

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Supreme Court

Hon Mikell R. Scarborough, Master-in-Equity

Case No 2007-CP-10-4692

Historic Charleston Foundation and
Preservation Society of Charleston,

Respondents,

v

The City of Charleston, The City of Charleston
City Council and Library Associates, LLC,

Appellants

RECORD ON APPEAL
VOLUME I OF V

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INDEX	PAGE
VOL I	
Order of the Honorable Mikell R Scarborough dated August 19, 2010	1
Order of the Honorable Mikell R Scarborough dated November 4, 2010	16
Order of Consolidation	17
Order of Reference	21
Notice of Appeal	25
Complaint	27
Answer – City Defendants	90
Answer – Library Associates, LLC	98
Motion to Alter, Amend or Reconsider	104
Transcript of hearing, January 12, 2009	113
Testimony	
BRADISH J WARING	
Direct by Mr Pritchard	133
Cross by Mr Domin	147
Cross by Ms Cantwell	151
Redirect by Mr Pritchard	156
Examination by the Court	162
JONATHAN H POSTON	
Direct by Mr Pritchard	163
Cross by Mr Domin	179

Cross by Ms Cantwell	183
Redirect by Mr Pritchard	187
Recross by Ms Cantwell	191
Redirect by Mr Pritchard	194
Examination by the Court	195

ROBERT GURLEY

Direct by Mr Walker	197
Cross by Mr Pritchard	249
Cross by Ms Cantwell	249
Cross by Mr Domin	272
Redirect by Mr Walker	275
Recross by Ms Cantwell	277
Recross by Mr Pritchard	281
Recross by Ms Cantwell	281
Examination by the Court	285

WINSLOW HASTIE

Direct by Mr Pritchard	287
------------------------	-----

VOL II

Transcript of hearing, March 9, 2009	294
--------------------------------------	-----

Testimony

WILLIAM J COOK

Direct by Ms Hanafi	302
Cross by Mr Domin	333
Cross by Ms Cantwell	345
Cross by Mr Walker	354
Redirect by Ms Hanafi	357
Examination by the Court	361
Recross by Mr Walker	366

LEE C BATCHELDER

Direct by Mr Domin	375
Cross by Ms Smith-Yancey	401
Cross by Ms Hanafi	420
Cross by Ms Cantwell	424
Redirect by Mr Domin	429
Recross by Ms Smith-Yancey	432
Cross by Mr Pritchard	435
Examination by the Court	437
Redirect by Mr Domin	441

MICHAEL T MAHER

Direct by Mr Domin	441
Cross by Ms Smith-Yancey	461

Cross by Ms Cantwell	481
Redirect by Mr Domin	484
Examination by the Court	486
Cross by Mr Pritchard	488

JOSEPH P RILEY

Direct by Mr Domin	488
Cross by Mr Walker	503
Cross by Ms Cantwell	520
Redirect by Mr Domin	523
Examination by the Court	523
Defendants' Exhibit 1	529
Defendants' Exhibit 2	532
Defendants' Exhibit 3	555
Defendants' Exhibit 4	588
Defendants' Exhibit 5	596
Defendants' Exhibit 6	597
Defendants' Exhibit 7	619
	VOL III
Defendants' Exhibit 8	768
Defendants' Exhibit 9	938
Defendants' Exhibit 10	940

Plaintiffs' Exhibit 1 (Filed separately)	947
Plaintiffs' Exhibit 2 (Filed separately)	947
Plaintiffs' Exhibit 3 (Filed separately)	947
Plaintiffs Exhibit 4 (Filed separately)	947
Plaintiffs' Exhibit 5	948
Plaintiffs' Exhibit 6	950
Plaintiffs' Exhibit 7 (Filed separately)	951
Plaintiffs' Exhibit 8 (Filed separately)	951
Plaintiffs' Exhibit 9	952
Plaintiffs' Exhibit 10	1020
Plaintiffs' Exhibit 11	1060
Plaintiffs' Exhibit 12	1062
Plaintiffs' Exhibit 13	1063
Plaintiffs' Exhibit 14	1064
Plaintiffs' Exhibit 15	1083
Plaintiffs' Exhibit 16	1096
Plaintiffs' Exhibit 17	1097
Plaintiffs' Exhibit 18	1123
Plaintiffs' Exhibit 19	1128
Plaintiffs' Exhibit 20	1151
Plaintiffs' Exhibit 21	1161
Plaintiffs' Exhibit 22 (Filed separately)	1166
Plaintiffs' Exhibit 23 (Filed separately)	1166

Plaintiffs' Exhibit 24	1167
Plaintiffs' Exhibit 25	1171

VOL IV

Plaintiffs' Exhibit 26	1258
Plaintiffs' Exhibit 27	1282
Plaintiffs' Exhibit 28	1283
Plaintiffs' Exhibit 29	1355
Plaintiffs' Exhibit 30	1528

VOL V

Plaintiffs' Exhibit 31	1529
Plaintiffs' Exhibit 32	1737
Plaintiffs' Exhibit 33	1761
Complaint re Variance Case	1762
Order Affirming Variance	1786
Notice of Intent to Appeal Variance	1796
Certificate of Counsel	1798

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

HISTORIC CHARLESTON FOUNDATION
and PRESERVATION SOCIETY OF
CHARLESTON,

Plaintiffs,

vs

THE CITY OF CHARLESTON, THE CITY
OF CHARLESTON CITY COUNCIL
and LIBRARY ASSOCIATES, LLC,

Defendants

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO 2007-CP-10-4692

ORDER

2010 AUG 20 AM 5 47
JULIE J ARMSTRONG
CLERK OF COURT

FILED

This matter comes before the Court on the issue of whether the rezoning by the City of Charleston ("City") of a portion of the property located at 404 King Street, Charleston, South Carolina to extend the 3X height district to the entire parcel should be annulled. Plaintiffs Historic Charleston Foundation ("Historic Charleston") and the Preservation Society of Charleston ("Preservation Society") challenge the rezoning of 404 King Street as an invalid exercise of illegal spot zoning by the City.

A trial on the merits was conducted on January 12, 2009 and March 9, 2009 in Charleston, South Carolina.

FINDINGS OF FACT

Having observed the witnesses, weighed their credibility, and fully considered the testimony and exhibits presented at the hearing, I make the following findings of fact:

1. Plaintiffs' challenge to rezoning was timely filed.



- 2 Notice of the time, date and nature of the hearing was timely given to all parties
- 3 Defendant, Library Associates, is the owner of 404 King Street, the site of the former Charleston County Library
- 4 404 King Street is a corner lot adjacent to the old Citadel building and Marion Square, and across the street from St Matthews Lutheran Church and the historic Aimar building at 409 King Street
- 5 Plaintiff Preservation Society holds a conservation easement on the historic Aimar building at 409 King Street
- 6 Both Historic Charleston and the Preservation Society hold easements on buildings adjacent and in proximity to 404 King Street
- 7 Library Associates intends to build a high-rise hotel on 404 King Street
- 8 At the time Library Associates acquired 404 King Street, the parcel was split zoned The portion of the parcel fronting King Street was zoned 3X and the back portion of the parcel was zoned 55/30 3X is a height district that allows the maximum height of a building to be three times the distance from the front of the building to the center line of the street it fronts 55/30 is a height district with a fifty-five foot maximum and thirty foot minimum height
- 9 Library Associates had actual or constructive knowledge that 404 King Street was split zoned at the time it acquired the property
- 10 On December 4, 2006, Library Associates filed an application with the Board of Zoning Appeals ("BZA") seeking a variance from the height limitation of fifty-five feet for the rear portion of 404 King Street in the 55/30 height zone

- 11 On January 2, 2007, the BZA conducted a hearing and granted Library Associates a variance allowing a building height of up to 105 feet on the portion of 404 King Street that had been zoned 55/30 (hereinafter "Variance Decision")
- 12 Members and representatives of Historic Charleston and the Preservation Society attended the BZA's January 2, 2007 public meeting and addressed and opposed the variance
- 13 On January 9, 2007, Historic Charleston filed a motion to reconsider with the BZA asking it to reconsider the Variance Decision On February 20, 2007, the BZA denied the motion for reconsideration
- 14 On February 1, 2007, Historic Charleston and Preservation Society appealed the Variance Decision to the Circuit Court, which appeal was heard by this Court on March 10, 2009 Historic Charleston and Preservation Society challenged the Variance Decision as arbitrary and erroneous as a matter of law because Library Associates failed to meet their burden of proving the elements of unnecessary hardship required to obtain a variance under the laws of South Carolina and the City of Charleston Zoning Ordinance
- 15 After Plaintiffs filed their appeal of the Variance Decision, Library Associates and the City pursued the rezoning of 404 King Street to expand the 3X zoning classification to cover the entire parcel
- 16 Testimony was presented by the City of Charleston that the zoning change was pursued even though the variance had already been approved in order to avoid the Plaintiffs' lawsuit surrounding the variance (Trial Transcript of March 9, 2009, pp 206-7, 213-14)



