Mr. Johnson. I think
16 you were saying, all right, now, have
17 you gone to this property, sucked some
18 of the density off that so you can use
19 it in another area and the answer is no
20 in the commercial context.

21 A, this isn't residential or hotel
22 context but clearly in this 15-acre
23 development there's very little
24 commercial, right?

25 I mean is that -- do we agree that

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

111

1 the record reflects there's 5,600 and
2 change of actual built commercial
3 there? I mean I don't think there's
4 any evidence in the record to the
5 contrary, so, that being the case how
6 much commercial density was allowed for
7 this entire acreage or is there
8 evidence that's somewhere along the
9 line which has happened in places, it
10 happened in Shelter Cove, the
11 development there.
12 The developer came in and said,
13 look, I don't need all this commercial.
14 I've got too much commercial. Will you
15 let me swap some of my commercial
16 density for some residential density?
17 And that was done. There's a record of
18 it. It's documented. You don't have
19 anything in the record and it doesn't
20 exist by the body to show that someone,
21 it would have been the Spinnaker guy or
22 whomever was -- somebody at one point
23 who was the control hold and the
24 developer, cohesively, we're going to
25 have this much commercial, this much

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

112

1 residential, and you've going to have
2 this much hotel and as time goes on
3 things don't always work out once the
4 shooting starts, so you end up, this
5 guy owns that and then his interest
6 competes with this guy who owns that
7 and that's a pretty common thing. It
8 happened at Sea Pines it happened at --
9 I haven't really heard about Palmetto
10 Dunes but it happens.

11 There's not any commercial out
12 there except 5,600 and change. Meaning
13 that there's still a substantial amount
14 of commercial to be allocated to be
15 used there. That argument is a
16 conflation and it tries to use what's
17 called the averaging of density, okay.
18 You don't average commercial, hotel,
19 and residential, they're each their
20 own, apple, orange, banana, that's how
21 that works.

22 There is a place where you can
23 talk about average density and it goes
24 to the concept Mr. Johnson eluded to
25 and they cite this in a prior page of

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

113

1 memo 7. Here's a part of the element;
2 only places I could find is Subsection
3 A where they talk about average
4 density, last sentence in A.

5 What this is doing is saying,
6 okay, if we've zoned and planned this
7 one section of land and let's say I'm
8 only allowed, hypothetically, I'm only
9 allowed ten units per acre of
10 residential but within the whole thing
11 I'm allowed a hundred units of
12 residential. What the code will let me
13 do is build 125 percent of what's
14 allowed in the base --

15 MR. CUTRER: What page is this?

16 MR. ALFORD: I'm sorry, this out
17 of the LMO. This is Section 16, 163106
18 and A it's kind of what you were
19 talking about, Mr. Johnson, where you
20 take basically within the PUD you can
21 shift density around in a reasonable
22 manner and let's you do that and so
23 that hasn't happened, commercially,
24 here so I think what you might have
25 been asking hadn't happened.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

114

1 Really, if we look at the LMO and
2 I'm -- I hate it but I have to look at
3 it sometimes maybe that's why I hate
4 it -- I really find that's the only
5 place you see average density, okay,
6 and what they're talking about here is
7 you've got to read -- under the law you
8 have to read things, if you can you,
9 read statutes and codes, you try to
10 read them consistently.

11 To take that word 'average
12 density' and then you have to do what
13 Mr. Johnson did and you have to jump
14 over to 1610 I think -- I'm terrible
15 about losing stuff -- so I've stuck one
16 section over the other here. Well.
17 sorry, I'm trying.

18 So you've got to read this stuff
19 again. What that's telling you is you
20 look at it, apple being residential,
21 orange being hotel and banana being
22 commercial and B1 tells you how to do
23 that and it's pretty -- I mean it's
24 kind of the question you're asking,
25 what's out there? 5,600 feet of

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

115

1 commercial. Okay, how much commercial
2 do we have allocated for this PUD? How
3 much? 15,000? 27,000.
4 27,000. So if we build this,
5 we're at 12, 13. There's still some
6 left, I think. Now, is there any land
7 left to build it on? I don't know.
8 Did they spread out their hotel in such
9 a manner that they can't put commercial
10 on top of it -- that's not my problem,
11 it's not your problem respectfully,
12 although I think I need to dovetail a
13 little bit here because the judge had a
14 question - which is do I need to think
15 about -- how's the -- do I need to
16 calculate -- and I think what he's
17 asking is has the commercial been built
18 out on that site within that PUD
19 because if it has then you would have
20 to say no.
21 In other words, if there were
22 27,000 square feet of commercial out
23 there today or some number less than
24 that, slightly, you wouldn't be able to
25 build anymore, right? I mean it stands

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

116

1 to reason that you wouldn't be able to
2 do it. So, I believe there's been a
3 conflation, although I use that word --
4 I looked it up and I kind of like it --
5 by the appellants in trying to blend
6 this density argument together there
7 today -- when the LMO tells you how to
8 do it and that's exactly what the LMO
9 has told them in the first place. They
10 said, look, there's only this much
11 commercial out here. They've got as
12 much acreage -- they could have built,
13 however, it X per acre. Here it is.
14 We're done.

15 Not real smart and I've got a lot
16 to say but I'll try to answer any
17 questions.

18 MR. ROBERT JOHNSON: For
19 clarification purposes and this is a
20 question for Mr. Johnson, I think that
21 27,000 was prior to --

22 MR. ALFORD: The expiration of the
23 deed --

24 MR. ROBERT JOHNSON: Right.

25 MR. ALFORD: What do you call --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

117

1 MR. ROBERT JOHNSON: And now you
2 took the Town's overlay. It's
3 15,000'ish just for clarification, is
4 that correct?

5 MR. ALFORD: I think that's why I
6 said 15 -- I do not take issue with
7 that.

8 MR. JOHNSON: To answer your
9 question -- Barry Johnson, I don't take
10 issue with that either. I might say I
11 don't think it's relevant.

12 MR. ROBERT JOHNSON: Right.

13 MR. JOHNSON: But I don't take
14 issue.

15 MR. ALFORD: Well, respectfully,
16 it's relevant only if you get up
17 against that ceiling. If you're not,
18 you're using a bank, if you will. If
19 you're not cashing all those chips --
20 and I think that's what the judge was
21 trying to ask. In Question 3 he says,
22 and must -- must the existing
23 development on the other parcels of
24 that PD-2 Overlay District take into
25 account any -- Parcel E? (Phonetic)

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

118

1 I would answer that in the
2 affirmative. I would say, yes, you
3 have to take it into account so that
4 you make sure you don't go over that
5 15,000 feet ceiling. That's my reading
6 of it because that would -- that would
7 prevent anymore commercial construction
8 out there if they went over whatever
9 the -- I'm sure there'll be a fight
10 about that, sorry, you know, is it 15?
11 Is it 27? I don't know. And I'm
12 not -- I have no authority to take
13 position on that at this juncture
14 but -- so that's -- I think one of the
15 questions that's been asked is, okay,
16 what do you want us to do? What are
17 you asking this body to do -- asking
18 you to do on behalf of the Town and on
19 behalf of yourselves, frankly -- if I
20 have to argue that.

21 I'm asking to you answer these
22 three questions and I think Ms. Dixon
23 did an excellent job in answering these
24 questions. I would ask you to
25 supplement that answer with reliance on

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

119

1 the -- 16-10-102B1 and I think that
2 takes care of the mathematical
3 questions that finance people have
4 because you're then how many apples,
5 how many oranges, how many bananas that
6 you're getting there. You're breaking
7 out -- just like the Sea Pine master
8 plan, how much commercial do we have?
9 How much residential do we have? How
10 many resorts do we have? So those are
11 my -- how many hotel spaces do we have?

12 MR. FINGERHUT: So are you saying
13 that it doesn't lend itself to
14 averaging?

15 MR. ALFORD: It would -- within
16 the categories it lends itself to
17 average, otherwise, no.

18 MR. FINGERHUT: So then -- okay.
19 But then this section of the LMO that
20 you have up there this -- obscured.
21 Let's talk about it let's do it.

22 MR. FINGERHUT: Because it sounds
23 like you can only -- you can't apply
24 both of them and come out with the
25 result that you want, at least I don't

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

120

1 think so.

2 MR. ALFORD: I respectfully

3 disagree. Let me try --

4 MR. FINGERHUT: Explain to me,

5 yeah.