- 17 The City advocated for the zoning change despite the fact that the 3X zoning district was referred to by the City as "prehistoric" and no longer appropriate in a September 2005 City Council meeting
- 18 Historic Charleston and the Preservation Society and their members spoke in opposition to the rezoning of 404 King Street at the City's Planning Commission and City Council deliberations
- 19 Despite objections of the Plaintiffs, on August 21, 2007, the City, acting through City Council, adopted an ordinance rezoning the rear portion of 404 King Street subject to the 55/30 height district so that the entire parcel became zoned a 3X height district
- 20 No other parcel in the area was rezoned at the time of the rezoning, only 404 King Street, the zoning on all of the properties to the north, south and west of the property along King Street as well as the properties to the east on Hutson Street also subject to split zoning were not rezoned and retained the exact same split height zoning restrictions they had prior to the rezoning of 404 King Street
- 21 Split zoning is typical in the area where 404 King Street is located As shown in zoning maps Plaintiffs admitted as exhibits, all properties on the east side of King Street from George Street to Line Street are split zoned
- 22 City Council adopted the Downtown Plan in 1999 as the land use element of the Comprehensive Plan for the City of Charleston
- 23 Section 8.4 of the Downtown Plan specifically states that 3X is an overly permissive height zone that should be replaced



- 24 In September 2006 the City eliminated the 3X district on King Street for all the blocks north of Hutson Street with one exception in the subject area of 404 King Street
- 25 Prior to the rezoning of 404 King Street, no parcel on the east side of King Street was zoned entirely 3X Only three parcels on the west side of King Street, between Calhoun and Vanderhorst Streets, are zoned entirely 3X These three parcels are not available to new development and contain the Francis Marion Hotel, St Matthews Lutheran Church, and the parking garage in between
- 26 Lee Batchelder, Zoning Administrator for the City of Charleston, testified at trial that the 3X height district had never before been expanded in the City of Charleston The rezoning of 404 King Street to extend the 3X district is the one and only instance in which 3X zoning has been expanded since the City's adoption of the Comprehensive Plan (Trial Transcript of March 9, 2009, p 127)
- 27 Section 8 4 of the Downtown Plan states that a goal of the plan is to preserve downtown's existing skyline and height zones The Downtown Plan allows for only slight increases to the existing skyline of one story and disfavors tall buildings that detract from historic sites
- 28 Section 9 2 of the Downtown Plan refers to 404 King Street as the "old library site and states that new development on this parcel should pay particular attention to preserving the prominence of the church steeples, the old Citadel building and the "Calhoun column" on the skyline



29 A 105 foot building at 404 King Street would be fifty feet taller than the adjacent historic old Citadel building, and substantially taller than many other historic structures in the area

CONCLUSIONS OF LAW

Based on the foregoing, I make the following legal conclusions

- 1 As Plaintiffs hold easements on buildings adjacent and in proximity to 404 King Street, I find that Plaintiffs have standing to bring this action under the injury-in-fact constitutional analysis and the public importance exception outlined in ATC South, Inc v Charleston County, 380 S C 191, 669 S E 2d 337 (2008)
- 2 This Court has the power to set aside a municipal body's zoning decision where there has been a clear abuse of discretion by the municipal body Talbot v Myrtle Beach Bd of Adjustment, 222 S C 165, 72 S E 2d 66 (1952) The presumption of fairness a municipal body normally enjoys as to their decisions will be set aside when the municipal body has acted arbitrarily or in obvious abuse of its discretion or where the board has acted illegally and in excess of its lawfully delegated authority Id
- 3 A municipal body acts arbitrarily and in abuse of its discretion when it engages in illegal spot zoning
- 4 Illegal spot zoning occurs when a rezoning (1) falls within the definition of spot zoning and (2) fails to both adhere to the City's comprehensive plan and promote the good of the common welfare Knowles v City of Aiken, 305 S C 219, 407 S E 2d 639 (1991)



The City's Motive for Enacting the Zoning Ordinance

- 5 Plaintiffs contend that the rezoning of 404 King Street was no ordinary act of zoning, but was instead an attempt by the City to single out a particular parcel to avoid litigation over that parcel. Plaintiffs argue that the primary purpose of the rezoning was to subvert the Plaintiffs' rights to judicial review of the Variance Decision in an effort to cure deficiencies in the Variance Decision.
- 6 The trial testimony that the City supported the rezoning as a way to avoid litigation and game playing heavily supports Plaintiffs' arguments. (Trial Transcript of March 9, 2009, pp. 206-7, 213-14)
- 7 Based on the City's testimony at trial, I find that avoiding litigation as to one small parcel of land was in fact the motive of the City in pursuing the rezoning of 404 King Street. I further find that the rezoning was an improper act by the City which sought to insulate the City and Library Associates from judicial review of the purported legal deficiencies in the Variance Decision, however, this court upheld the decision of the City of Charleston Board of Zoning Appeals in C/A # 2007-CP-10-451 by decision entered June , 2010.

The Rezoning of 404 King Street was "Spot Zoning"

- 8 The leading case in South Carolina on spot zoning is Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639, 641 (1991).
- 9 In Knowles, the South Carolina Supreme Court held that spot zoning occurs when a small parcel of land is singled out and rezoned to a classification different from that



of the surrounding area for the benefit of owners of such property and to the detriment of other owners Id. at 221

10 Spot zoning is also characterized as the “upzoning” of an individual tract or relatively small parcel of land at the owner’s request to allow a higher density or more intensive use or development 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING §41 2 (4th ed) Singling out one lot or small area for treatment less onerous than that imposed upon nearby, indistinguishable properties qualifies as spot zoning W R Grace Co v Cambridge City Council, 56 Mass.App Ct 59, 570, 779 N E 2d 141, 151 (2002) Spot zoning is also defined as an instance where one lot or small area is singled out for different treatment from that accorded to similar surrounding land indistinguishable from it in character for the economic benefit of the owner of that lot Putney v Township of Abington, 176 Pa Super 463, 476, 108 A.2d 134, 140 (1954)

11 Plaintiffs argue that the rezoning of the rear portion of 404 King Street to 3X qualifies as spot zoning under the legal definition of the term in Knowles because the rezoning applied to only a portion of one parcel Plaintiffs emphasize that no other parcel was changed and that the small area rezoned was a “spot ”

12 I find that the rezoning at issue did apply to a “spot,” that “spot” being a portion of the single parcel of 404 King Street

13 Plaintiffs further argue that rezoning the “spot” to expand the 3X classification is rezoning in a manner inconsistent with the surrounding area and the Charleston peninsula as a whole Parcels adjacent to 404 King Street are all split zoned and remain split zoned despite the different treatment of 404 King Street It is

undisputed that 3X zoning was, and is, a disfavored zoning classification that is in the process of being actively phased out. The City's comprehensive plan called for elimination of 3X zoning, and the rezoning of 404 King Street is the one and only instance in which the 3X zoning district has been expanded since the City's adoption of the Comprehensive Plan.

14 Defendants argue that three parcels along the west side of King Street are zoned entirely 3X. These parcels are the Francis Marion Hotel, St. Matthews Lutheran Church, and the parking garage in between.

15 I find that City Council engaged in spot zoning by rezoning only a portion of one parcel of land to expand the 3X district, a zoning classification that is disfavored by the City and which has been in the process of being phased out in the downtown area.

16 I find that expanding the 3X district is inconsistent with the zoning scheme of surrounding parcels. While there are three parcels on the west side of King Street zoned entirely 3X, it is clear from the zoning maps admitted into evidence that this is atypical for the immediate vicinity. Furthermore, none of these parcels are available to new development.

17 Plaintiffs argue that the rezoning of 404 King Street to expand 3X was done for the benefit of the owner of the property, Library Associates. The extra height allowed by the rezoning allows an increased number of rooms to be added to the proposed hotel, which will in turn increase revenues.

18 I find that City Council's rezoning of 404 King Street was done for the benefit of the owner, Library Associates. The rezoning allowed a larger hotel, which in turn



increases the revenue potential from the project (Trial Transcript of March 9, 2009, p 213)

19 Plaintiffs argue that the rezoning of 404 King Street to expand 3X will be a detriment to surrounding properties and other owners. The rezoning allows a 105 foot building to be built across the entire parcel, dwarfing nearby historic structures such as the old Citadel building and St. Matthews Lutheran Church. A 105 foot building stretching across the entire parcel could also jeopardize the historic status and designation granted to the City that is the basis for all façade conservation easements.

20 I find that City Council's rezoning of 404 King Street is detrimental to surrounding properties and other owners. The 105 foot building permitted under the rezoning would be nearly twice as large as the historic old Citadel building and could jeopardize the historic status granted to the City.

21 While in Knowles the Court concluded that the zoning at issue was not "spot zoning," the facts of the present case are plainly distinguishable. In Knowles, the subject property had been previously unzoned, therefore, its zoning actually created more restrictions for the use and development of the land. Here, on the other hand, 404 King Street was already zoned, and the rezoning eliminated a critical building dimensional restriction in an effort to benefit the owner.