6 MR. ALFORD: Yeah, yeah. So -- I

7 mess up so, density, little 'd' --

8 section planned development may be

9 built adding density which is greater

10 than the site specific density allowed

11 by the -- provided that any such

12 concentration density is offset by an

13 area of lower density in the other

14 sections -- based on the LMO.

15 Okay, if I have approval to build,

16 how do I say this, you -- if I take up

17 all the land building residential I

18 can't build a commercial. I've

19 precluded myself, right? Vice versa.

20 If I -- well, space -- residential

21 density is probably the only one you

22 can -- already tells you can expand so

23 much I don't think commercial is based

24 on square foot, so you'd -- kind of

25 footprint but you have to read them

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

121

1 together, I mean the law requires you
2 do and it says little 'd' density,
3 okay, so in a planned unit development
4 you've got commercial but you don't
5 average, okay, I've used this many
6 residential units so I'm going to
7 average it over -- and take out
8 commercial. Does that make any sense?

9 MR. FINGERHUT: A little bit.

10 MR. ALFORD: -- application.

11 MR. FINGERHUT: But then I go back
12 to then in November 2016 when I thought
13 it was stipulated to that the Town's
14 map was correct on density, they just
15 didn't think it applied, so are you
16 telling me now that that --
17 notwithstanding that testimony, you
18 don't think the calculation is correct
19 in which case I would ask you the same
20 thing, Mr. Johnson, let me see your
21 calculation.

22 MR. ALFORD: Sure. Well, let me
23 say this. I go with Mr. Johnson then,
24 math is math, one plus one is two. The
25 math may be correct. The formula

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

122

1 wasn't. The formula was -- the
2 formula, as a matter of law, being
3 16-10-103 B, is it 103? I'm sorry
4 16-10-102B, that's where the formula
5 is. They didn't use that formula.

6 MR. FINGERHUT: Are you certain
7 they didn't or not? I'm just asking?

8 MR. ALFORD: Which they go
9 through.

10 MR. FINGERHUT: Yeah. I have a
11 copy of it. Yeah, they clearly said
12 what they did so I'm asking you the
13 same thing.

14 MR. ALFORD: I don't believe they
15 did, no, sir. I think they did not. I
16 believe they spread they did -- here's
17 what I think he did and I think I --

18 MR. WILLIAMS: Mr. Chairman, he's
19 testifying contrary to what the sworn
20 testimony from the last hearing was and
21 we object.

22 MR. FINGERHUT: I'll overrule it.
23 He is answering my question and during
24 his argument I think it's --

25 MR. ALFORD: For the record,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

123

1 lawyers don't get to testify and I'm
2 not testifying, okay, but I would say
3 this about that, if -- I think the math
4 that I think they want to do is and I
5 understand why and it's because they
6 want to use the density, they want to
7 use the space and -- up and running, I
8 think that's the answer. Mr. Garrett,
9 he asked the question, it's only one or
10 two reasons -- they don't care about
11 the rules. The rules are going to
12 change in the next five or six years
13 and they're -- that's how it works. If
14 you don't like the rules you apply for
15 variances -- kind of zoning magic that
16 these people are famous for -- I'm just
17 saying, it is not based on the rules.
18 There's a competitive business reason
19 that they are doing, okay. They're in
20 a competing business, hotel, timeshare,
21 short-term rentals. It's a competing
22 business.

23 Within that competition now
24 they're all in this Circle, square,
25 whatever shape the property is, there's

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

124

1 only so much to go around. There's
2 only so much hotel, there's only so
3 much commercial, there's only so much
4 residential, so I don't -- I would have
5 answered the question differently. I
6 would have been truthful. I'd said,
7 I'm here because I'm stuck in this PUD
8 with this guy and there's only so much
9 density to go around and I want to take
10 mine, that would have been my answer
11 because I think that's the truth, just
12 my opinion.
13 But going back to your calculation
14 question, I just don't want to
15 overcomplicate things. There's X
16 amount of hotel rooms allowed there.
17 There's X amount of commercial allowed
18 in there and there's X amount of what
19 do you call it, non-hotel or
20 nonresidential, so either it is or it
21 isn't and I believe, respectfully, I
22 don't -- I mean no disrespect, I don't
23 care what their calculations are. This
24 is how we have to do it.
25 MR. FINGERHUT: Would you like a

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

125

1 ten-minute recess to do that for us so
2 we can see it? I'm asking for
3 evidence, that's all because you're
4 asking us to do something, so --

5 MR. ALFORD: I was a -- in college
6 so I've got to stop for a minute and
7 ask -- yes, I would love a short break.
8 Would that be okay?

9 MR. FINGERHUT: If you're going to
10 come back with a number and a --

11 MR. ALFORD: I will endeavor to do
12 that.

13 (Whereupon, a short break was
14 taken.)

15 MR. FINGERHUT: Back in session.

16 MR. ALFORD: Yes, sir. As I told
17 you, I'm not a mathematician. Mr.
18 Walczak can attest.

19 I had a moment to consult with
20 staff and so this is what's out there
21 today. If you want to talk about kind
22 of the average density concept.

23 Right now there's 91 hotel units
24 spread over the 15.1 acres, that's 6.56
25 -- there's 5,260 square feet commercial

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

126

1 spread over 15.1, take that out and you
2 get the 3408.

3 There's 198 residential units,
4 which are timeshares that are out there
5 and then that times 15.01, average out
6 13 on those units -- so, going back to
7 this document, everything out there is
8 under built. Everything category.

9 They could have built 94 or --
10 they could have built 94, they built
11 91.

12 They could have built 200 and they
13 only built 198 and out of the density
14 that they had -- so if you look at the
15 table and I think I understand what
16 they're trying to do, now, they're
17 trying to say the PUD exists. Under
18 the old rules we have what we have
19 under the PUD but now there's no
20 commercial and I think what staff said
21 is, well, no, we're going to apply the
22 density, the base density numbers to
23 the acreage and they get to build
24 8,400 square feet and they applied for
25 7,500, so, in other words, the

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

127

1 commercial density has not been built
2 out. I don't know if I answered your
3 question.

4 MR. FINGERHUT: Well you --
5 actually -- I'm sorry, Mr. Walczak.

6 MR. WALCZAK: I was going to say,
7 so what is the allowable density under
8 the base district?

9 MR. ALFORD: You could build 8,000
10 square feet per acre right now today
11 under the bas district.

12 MR. WALCZAK: And what is our
13 average density based on your
14 calculations?

15 MR. ALFORD: Average density?

16 MR. WALCZAK: Average density. It
17 seemed to me that those three numbers
18 you found an average? No, or something
19 similar to that?

20 MR. ALFORD: We think they're
21 mixing apples and oranges.

22 MR. WALCZAK: Yeah but that does
23 -- that's what -- isn't that what the
24 ordinance says? The LMO says that?

25 MR. ALFORD: No. Actually it says

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

128

1 -- that section of the LMO that we held

2 up says --

3 MR. CUTRER: There's no

4 co-mingling.

5 MR. ALFORD: Thank you.

6 MR. FINGERHUT: No co-mingling.

7 You calculate these densities here

8 separate, that's correct, but then once

9 you have done that it seems to me that

10 103G4 -- 163G4 says you average them,

11 doesn't it?

12 MR. ALFORD: It's telling you to

13 average, at least I think. Yes, I

14 think what it's telling you to do is

15 you average -- average them within

16 their categories is what I'm saying,

17 so, I do think you can say, okay,

18 that's what I -- that's my belief, you

19 average them within your category,

20 because it otherwise would say to you,

21 you average it this way and you

22 disregard Section 16-10-102.

23 MR. FINGERHUT: Okay. So then but

24 if you look at Section G1, the same --

25 163G1, the purpose the PD-2 Overlay

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

129

1 District is intended to encourage
2 creativity and design planning and
3 development of parcels -- acres by
4 allowing greater site flexibility than
5 the underlying base zoning district so
6 that natural futures may be protected
7 and development concentrated in more
8 suitable or -- environmentally
9 sensitive areas, so it's intended to
10 give perhaps have more of one thing
11 less of another and that's why I think
12 the G4 asks you average them and
13 that's -- (Phonetic)
14 MR. ALFORD: I respectfully
15 disagree. I think now I'm starting to
16 think maybe understand it.
17 It's telling you that the PD or
18 PUD planned district, I'm going to get
19 this much residential, I'm going to get
20 this much hotel, I'm going to get this
21 much commercial and what this section
22 -- the G section you're referring to
23 talks about averaging but it also says
24 you can take more off of one parcel and
25 overpopulate another parcel provided