22 Additionally in Knowles, the subject land was simply being zoned for professional office, a commercial zoning category entirely consistent with the zoning of many surrounding parcels. Here, the 3X district did not apply to any other parcels in the vicinity on the east side of King Street. There is no indication in Knowles, as there is



here, that the zoning classification applied to the subject property was “prehistoric” and being phased out in compliance with the Comprehensive Plan Future rezonings in the area consistent with, not adverse to, the height standards of the Comprehensive Plan’s goals and objectives should be enacted.

- 23 Based on the foregoing, I find that the actions of City Council in rezoning a portion of 404 King Street to expand the 3X zoning classification squarely falls within the definition of spot zoning because it was the singling out and rezoning of one small parcel to a classification totally different from that of the surrounding area for the benefit of the owner, Library Associates, and to the detriment of other owners

The Rezoning of 404 King Street was *Illegal Spot Zoning*

- 24 Spot zoning ordinances are not *per se* invalid, but are ordinarily found to be invalid

Knowles, 305 S C at 222

- 25 In determining whether spot zoning is illegal or invalid, the Court must consider whether the zoning (1) adheres to the City’s comprehensive plan, and (2) promotes the good of the common welfare Id at 223

- 26 While the municipal body enjoys a presumption of fairness as to their decisions, the presumption of fairness and correctness will fall and a variance will be set aside where there is a clear abuse of discretion Talbot v Myrtle Beach Bd of Adjustment, 222 S C 165, 72 S E 2d 66 (1952)

- 27 When there is a lack of evidence supporting a municipal body’s zoning decision, the decision is not fairly debatable and the Court must overturn the selective zoning as illegal spot zoning Knowles, 305 S C at 224

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- 28 The “piecemeal” zoning process undertaken by the City here is a quasi-judicial process, rather than a legislative process, and judicial review of this piecemeal rezoning must include the determination of whether the fact-finding process has been properly pursued and whether the evidence of record supports the City’s decision Anderson House, LLC v Mayor and City Counsel of Rockville, 402 Md 689, 708, 939 A 2d 116, 127 (2008)
- 29 Plaintiffs argue that the rezoning of 404 King Street to extend the 3X height district across the parcel failed to adhere to the City’s Comprehensive Plan in several respects. Plaintiffs cite specific provisions of the Downtown Plan, adopted as part of the City’s Comprehensive Plan, including the plan’s disfavor of tall buildings that detract from historic sites and the statement in the plan that 3X is an overly permissive height zone which should be phased out. Plaintiffs also point out that the Downtown Plan specifically requires particular attention to be paid to the skyline, including the prominence of church steeples and the old Citadel towers located adjacent to 404 King Street.
- 30 Plaintiffs entered into evidence a diagram from the Downtown Plan showing examples of the current, desired and undesired skyline for Charleston. The current and desired skylines were nearly identical. The undesired skyline was characterized by tall buildings that rose above the church steeples.
- 31 Defendants argue that the propriety of the rezoning is fairly debatable and is consistent with the Comprehensive Plan’s general goal of economic growth.
- 32 Under rules of statutory construction, specific provisions prevail over general provisions. Atlas Food Sys and Serv., Inc v Crane Nat Vendors Div of



Unidynamics Corp., 319 S C 556, 558, 462 S E 2d 858, 859 (1995) See also, Mikell v County of Charleston, et al , 386 S C 153, 687 S E 2d 326 (2009) Additionally, provisions should be read in harmony, to give meaning to all terms if possible Foothills Brewing Concern, Inc v City of Greenville, 377 S C 355, 363, 660 S E 2d 264, 268 (2008)

33 Based on this well-founded rule of statutory construction, I find that the Downtown Plan's specifications as to the skyline and height of buildings around Marion Square control

34 I further find that City Council's rezoning of 404 King Street to extend the 3X district and allow a 105 foot building to stretch across the entire parcel does not adhere to the City's Comprehensive Plan The propriety of the rezoning is not even fairly debatable The rezoning is in direct conflict with the Comprehensive Plan's provision that tall buildings should not detract from historic sites, particularly the old Citadel towers and St Matthews Lutheran Church The rezoning is also in direct conflict with the Comprehensive Plan's statement that 3X is an overly permissive height zone which should be phased out Further, the rezoning conflicts with the Comprehensive Plan's diagram illustrating the desired skyline of Charleston The diagram illustrating the desired height and skyline in the Downtown Plan, as well as the specific text governing Marion Square, clearly cannot be reconciled with the extension of the 3X district and the radical increase in height, almost double, that would be allowed by this rezoning

35 As to whether the rezoning promotes the good of the common welfare, Plaintiffs argue that it does not Plaintiffs argue that the rezoning adversely affects the historic

character of the surrounding area and damages the historic skyline of Charleston that so many visitors come to see each year Plaintiffs further argue that a possible change in Charleston's historic status due to taller buildings in the downtown area would adversely impact the City's tourist appeal, thereby negatively impacting the common welfare

36 I agree with Plaintiffs that allowing a building nearly twice the height of many adjacent and nearby historically significant structures would have a negative impact on the common welfare, and I find that the rezoning of 404 King Street to extend the 3X zoning classification does not promote the good of the common welfare

37 I find that the rezoning does not adhere to the City's Comprehensive Plan See Knowles, 305 SC at 222-223, 407 SE 2d at 642 If the city is to preserve its colonial skyline heritage, more stringent height standards as envisioned in the Comprehensive Plan, not less stringent standards as pursued in this single instance, must be pursued The result of continued single instances of lessened height standards will, ultimately and inevitably, result in a loss of the unique and historic skyline of the City of Charleston

38 I find that the rezoning of 404 King Street to extend the 3X zoning classification was not only spot zoning, but illegal spot zoning because it did not adhere to the City's Comprehensive Plan and did not promote the good of the common welfare

39 I find that by engaging in illegal spot zoning, the City clearly abused its discretion, and therefore the presumption of fairness normally applying to a municipal body's decision does not apply in this case

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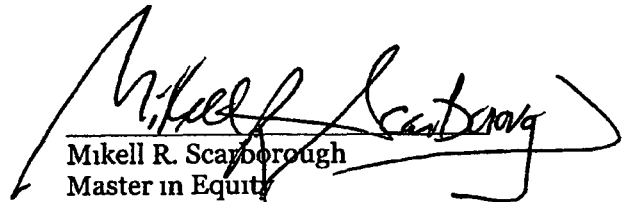
40 I find that there is a lack of evidence supporting the City's zoning decision, and therefore the decision is not fairly debatable

ORDER

41 IT IS THEREFORE ORDERED that City Council's zoning ordinance of August 21, 2007, rezoning a portion of 404 King Street to extend the 3X height district to the entire parcel, was an invalid act of illegal spot zoning

42 IT IS THEREFORE ORDERED that the City of Charleston's August 21, 2007 zoning ordinance extending the 3X district be, and hereby is, declared annulled

AND IT IS SO ORDERED'


Mikell R. Scarborough
Master in Equity

Charleston, South Carolina
8/19, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
MASTER IN EQUITY COURT

JUDGMENT IN A CIVIL CASE
CASE NO 2007-CP-10-4692

HISTORIC CHARLESTON FOUNDATION
and PRESERVATION SOCIETY OF
CHARLESTON

THE CITY OF CHARLESTON,
THE CITY OF CHARLESTON
CITY COUNCIL and LIBRARY
ASSOCIATES, LLC

PLAINTIFF(s)

DEFENDANT(s)

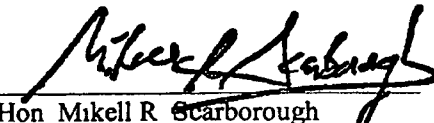
- ☐ Jury Verdict This action came before the court for a trial by jury The issues have been tried and the verdict rendered
- ☒ Decision by court This action came to trial or hearing before the court The issues have been tried or heard and a decision rendered
- ☐ Action Dismissed ☐ Rule 12(b) SCRPC ☐ Rule 40(j) SCRPC
☐ Rule 41(a) SCRPC (Voluntary Nonsuit) ☒ Settled ☐ Other, Explain

IT IS ORDERED AND ADJUDGED ☐ See attached order
☐ Statement of Judgment by Court

FILED
2010 NOV -9 AM 9 38
JULIAN ARMSTRONG
CLERK OF COURT

DEFENDANT'S MOTION TO ALTER, AMEND OR RECONSIDER, PURSUANT TO
RULE 59 (e), IS RESPECTFULLY DENIED

Dated at Charleston, South Carolina, this 4th day of NOVEMBER, 2010


Hon Mikell R Scarborough
Master In Equity

This judgment was entered on the ____ day of _____, 19____, and a copy mailed first class this ____ day of _____, 20____, to attorneys of record or to parties (when appearing pro se) as follows

Attorney(s) for Plaintiff

Attorney(s) for Defendant

SCRPC Form 4

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Historic Charleston Foundation and Preservation)
Society of Charleston,)
Appellants,)
vs)
The City of Charleston, The City of Charleston)
Board of Zoning Appeals-Zoning and Library)
Associates, LLC,)
Respondents)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO 2007-CP-10-451