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

130

1 that you then account for that by
2 creating more open space, things of
3 that nature. There's nine acres of
4 open space in this PUD that his client
5 created nine-acres of open space, so
6 he's -- and you asked the important
7 question, are they related, those
8 entities, the answer is, yes, and so
9 they've given up -- they've for -- I
10 guess they've banked, if you will,
11 already by creating that over space as
12 the section -- I need to find that
13 section, that G section because I think
14 now I'm understanding -- yeah, you
15 don't cross -- yeah, Mr. Johnson made
16 his point. I think it's a good one --
17 right here in mixed use developments,
18 acreage allocated to residential shall
19 not be used to calculate
20 nonresidential. Acreage allocated for
21 nonresidential shall not be used -- so
22 you're not -- I think that -- because
23 you're not going to cross pollenate.

24 MR. FINGERHUT: Well, no, when you
25 calculate the density but overall you

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

131

1 need to know what the total density is
2 and once you have calculated each
3 category correctly you put them
4 together, at least that's how I read it
5 in G4, but that's -- to me that's what
6 the plain language is saying and I'm
7 trying to understand if there's another
8 formula that shows a different number
9 that's great, that's what I'm asking.

10 MR. ALFORD: I guess my --

11 MR. ROBERT JOHNSON: The only
12 thing that doesn't add up there is that
13 some densities are by units and other
14 densities are by square footage. You
15 can't put those two together, you know,
16 it's like putting metric with, you
17 know, American imperial, you just can't
18 do that, that's not possible.

19 MR. ALFORD: That is I think what
20 the LMO is trying to say when they come
21 back about with this other section.

22 MR. ROBERT JOHNSON: The One thing
23 I do take issue with, I believe you're
24 using an old document --

25 MR. ALFORD: I am.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

132

1 MR. ROBERT JOHNSON: That was pre
2 2000 --

3 MR. WILLIAMS: 2002, pre-2002.

4 MR. TAYLOR: Mr. Chairman, could
5 that be marked for the record, please?

6 MR. FINGERHUT: Absolutely. It
7 can reside in the record, correct.

8 That would be --

9 MR. WILLIAMS: No, but his
10 calculations --

11 MR. TAYLOR: And the calculations
12 both should be marked.

13 MR. ALFORD: Yeah, this in the
14 record.

15 MR. WILLIAMS: Let's mark it so
16 it's attached to the transcript.

17 MR. ROBERT JOHNSON: We need to go
18 by today's LMO and not an agreement
19 that was made pre-LMO.

20 MR. ALFORD: Yes, sir.

21 MR. ROBERT JOHNSON: You're mixing
22 those two up. You need to take that,
23 put it aside.

24 MR. ALFORD: Under today's LMO
25 they're allowed 8,000 feet -- average

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

133

1 per acre on a piece of property --

2 MR. FINGERHUT: Regardless of what
3 else is going on in the --

4 MR. ALFORD: Yeah, as long as they
5 haven't used up everything in the
6 commercial category and that was
7 staff's determination because there's
8 hardly any commercial out there.

9 MR. FINGERHUT: I looked at that.
10 Most of the files that were done in the
11 Circuit Court, did you make this
12 argument there?

13 MR. ALFORD: We didn't get that
14 far in Circuit Court.

15 MR. FINGERHUT: You picked the
16 questions, you sit down --

17 MR. ALFORD: Evidence was put up
18 and Tom was like, he went through the
19 record. He asked us questions. They
20 made those lengthy arguments.

21 Our arguments were more way -- you
22 know, generally when -- you know what
23 the standard of review says, you guys
24 got it made. You can almost never be
25 wrong. It's the any evidence standard.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

134

1 If there's any evidence in the record
2 to support your decision you're upheld
3 because the court feels like local
4 bodies should make zoning decisions and
5 I think that's a good rule.

6 His problem was, the record -- he
7 wanted to know whether or not -- I
8 guess he wanted to know the question
9 you're asking, have you used up the
10 other density in the commercial, that's
11 question 3. Question 3 is his real
12 meat of trying to make his decision and
13 so we spent time formulating that.

14 The arguments that were made in
15 front of him were essentially, hey,
16 zoning appeals heard all of this.
17 There's some evidence here to support
18 the decision. Look how big this record
19 is. And there's a lot of conflicting
20 statements in this record and a lot
21 of -- you know, I don't know, I think
22 the old zoning document that was --
23 categorical exemption is out. We're
24 going under the new rules, 8,000 feet.

25 MR. WALCZAK: If I may.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

135

1 MR. FINGERHUT: Please.

2 MR. WALCZAK: Under 16-3-106G4.

3 MR. ALFORD: Yes, sir.

4 MR. WALCZAK: A.

5 MR. ALFORD: Yes.

6 MR. WALCZAK: Sentence says -- we

7 discussed in the past, the average

8 density for PD-2 Overlay District shall

9 not exceed the maximum density

10 permitted in the base zoning direct.

11 MR. ALFORD: Right.

12 MR. WALCZAK: So, how would you

13 calculate the average density with PD

14 overlay so that you can compare it so

15 that it meets this --

16 MR. ALFORD: Well, and I think

17 that goes that then you need to go and

18 look at D1 and it tells you how to

19 apply that formula because there's

20 different kinds of density just as

21 you've noted. There's square footage

22 of commercial density, there's number

23 of units in residential and there's

24 number of hotel rooms and hotel density

25 -- and I think your point's very well

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

136

1 taken, you can't mix --

2 MR. WALCZAK: So if there's three
3 different densities then what are the
4 three different requirements or base
5 requirement which will you have in the
6 PD-2? (Phonetic)

7 MR. ALFORD: Well, I'm sorry, it
8 would depend on what you're trying to
9 build.

10 If you were trying to build hotel
11 rooms you would have one allocation.

12 If you were trying to build
13 residential you'd have X number of
14 units and if you're trying to build
15 commercial you'd have --

16 MR. WALCZAK: Well, we have
17 existing and you're saying in all three
18 cases they're under the requirement of
19 the base district?

20 MR. ALFORD: I am. If you do the
21 math on -- I'm I'll mark it. I'm not
22 scared.

23 MR. WALCZAK: Okay.

24 MR. FINGERHUT: What he's saying
25 is how many acres -- for this use?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

137

1 MR. CUTRER: There are -- excuse
2 me, one, two, three, four, five. There
3 are five parcels list in this property.

4 MR. WILLIAMS: 15.1 acres.

5 MR. CUTRER: A through F. D is
6 the Waterside Drive right-of-way. What
7 I think you have to do --

8 MR. ALFORD: I'm sorry. Go ahead,
9 sir. A lot of smart people -- there's
10 your answer.

11 MR. CUTRER: I can't do that
12 calculation unless I know how many
13 acres were used. What I want to know,
14 I think we need to know, is how many
15 acres comprise Parcels A and C? How
16 many acres comprises Parcel F? And how
17 many acres comprises Parcel E? We know
18 --

19 UNIDENTIFIED SPEAKER: What's the
20 total?

21 MR. FINGERHUT: I'd like to hear
22 his answer before -- you have rebuttal
23 after that so I'd like to hear if you
24 don't mind.

25 MR. ALFORD: This in the record,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

138

1 right, Chet?

2 MR. WILLIAMS: Yes, a copy of that
3 is attached to Nicole's memo of
4 August 1st.

5 MR. ALFORD: All right. So I'll
6 go through the numerical designation.

7 Parcel F is 10.735 acres, although
8 nine of those acres are open space.

9 MR. CUTRER: Nine are what?

10 MR. ALFORD: Are open space.

11 Parcel D is the right-of-way which
12 has no allocation and it consists of
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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

139

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.

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

140

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

141

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?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

142

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

143

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 you 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 pollinating 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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

144

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

145

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
16 or loading areas.

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

19 MR. ALFORD: What section is that?

20 MS. DIXON: It's in the
21 definition.

22 MR. ALFORD: My concern is, you
23 take their reading with -- 102B1 out --
24 density, then it's apples to oranges
25 and I also think you would render 4A to

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

146

1 take their -- do your strict
2 mathematical calculation. You walk me
3 through -- and you're right, it exceeds
4 the 15.1 but then it leaves 4A,
5 flexibility built in and the Spinnaker
6 guys who own this piece of land gave up
7 acreage exactly as the code told them
8 to do and now it's, oh no, now, you
9 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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

147

1 information on it, as well?