CONSENT ORDER
OF CONSOLIDATION

FILED
2008 JAN 18 PM 2 18
JUL
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Historic Charleston Foundation and Preservation)
Society of Charleston,)
Plaintiffs,)
vs)
The City of Charleston, The City of Charleston)
City Council, and Library Associates, LLC,)
Defendants)

COURT OF COMMON PLEAS
CASE NO 2007-CP-10-4692

CONSENT ORDER
OF CONSOLIDATION

The within matters concern challenges to the height approved for a hotel scheduled to be constructed at 404 King Case No 2007-CP 10-451 is an appeal from the decision of the City of Charleston Board of Zoning Appeals granting a height variance for the hotel Case No 2007 CP-10-4692 is a challenge to an ordinance ratified by the City Council of Charleston that rezoned the height regulations applicable to 404 King Street As each of these actions have

facts and parties in common the interests of judicial economy would be served if the matters were consolidated for purposes of trial, and the parties so agree

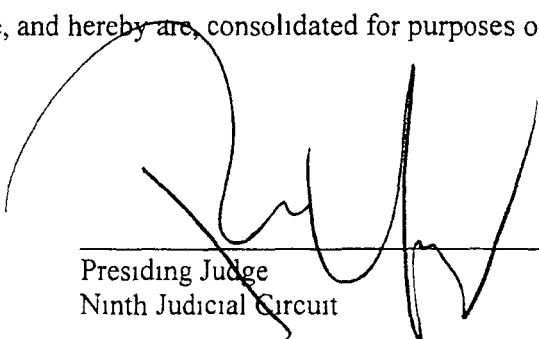
NOW, THEREFORE, IT IS

ORDERED that the within matters be, and hereby are, consolidated for purposes of trial, and

IT IS SO ORDERED

Charleston South Carolina

11/15/18, 2007



Presiding Judge
Ninth Judicial Circuit

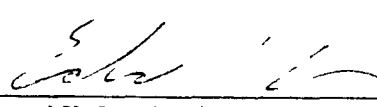
WE CONSENT

Attorney for Appellant Historic Charleston Foundation

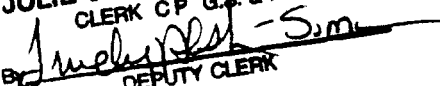
Case No 2007-CP-10-451

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Case No 2007-CP 10-4692



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ATTEST A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK CP G.S. & FC.
By  - S.m.
DEPUTY CLERK

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facts and parties in common, the interests of judicial economy would be served if the matters were consolidated for purposes of trial, and the parties so agree

NOW, THEREFORE IT IS

ORDERED that the within matters be and hereby are, consolidated for purposes of trial and

IT IS SO ORDERED

Charleston, South Carolina

_____ 2007

Presiding Judge
Ninth Judicial Circuit

WE CONSENT

Attorney for Appellant Historic Charleston Foundation

Case No 2007-CP 10-451

Attorney for Plaintiff Historic Charleston Foundation

Case No 2007 CP 10-4692

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Charleston South Carolina 29401

Attorneys for Appellant Preservation Society of Charleston

Case No 2007-CP 10-451

Attorneys for the Plaintiff Preservation Society of Charleston

Case No 2007-CP-10 4692



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**Attorney for Respondent City of Charleston,
The City of Charleston Board of Zoning Appeals-Zoning**
Case No 2007 CP 10-451

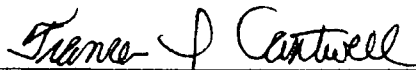
Attorney for Defendants City of Charleston and City of Charleston City Council
Case No 2007 CP-10-4692



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Charleston, South Carolina 29492-8144

Attorneys for Respondent Library Associates, LLC
Case No 2007-CP-10-451

Attorneys for the Defendant Library Associates, LLC
Case No 2007-CP 10-4692



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David B. McCormack
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P.O. Box 999
Charleston, South Carolina 29402

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Historic Charleston Foundation and Preservation)
Society of Charleston,)
Appellants,)
vs)
The City of Charleston, The City of Charleston)
Board of Zoning Appeals Zoning and Library)
Associates, LLC)
Respondents)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO 2007 CP-10-451

ORDER OF REFERENCE

FILED
2008 MAR 24 PM 12:01
CLERK J. A. HESTRONG

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Historic Charleston Foundation and Preservation)
Society of Charleston,)
Plaintiffs,)
vs)
The City of Charleston The City of Charleston)
City Council, and Library Associates LLC)
Defendants)

COURT OF COMMON PLEAS
CASE NO 2007-CP-10-4692

ORDER OF REFERENCE

2107-00-018

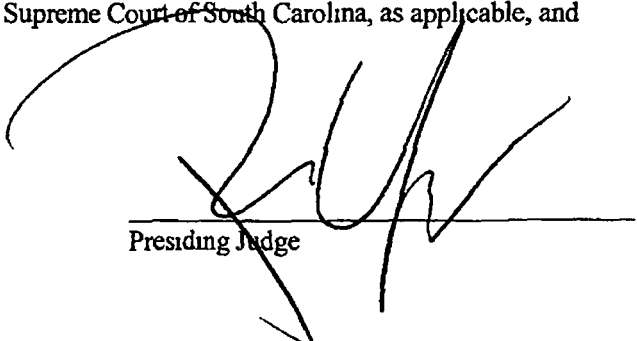
The within matters have been consolidated for trial pursuant to an Order of this Court dated January 15 2008 It appears that the parties desire to have these matters referred to the Master-in Equity for a final determination, with any appeal being directly to the South Carolina Court of Appeals or the Supreme Court, as applicable, pursuant to S C Code § 14-11 85 (Cum Supp 2007)

NOW THEREFORE, IT IS ORDERED that the within actions be, and hereby are, referred to the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, for a final determination of the merits of these actions, with any appeal from that determination being directly to the South Carolina Court of Appeals or Supreme Court of South Carolina, as applicable, and

IT IS SO ORDERED

Charleston, South Carolina

3/20, 2008


Presiding Judge

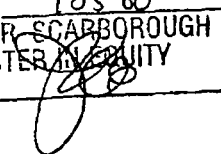
WE CONSENT

Attorney for Appellant Historic Charleston Foundation
Case No 2007-CP-10-451

Attorney for Plaintiff Historic Charleston Foundation
Case No 2007-CP-10-4692



Edward K. Pritchard, III, Esq
Pritchard & Elliott, LLC
8 Cumberland Street, Suite 200
Charleston, South Carolina 29401

DATE 3-17-08
AMOUNT 185.00
MIKELL R. SCARBOROUGH
MASTER IN EQUITY
BY 

Attorneys for Appellant Preservation Society of Charleston
Case No 2007-CP-10-451

Attorneys for the Plaintiff Preservation Society of Charleston
Case No 2007-CP-10-4692


G. Trenholm Walker, Esq
Lindsay K. Smith-Yancey, Esq
Pratt-Thomas, Epting & Walker, PA

NOW THEREFORE, IT IS ORDERED that the within actions be, and hereby are, referred to the Honorable Mikell R Scarborough, Master-in-Equity for Charleston County, for a final determination of the merits of these actions, with any appeal from that determination being directly to the South Carolina Court of Appeals or Supreme Court of South Carolina, as applicable, and

IT IS SO ORDERED

Charleston, South Carolina

Presiding Judge

_____, 2008

WE CONSENT

Attorney for Appellant Historic Charleston Foundation
Case No 2007-CP-10-451

Attorney for Plaintiff Historic Charleston Foundation
Case No 2007-CP-10-4692

DATE 3-17-08
AMOUNT 125.00
MIKELL R. SCARBOROUGH
BY [Signature]
COUNTY

Edward K. Pritchard, III, Esq
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Attorneys for Appellant Preservation Society of Charleston
Case No 2007-CP-10-451

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Case No 2007-CP-10-4692

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**Attorney for Respondent City of Charleston,
The City of Charleston Board of Zoning Appeals-Zoning**
Case No 2007-CP-10-451

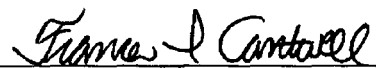
Attorney for Defendants City of Charleston and City of Charleston City Council
Case No 2007-CP-10-4692



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-4692

Historic Charleston Foundation and
Preservation Society of Charleston,

Respondents,

v

The City of Charleston, The City of Charleston
City Council and Library Associates LLC

Appellants

NOTICE OF APPEAL

The City of Charleston The City of Charleston City Council and Library Associates LLC (Appellants) appeal the order of the Honorable Mikell R Scarborough dated August 19 2010, and the Order dated November 4 2010 denying Appellants' Rule 59 (e) motion

Appellants received written notice of entry of the August 19, 2010 order on August 30, 2010 and timely filed and served a motion to reconsider alter or amend pursuant to Rule 59 (e), SCRCF on September 9, 2010 Appellants received written notice of entry of the order dated November 4, 2010 denying the Rule 59 (e) motion on November 22, 2010 Copies of the orders appealed are attached to this notice

FILED
2010 DEC -6 AM 11:23
JULIE J ARMSTRONG
CLERK OF COURT

Charleston, South Carolina

December 3, 2010

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Attorney for Appellants City of Charleston and the
City of Charleston City Council