2 MR. WILLIAMS: Yes. It's

3 attached, as well.

4 MR. FINGERHUT: Then the sheet

5 from -- the charts from 1987, is that

6 --

7 MR. ALFORD: That is in the

8 record.

9 MR. FINGERHUT: That is? Okay. I

10 didn't see it. Okay.

11 UNIDENTIFIED SPEAKER: Part of

12 Attachment H --

13 MR. TAYLOR: Mr. Chairman, I would

14 propose that be, though, as an

15 attachment just so that we don't have

16 to dig through it and that --

17 MR. FINGERHUT: That's fine.

18 Are there other questions for the

19 Town? There are, I apologize. My

20 apologies.

21 MR. CUTRER: I have one question.

22 MR. FINGERHUT: Mr. Alford, I

23 think we have one more question.

24 MR. ALFORD: I hope I have one

25 more answer.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

148

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

149

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.

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

150

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

151

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

152

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

153

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

154

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

155

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?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

156

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 --
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

157

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

158

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

159

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
23 construing the LMO, the LMO has its own
24 rules for that and those are the rules
25 that you have to follow.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

160

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 --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

161

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

162

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

163

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

164

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

165

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

166

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

167

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

168

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,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

169

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

170

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

171

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

172

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

173

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,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

174

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

175

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

176

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

177

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

178

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

179

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

180

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
9 redeveloped 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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

181

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

182

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

183

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

184

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

185

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

186

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.

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

187

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 --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

188

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

189

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

190

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?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

191

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

192

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

193

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

194

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

195

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

196

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

197

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

198

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

199

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
8 Overlay District apply.

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

200

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.'

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

201

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

202

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

203

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

204

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 --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

205

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

206

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,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

207

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,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

208

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 grievance 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 grievance or injury to the
20 appellant.

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

23 MR. FINGERHUT: Let's keep on.
24 We're going to dispose of the motion
25 and then go to the next step.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

209

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

210

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

211

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

212

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

213

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

214

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

215

1 that motion? Teresa, please call the
2 roll.

3 MS. HALEY: Mr. Walczak?

4 MR. WALCZAK: For the motion.

5 MS. HALEY: Mr. Johnson?

6 MR. ROBERT JOHNSON: For the
7 motion.

8 MR. HALEY: Mr. Fingerhut.

9 MR. FINGERHUT: For the motion.

10 MS. HALEY: Mr. Cutrer?

11 MR. CUTRER: I guess for the
12 motion.

13 MS. HALEY: Mr. White?

14 MR. WHITE: For the motion.

15 MS. HALEY: Ms. Laudermilch.

16 MS. LAUDERMILCH: For the motion.

17 MR. FINGERHUT: Thank you.

18 Question C, If Parcel E is subject
19 to the LMO's PD-2 Overlay District
20 regulations -- which we decided they
21 are -- what effect does that have on
22 the development of Parcel E, and must
23 the existing development on the other
24 parcels within that PD-2 Overlay
25 District be taken into account in

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

216

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

217

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

218

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.

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

219

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
25 down to is, because F is a legally

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

220

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?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

221

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

222

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 --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

223

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

224

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

225

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

226

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?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

227

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

228

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 --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

229

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

230

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

231

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

232

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

233

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

234

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

235

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
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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

236

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,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

237

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,

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

238

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

239

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

240

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 --

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

241

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

242

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

243

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 --

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

244

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

245

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

246

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

247

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

248

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

249

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

250

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

251

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
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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

252

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?

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

253

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.

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

254

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 --

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

BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

255

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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BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

256

1 CERTIFICATE

2

3 STATE OF GEORGIA:

4 CHATHAM COUNTY:

5

6 I, Kyle J. Saniga, Court Reporter and
7 Notary Public in and for the above county and
8 state, do hereby certify that the foregoing
9 testimony was taken before me at the time and
10 place herein-before set forth; that the witness
11 was by me first duly sworn to testify to the
12 truth, the whole truth, and nothing but the
13 truth, that thereupon the foregoing testimony
14 was later reduced by computer transcription; and
15 I certify that this is a true and correct
16 transcript of my 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 _____
Kyle J. Saniga, CCR

24 Notary Public, B-2038

25 Savannah, Georgia