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT

Historic Charleston Foundation and) Case No 2007-CP-10-_____
Preservation Society of Charleston,)
))

Plaintiffs,)

v)

The City of Charleston The)
City of Charleston City Council,)
and Library Associates, LLC,)

Defendants)
_____)

COMPLAINT
(Challenge to Validity of Re-Zoning
Pursuant to Section 6-29 760(D), Code of
Laws of South Carolina, 1976, as Amended

2007 OCT 19 PM 1:15

Plaintiffs, Historic Charleston Foundation (hereinafter referred to as "HCF") and Preservation Society of Charleston (hereinafter referred to the "Preservation Society") complaining of defendants, City of Charleston and City of Charleston City Council (hereinafter collectively referred to as "The City"), and Library Associates, LLC (hereinafter referred to as the "Library") would respectfully show unto the Court

BACKGROUND

1 That HCF is, and at all times relative hereto was, an eleemosynary corporation organized and existing pursuant to the laws of the State of South Carolina, and that it has its principal place of business in Charleston County South Carolina, and that it is a qualified tax exempt entity pursuant to IRC § 501(c)(3)

2 That the Preservation Society is, and at all times relative hereto was an eleemosynary corporation organized and existing pursuant to the laws of the State of South Carolina, and that it has its principal place of business in Charleston County South Carolina, and that it is a qualified tax exempt entity pursuant to IRC § 501(c)(3)

3 That The City is a “municipality” as defined in Section 5-1-20(l), Code of Laws of South Carolina, 1976, and is a political subdivision of the State of South Carolina, and that The City of Charleston City Council serves as the legislative body for The City

4 That, on information and belief, Library is a limited liability company existing pursuant to the law of the State of South Carolina and has its principle place of business in Charleston County, South Carolina

5 That HCF and the Preservation Society are, for purposes of this action, parties who have a substantial interest in and are adversely affected by the City’s rezoning challenged herein

6 That HCF was founded in 1947, as a self-perpetuating trustee governed organization, that it has approximately thirty-five (35) Trustees on its Board of Trustees who are made up of members of the Charleston, South Carolina, community, all of which have a strong interest in or specialized interest in historic preservation, and that the mission and purpose of HCF as set forth in its charter and by laws is to preserve and protect the buildings, landscapes, cultural resources, and the historical, architectural, and cultural character of the Charleston, South Carolina, area and its environs

7 That since its earliest days, HCF has been a national pacesetter in its efforts to preserve the historic buildings, neighborhoods, and landmarks that make Charleston a unique American city

8 That since its founding, HCF has been an active voice at the City’s Council meetings, at Charleston County Council meetings, at the City’s Board of Architectural Review hearings, and at the City’s Boards of Zoning Appeals hearings, helping to preserve historic structures and plan wisely for Charleston’s future

9 That HCF has acquired and protected through restrictive covenants scores of structures in the Charleston, South Carolina, area and its environs, has protected scores of buildings through its historic preservation easement program, and has a distinguished history of protecting buildings of national importance, including, without limitation, Drayton Hall McCloud Plantation, the William Gibbes House, Mulberry Plantation, Frank Lloyd Wright's Auldbrass Plantation, as well its two house museums, the Nathaniel Russell House, and Aiken-Rhett House

10 That HCF continues to play a major role in the shaping of public policies relating to the protection of buildings landscapes cultural resources, and the historical, architectural, and cultural character of Charleston, South Carolina, and the Charleston, South Carolina, area, and its environs, including, without limitation, participation in the drafting and enactment of many of the City's ordinances, such as the 1973 City Preservation Plan, the 1975 Architectural Inventory, the 1978 Urban Height Ordinance, the 2004 Height Ordinance Revision, the expansion of the old and historic district from one hundred forty four (144) acres to more than one thousand (1,000) acres, and the addition of the Cooper River Historic District on the National Register of Historic Places

11 That the Preservation Society was founded in 1920 as a membership organization of more than two thousand (2000) members from South Carolina, and thirty-five (35) other states who are concerned about the future of Charleston's historic district, governed by a Board elected by the members, and that the mission and purpose of the Preservation Society as set forth in its charter and by-laws is to preserve and protect the historical, architectural, and cultural character of the Charleston, South Carolina, area and its environs, cultivate and encourage interest in the preservation of buildings, sites, and structures of historical or aesthetic significance and to take whatever steps may be necessary and feasible to prevent the destruction or defacement of any such building, site, or structure

12 That the Preservation Society was founded by Miss Susan Pringle Frost and a small group of individuals who were concerned about the future of the circa-1802 Joseph Manigault House, which was eventually restored

13 That in 1931, the Preservation Society was instrumental in persuading the City to pass the first zoning ordinance enacted to protect historic resources, which ordinance established the first Board of Architectural Review and designated a one hundred thirty-eight (138) old and historic district, which district has since been expanded to include over four thousand eight hundred (4,800) historic structures

14 That the Preservation Society has sought to fulfill its mission through, among other ways, programs that focus on preservation, education, advocacy, and planning

15 That the Preservation Society has also sought to fulfill its missions through its Carolopolis Awards Program, and its award-winning quarterly newsletter *Preservation Progress* established in 1956

16 That in the 1970s, the Preservation Society was one of the first organizations in South Carolina to accept exterior and interior preservation easements

17 That in recognition of the Preservation Society's efforts, the American Institute of Architects presented the Preservation Society with its 1996 Institute Honor Award, recognizing the Preservation Society for "being as much a part of Charleston, South Carolina history as protector of it, this Society has wrought a standard of commitment to communities befitting the beauty and rich legacy of the city it has served for over seventy five years "

18 That on information and belief, Library is the owner of that certain piece, parcel or lot of land currently known and designated in The City's current numbering system as 404 King

Street, Charleston, South Carolina 29403, and assigned Parcel Identification Number 460 16 04-009 by the Charleston County Auditor's office (hereinafter referred to as the "Property")

19 That the Preservation Society is the grantee of a conservation façade easement on the historically significant building at 409 King Street, across the street from the Property, which building conservation and façade easement will be negatively affected by the project proposed for the Property

20 That, on information and belief, the Property is located in a General Business – Accommodation zoned district (hereinafter referred to as "GB-A Zoning District") under The City's zoning ordinances

21 That at the time of Library's acquisition of the Property, the Property was split-zoned as to height, with approximately half of the Property – the half closest to King Street - subject to a 3X height district and the other half of the Property subject to a 55/30 height district

22 That any newly constructed building on the Property is and was, at all times relative hereto, subject to height restrictions pursuant to the City's zoning ordinances

23 That at the time Library acquired the Property it was located in a GB-A Zoning District and split zoned as to height in the aforementioned manner Library had actual or constructive knowledge of the GB A Zoning District and the split zoning as to height at the time it acquired the Property

24 Prior to Library's acquisition of the Property it was the site of the main branch of the Charleston County Library a two story structure

THE SPECIAL EXCEPTION, ITS EXTENSIONS, AND THE APPEALS

25 That in 2004, sometime prior to February 17, 2004 Library made an application with the City's Board of Zoning Appeals – Zoning (hereinafter referred to as the "BZA") seeking

a special exception under Section 54-220(b), THE ZONING ORDINANCE OF THE CITY OF CHARLESTON (2005), to allow a 185-room hotel in a GB A Zoning District

26 That at the time of the filing of the application in 2004, as required by the applicable ordinances, Applicant submitted an assessment of certain aspects of the proposed project

27 That during its February 17, 2004, meeting, the BZA granted Applicant a special exception under Section 54-220(b) to allow a 185-room hotel in a GB-A Zoning District (hereinafter referred to as the "Special Exception")

28 That under the law and applicable ordinances of the City then in effect the Special Exception expired after two years if the construction permit for the project had not yet been "lifted "

29 That because Library had not obtained a construction permit nor received all necessary approvals for the project on the Property, on January 9, 2006, the Library, by and through its representative, Goff D Antonio Associates made an application with the BZA seeking a one year extension of the Special Exception, a copy of which application is attached hereto as Exhibit "A" and incorporated herein by reference (hereinafter referred to as the 2006 Application")

30 That at the time of the making of the 2006 Application, Library relied on its 2004 assessment and did not update the mandatory assessment to take into account significant changes

31 That members and representatives of HCF and the Preservation Society attended the BZA s February 7, 2006, public meeting prepared to address and oppose the extension of the Special Exception for multiple reasons, including among others the patent inadequacy of the outdated 2004 assessment of impacts, material changes in the neighborhood (current and

foreseeable), and the overall detrimental effect to the historical and architectural character of Charleston

32 That at its February 7, 2006, meeting, the BZA, by and through its Members, approved a one-year extension of the Special Exception without hearing or public comment on the merits, ruling that the BZA was required to automatically grant approval for the one year extension of the Special Exception under Ordinance Sections 54-960 through 968, and that the BZA had no authority to consider the merits of the application or deny the application and, therefore, no public hearing or comment on the shortcomings of the 2004 impact assessment or the significant negative impact of the project would be permitted (hereinafter referred to as the 2006 Ruling')

33 That on February 14, 2006, HCF and the Preservation Society filed a motion to reconsider with the BZA asking the BZA to reconsider its 2006 Ruling, a copy of which motion to reconsider is attached hereto as Exhibit "B" and incorporated herein by reference

34 That the motion to consider the 2006 Ruling was denied by the BZA

35 That on March 8, 2006, HCF and Preservation Society appealed the 2006 Ruling to the Circuit Court, which appeal was captioned *Historic Charleston Foundation and Preservation Society of Charleston Appellants v The City of Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library Associates LLC Respondents* and assigned Civil Action Number 2006 CP-10-954 by the Office of the Clerk of Court for the Charleston County Court of Common Pleas (hereinafter referred to as the '2007 Appeal')

36 That by order of The Honorable R. Markley Dennis, Jr., Circuit Court Judge, dated January 19, 2007, the Circuit Court affirmed the 2006 Ruling

37 That on February 22, 2007, HCF and Preservation Society appealed the Circuit Court's order affirming the 2006 Ruling to the South Court of Appeals, which appeal is still pending before the Court of Appeals

38 That the extension of the Special Exception granted by the BZA by the 2006 Ruling was set to expire on February 7, 2007

39 That because Library had not obtained a construction permit nor received all necessary approvals for the project on the Property, on January 5, 2007, Library, made an application with the BZA seeking a second one-year extension of the Special Exception a copy of which application is attached hereto as Exhibit "C" and incorporated herein by reference (hereinafter referred to as the "2007 Application")

40 That at the time of the making of the 2007 Application, Library relied on its 2004 impact assessment and did not update the mandatory assessment to take into account significant changes

41 That members and representatives of HCF and the Preservation Society attended the BZA's February 6, 2007, public meeting prepared to address and oppose the extension of the Special Exception for multiple reasons, including among others the patent inadequacy of the outdated 2004 assessment, material changes in the neighborhood (current and foreseeable), and the overall detrimental effect to the historical and architectural character of Charleston

42 That at its February 6, 2007 meeting, the BZA, by and through its Members approved the one-year extension of the Special Exception without hearing or public comment on the merits, ruling that the BZA was required to automatically extend the Special Exception under Ordinance Sections 54-960 through 968, and that the BZA had no authority to consider the merits of the application or deny the application and therefore, no public hearing or comment on the

significant negative impact of the project would be permitted (hereinafter referred to as the “2007 Ruling”)

43 That on March 8 2007, HCF and Preservation Society appealed the 2007 Ruling to the Circuit Court, which appeal was captioned *Historic Charleston Foundation and Preservation Society of Charleston Appellants v The City of Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library Associates LLC Respondents*, and assigned Civil Action Number 2007-CP-10-975 by the Office of the Clerk of Court for the Charleston County Court of Common Pleas (hereinafter referred to as the “2007 Appeal”)

44 That by order of the Honorable Perry M Buckner, Presiding Judge of the Ninth Judicial Circuit dated May 14, 2007, the 2007 Appeal was stayed pending disposition of the 2006 Appeal by the South Carolina Court of Appeals

THE HEIGHT VARIANCE

45 That on December 4, 2006 Library, by and through its legal representatives, made an application with the BZA seeking a variance of the 55/30 height restriction applicable to the Property, of copy of which application is attached hereto as “Exhibit D” and incorporated herein by reference (hereinafter referred to as the ‘Variance Application’)

46 That pursuant to the laws of South Carolina and Section 54-924 of the zoning ordinances of the City a variance may be granted ‘in an individual case of unnecessary hardship if the Board makes and explains in writing the following findings (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property (b) these conditions do not generally apply to other property in the vicinity, (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property, and (4) the authorization of a variance will not be of substantial

detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance ”

47 That at its January 2, 2007, meeting, the BZA conducted a hearing and granted Library a variance to the applicable height restrictions under Section 54-924 of the City’s ordinances (hereinafter referred to as the Variance Decision”), a copy of which Variance Decision is attached as ‘Exhibit E’ and incorporated herein by reference

48 That members and representatives of HCF and the Preservation Society attended the BZA’s January 2, 2007, public meeting and addressed and opposed the variance for multiple reasons as more fully stated in the transcript of the BZA’s January 2, 2007, meeting

49 That on January 9 2007 HCF filed a motion to reconsider with the BZA asking it to reconsider the Variance Decision, a copy of which motion is attached hereto as Exhibit F and incorporated herein by reference

50 That at its February 20, 2007 meeting, the BZA denied the motion for reconsideration

51 That the Variance for the subject Property will result in an individualized injury to HCF and its trustees and to the Preservation Society and its members

52 That the interests at stake are germane to both organizations’ respective missions and purposes

53 That in addition the construction of a high rise hotel on the Property will have a significant adverse effect on the Preservation Society’s conservation façade easement on 409 King Street

54 That on February 1, 2007, HCF and Preservation Society appealed the Variance Decision to the Circuit Court, which appeal was captioned *Historic Charleston Foundation and*

Preservation Society of Charleston Appellants v The City of Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library Associates, LLC Respondents, and assigned Civil Action Number 2007-CP-10-451 by the Office of the Clerk of Court for the Charleston County Court of Common Pleas (hereinafter referred to as the “Variance Appeal”)

55 That the Variance Decision was contrary to the requirements of state law and Section 54-924, unsupported by the record before the BZA, arbitrary and capricious based on the record before the BZA, and legally erroneous, for the following reasons

(a) That the unsupported and unexplained conclusory finding of the BZA that there are extraordinary and exceptional conditions pertaining to the Property herein is erroneous and not based on evidence as there are other properties that have split-lot zoning. Additionally, the “extraordinary and exceptional condition” must relate to the physical characteristics of the Property, and zoning does not constitute, as a matter of law, an “extraordinary and exceptional condition” of the Property for purposes of a variance.

(b) That the unsupported and unexplained conclusory finding of the BZA that “conditions do not generally apply to other property in the vicinity” is erroneous and not based on evidence as there are other properties in the area that are subject to these zoning height categories. In fact, much of King Street in the vicinity of the Property used to be zoned 3X as to height. Additionally, the conditions [that] do not generally apply to other property in the vicinity must relate to the physical characteristics of the Property and zoning does not constitute, as a matter of law, “conditions [that] do not generally apply to other property in the vicinity” for purposes of a variance.

(c) That the unsupported and unexplained conclusory finding of the BZA that “because of these conditions, the application of the ordinance to the particular piece of

property would effectively prohibit or unreasonably restrict the utilization of the property” is erroneous and not based on evidence as there are innumerable other feasible uses of the Property that would not require a height variance. The determination of an unreasonable restriction of the utilization of property must be based on an evaluation of all permissible reasonable feasible uses of the property, and not confined to one single use the owner would like. Moreover, even if the determination of whether the Property could be utilized without a variance was to be determined by its use as a hotel, there was no evidence that there could not be a hotel use on the Property without a variance. Additionally, the “conditions’ that supposedly unreasonably restrict the Property must relate to the physical characteristics of the Property, and zoning does not constitute, as a matter of law, these conditions’ for purposes of a variance.

(d) That the unsupported and unexplained conclusory finding of the BZA that “authorization of a variance will not be of substantial detriment to adjacent property or to the public good and the character of the district will not be harmed by the granting of a variance” is erroneous and not based on evidence. The proposed eight story mega hotel with 100ft top bar on the Property in the historic district will substantially harm the character of the district and be of detriment to adjacent properties, including the building(s) on which the HCF and Preservation Society hold conservation façade easements, by minimizing and diminishing other lower scale buildings of historic significance in the immediate vicinity.

(e) That the BZA erroneously premised its Variance Decision on aesthetics and financial costs of the Applicant rather than the criteria set forth in Section 54.924 of the City’s ordinances and the applicable law.

56 That the Variance Decision is further legally erroneous, arbitrary and capricious, and contrary to the governing statutes and ordinances on the separate and additional ground that the BZA did not set forth its written findings that purportedly supported its Variance Decision

57 In its application and at the BZA hearing, the Applicant referred to plans for the proposed hotel that had previously received conceptual approval by the City's Board of Architectural Review ('BAR')

58 That the renditions of the proposed hotel that the Applicant presented to the BZA were **not** the renditions of the proposed hotel which received conceptual approval from the BAR but were in fact substantially different from them

59 That the Variance Decision should be further set aside and vacated on the separate and additional ground that the Applicant misrepresented facts to the BZA, and the BZA based its Variance Decision on these misrepresentations by the Applicant

60 That this misrepresentation also leaves the Variance Decision without factual support, renders it arbitrary and capricious, and makes it legally erroneous

61 The Variance Appeal is still pending before the Circuit Court

THE SPOT ZONING OF THE PROPERTY TO "FIX" DEFICIENCIES IN THE VARIANCE

62 That both the City and Library were concerned about that the Plaintiffs' Variance was meritorious and decided to pursue re zoning the Property to eliminate its split zoning as to height and classify the entire Property as 3X

63 HCF and the Preservation Society and their members spoke in opposition to the rezoning of the property when it was considered by the City's Planning Commission and City Council. These objections to the rezoning of the Property included, among other grounds, that the rezoning was impermissible spot zoning, that the City and the mayor had criticized the 3X

height category as archaic and no longer appropriate in a City Council meeting in September 2005 where Council discussed the elimination of the 3X height classification altogether, and that there was no need to rezone the Property since the BZA had granted a variance from the height restrictions for that part of the Property with a 55/30 height restriction. The multiple reasons in opposition to the rezoning of HCF, the Preservation Society, and their members are more fully stated in the minutes of the meetings at which the rezoning was discussed and voted upon.

64 Despite the objections of the Plaintiffs, on August 21, 2007, the City through City Council, adopted an ordinance rezoning the half of the Property subject to the 55/30 height district so that the entire Property was zoned as a 3X height district.

65 That no other property in the area was rezoned at that time, only the Property, the zoning on all of the properties to the north, south and west of the Property along King Street as well as the properties to the east on Hutson Street were not rezoned and retained the exact same height zoning restrictions they had prior to the rezoning of the Property.

66 That, on information and belief, the primary purpose of the rezoning was to subvert the Plaintiffs' rights to judicial review of the Variance Decision in an effort to cure the deficiencies in the Variance Decision.

67 That Section 6-29-720(D), Code of Laws of South Carolina, 1976, as amended, provides, among other things:

The regulations must be made in accordance with the comprehensive plan for the jurisdiction and be made with a view to promoting the purposes set forth throughout this chapter. Except as provided in this chapter, all of these regulations must be uniform for each class or kind of building, structure, or use throughout each district, but the regulations in one district may differ from those in other districts.

68 That Section 6-29-710 Code of Laws of South Carolina, 1976 as amended, provides:

(A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:

(1) to provide for adequate light, air, and open space,

(2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets,

(3) to facilitate the creation of a convenient, attractive, and harmonious community,

(4) to protect and preserve scenic, historic, or ecologically sensitive areas,

(5) to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes,

(6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action,

(7) to secure safety from fire, flood, and other dangers, and

(8) to further the public welfare in any other regard specified by a local governing body.

69 I hat the rezoning of the property from split zoning of 3X and 55/30 to entirely 3X is and was unlawful in the following particulars, to wit:

(a) In that it creates non-uniform regulations through out the zoning district in which the Property is located in violation of Section 6 29-720(D),

(b) In that it constitutes spot zoning in violation of Section 6-29-720(D) and other laws of South Carolina,

(c) In that it was not enacted for any of the purposes set forth in Section 6 29-710, but rather for the purpose of accommodating a specific site design and project on the Property put forward by Library, the owner, and,

(d) In that it was not enacted for any of the purposes set forth in Section 6 29 710, but rather for the purpose of eliminating the need for a variance from the 55/30 height ordinance

70 That the ordinance rezoning the entire Property to 3X is arbitrary, capricious, and invalid for the additional reason that Charleston City Council exceeded its authority under the enabling legislation and state law by using its police powers of zoning solely to assist facilitate, and accommodate the particular design of a specific project of an owner and further that the rezoning was for a private purpose, rather than public purpose

71 That the ordinance rezoning the entire Property to 3X is arbitrary, capricious, and invalid for the additional reason that the re-zoning was to frustrate the right to judicial review of the Variance Decision by the Plaintiffs and to insulate the City and Library from judicial review of the legal deficiencies in the Variance Decision

72 That the Plaintiffs are entitled to the order of this Court overturning, voiding, and vacating the ordinance adopted August 21, 2007 which purported to re-zone the entire Property to a 3X height district, and ruling that the Property remains split zoned in the same manner as before the legally invalid spot rezoning of the Property

WHEREFORE, Appellants, Historic Charleston Foundation and Preservation Society of Charleston, having complained of Defendant, The City of Charleston, pray that this Court enter

an order overturning, voiding, vacating and/or quashing the ordinance rezoning of the Property,
for the costs and attorneys' fees incurred in bringing this action, and for such other and further
relief as this Court deems just and proper

Respectfully submitted,

THE PRITCHARD LAW FIRM INC
8 Cumberland Street, Suite C
Charleston, SC 29401
Phone (843) 722-3300, Fax (843) 722-3379

By Edward K. Pritchard, III
Edward K. Pritchard, III
Attorney for Appellant
Historic Charleston Foundation

PRATT-THOMAS WALKER, P A
Post Office Drawer 22247
Charleston, SC 29413-2247
Phone (843) 727-2208, Fax (843) 727-2231

By G. Trenholm Walker
G. Trenholm Walker
Lindsay K. Smith-Yancey
Attorney for Appellant
Preservation Society of Charleston

Charleston South Carolina
October 19, 2007

Exhibit A



Application for Variance Special Exception or Reconsideration
to the Board of Zoning Appeals - Zoning (Form 1)

Page 1 of 2

City of Charleston

Instructions - Applicants must complete and submit this form, along with the required information and fee to the Zoning Division office at 75 Calhoun Street. Applications are due by 3:00 P.M. on the deadline date. A sign will be posted on the property and a public hearing will be conducted by the Board of Zoning Appeals - Zoning before the Board makes its decision. Each scheduled meeting of the Board is limited to 25 new applications. Additional applications even if submitted prior to the deadline will be placed on the agenda of the next scheduled meeting. There is a five (5) business day appeal period following the date of Board action. No permits may be issued until this appeal period has expired. An appeal to the Board stays all further action on the application.

THE APPLICANT HEREBY APPEALS

- ☒ For a Variance and/or Special Exception as indicated on page 2 of this application
☐ For reconsideration of a decision of the Board or action of a zoning official as stated on attached Form 2

MEETING DATE REQUESTED Feb. 7, 2006

Property Address 404 King St. TMS # 416 116 04 009

Property Owner Liberty Associates, LLC Daytime Phone 722 8109

Applicant Goff D'Antonio Associates Daytime Phone 517 2163

Applicant's Mailing Address 34 Radcliffe St Charleston, SC 29403

Relationship of applicant to owner (same representative prospective buyer other) Design Professional

Zoning of property GB-A

Information required with application (check information submitted)

- ☒ Scaled plans or plats, including elevations if applicable showing the variance(s) being requested (3 copies)
☒ For density variances scaled floor plans with rooms labeled and the total floor area of each dwelling unit noted (3 copies)
☒ Check or cash (make checks payable to the City of Charleston)

Optional information which will be helpful to the Board

- ☐ Photographs
☐ Letters or petitions from neighbors or organizations directly affected by your request

I certify that the information on this application and any attachments is correct that the proposed improvement(s) comply with private neighborhood covenants if there are any and that I am the owner of the subject property or the authorized representative of the owner. I authorize the subject property to be posted with a notice of the hearing before the Board and inspected.

Applicant Hank D'Antonio Date 1/9/06

For office use only		
Date application received <u>1/9/06</u>	Fee \$ <u>3900</u>	Time application received <u>1:07</u>
Staffperson <u>[Signature]</u>		Receipt # <u>6205</u>

Dept. of Design Development and Preservation 75 Calhoun Street Third Floor Charleston South Carolina 29401
(843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us

APPLICANTS FOR VARIANCES MUST COMPLETE THE FOLLOWING.

Applicant hereby appeals to the Board for a variance from the strict application of the Zoning Ordinance to the property described on this application so that a zoning permit may be issued to allow use of the property in a manner shown on the attached site plan and described as follows

Applicant must explain how strict application of the ordinance will result in an unnecessary hardship and how standards for a variance set by the Zoning Ordinance are met by answering the following questions

- a. What are the extraordinary and exceptional conditions pertaining to the particular piece of property _____
- b. Explain why these conditions do not generally apply to other property in the vicinity _____
- c. Explain how because of these conditions the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property _____
- d. Explain why authorization of the variance will not be of substantial detriment to the adjacent property or to the public good and the character of the district will not be harmed by the granting of the variance _____

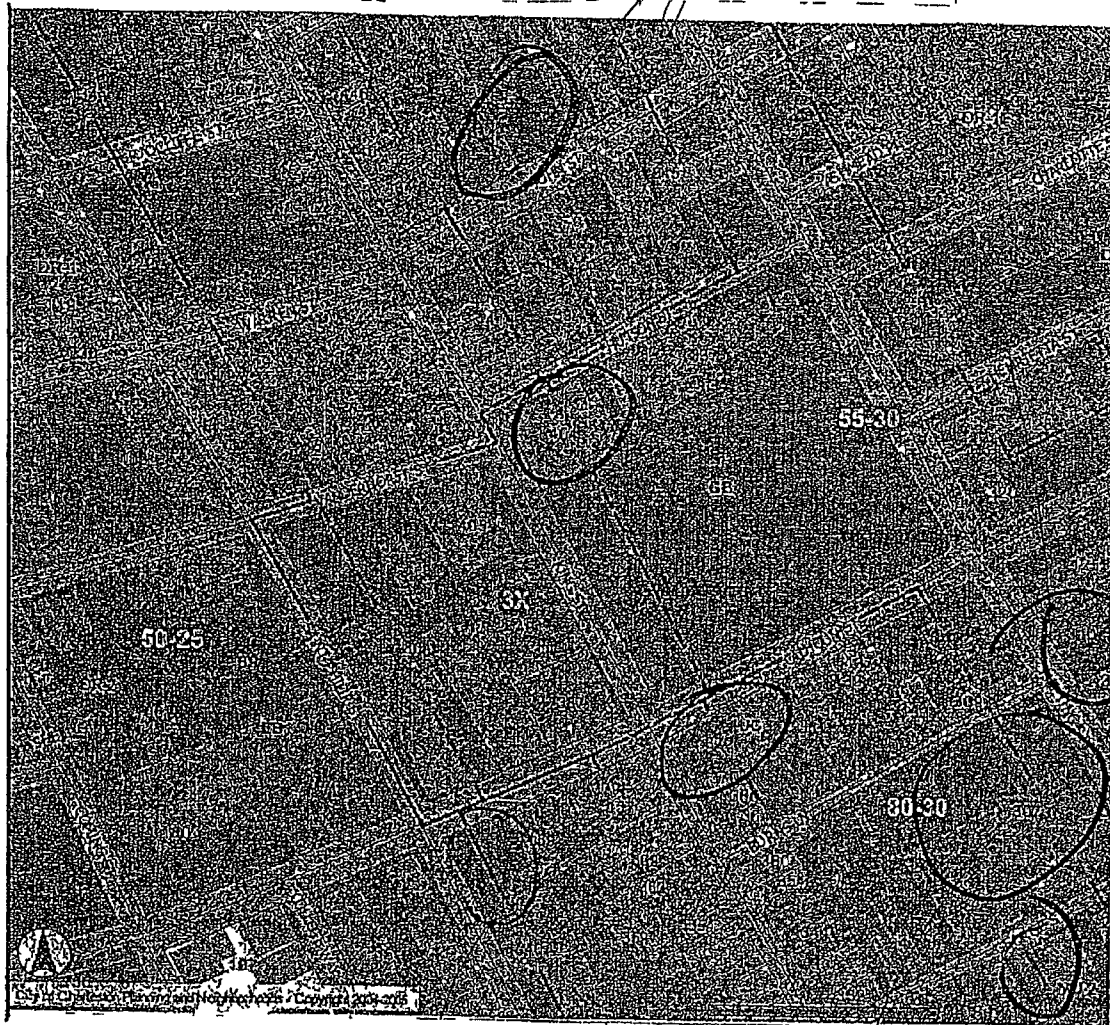
Signature of applicant _____ Date _____

APPLICANTS FOR SPECIAL EXCEPTIONS MUST COMPLETE THE FOLLOWING.

- 1 Applicant hereby appeals to the Board for a special exception to use the property identified on this application as follows Persuant to Section 54-962, we request the extension of the approval of special exception for a 185 room hotel, granted on 2-1
- 2 Applicant will meet the special exception requirements listed in Section 54-220 of the Zoning Ordinance in the following manner
Per previous approved submittal
- 3 The following documents are submitted in support of this application.
Per previous approved submittal (documents enclosed)

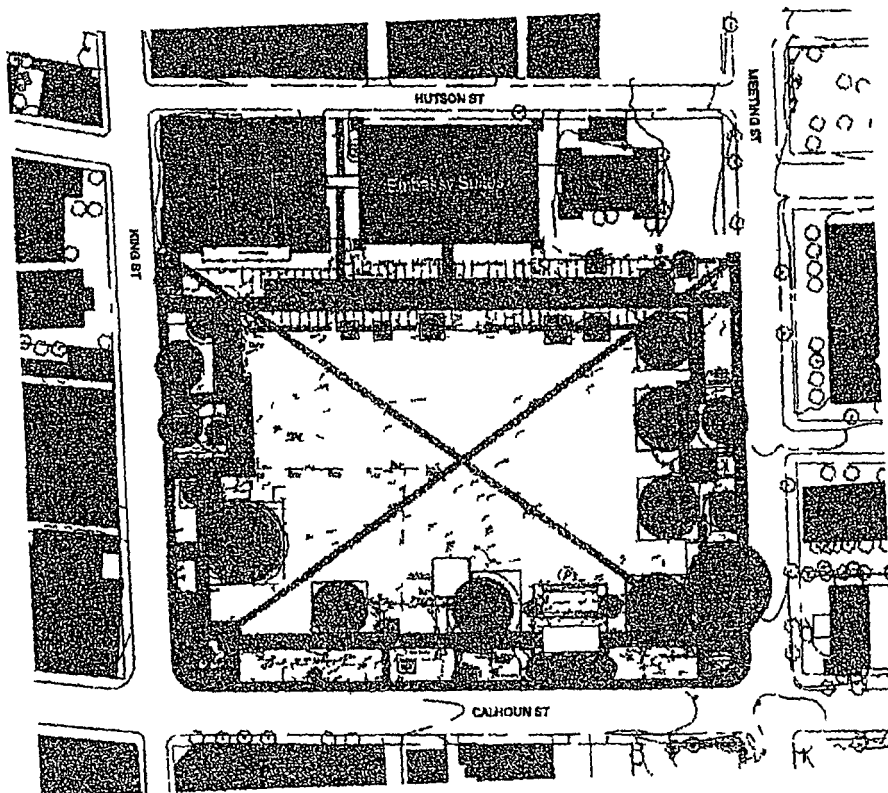
Signature of applicant Hank D'Antonio Date 1/9/06

Dept of Design Development and Preservation 75 Calhoun Street Third Floor Charleston, South Carolina 29401
(843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us



Old Library Site/
Proposed Marion Square Hotel
404 King Street

Special Exception Assessment Report
January 16, 2004



Prepared for	Library Associates LLC Charleston, SC
Prepared by	Goff D'Antonio Associates Charleston, SC
Traffic Study by	Day Wilburn Associates Atlanta, GA

Goff-D'Antonio Associates

January 16, 2004

Architecture
Interior
Planning

Old Library Site /
Proposed Marion Square Hotel

Special Exception for Accommodation Overlay

Dear Sir or Madam

The enclosed document addresses the questions outlined in Section 54-220 of the Zoning Code as related to the Accommodation Overlay. These questions are listed under b. Permitted Uses, Number 1e of the Ordinance. Each item is organized with the question first and the response to the question below it. There are 18 items addressed. Some items, such as questions related to traffic and vehicle trips, are addressed under separate study/covers authored by Day Wilburn Associates, a qualified Traffic Engineering consultant from Atlanta who has conducted a number of studies in Charleston.

It should be noted that this site is already zoned for General Business with an Accommodation Overlay. The site is one of the few remaining sites in downtown Charleston capable of supporting a significant landmark hotel on one of the major urban parks, Marion Square, in the City. This project will bring added vitality to the park and complete the redevelopment of the property adjacent to the park, which was started with the renovation of the Old Citadel Building into a successful Embassy Suites Hotel.

Respectfully submitted,


Henry D'Antonio Jr. AIA
Principal

HDA:ksi

14 Rutledge Street
Charleston, SC 29403
FAX 843-777-9754
812-57-21-2

January 16 2004
Revised February 13, 2004

**Accommodations Overlay Zone
Old Library Site
Marion Square/King Street**

Assessment Report

1 Number of Existing Housing Units

This site has no existing housing units that will be displaced

2 Effect of Displacement of Housing Units

There is no affect on the communities housing stock The current site is a vacant County library which has moved to its new location on Calhoun Street

3 Vehicle Trips generated by the facility and traffic circulation pattern serving the facility and efforts made to minimize traffic impacts

See attached Traffic Study

4 Distance of main entrance and parking entrance of facility from a road classified as an arterial or collector road

The proposed hotel is sited at the corner of King Street and Hutson Street The proposed main pedestrian entrance is located closest to the corner of Marion Square Park and King Street The vehicle parking entrance to the parking garage below the building is located approximately 175 feet from the corner of King and Hutson Streets on Hutson Street A vehicular passenger drop-off/pick-up will be located near the King Street pedestrian entrance The pedestrian entrance to the hotel is approximately 160 feet south of the intersection of King and Hutson Streets The hotel entrance is approximately 470 feet to the corner of Calhoun and King Streets intersection Both King Street and Calhoun Street serve as arterial streets with King Street serving as a north/south arterial and Calhoun Street serving as the east/west arterial across the peninsula

Accommodations Overlay Zone

January 16 2004

Revised February 13 2004

Page 2 of 6

- 5 Development pattern and predominant land uses within five hundred feet (500') of the facility

The site is located within the commercial district of Charleston at the southern edge of what is considered the upper King Street commercial district. Surrounding uses include The Embassy Suites Hotel immediately to the east of the site, Marion Square to the south with commercial, retail, clubs and cafes on the south side of Calhoun. The Francis Marion Hotel is located at Calhoun and King Streets and retail outlets and a City Parking garage located on the west side of King Street within a few hundred feet of the site. St. Mathews Lutheran Church and supporting functions are located adjacent to the parking garage and occupy the site to the corner of King Street and Vanderhorst Street. The northwest corner of King and Vanderhorst Street is a commercial office building with a combination of commercial, retail, and office buildings located further along the west side of King Street north of Vanderhorst Street. Directly north of the subject site across Hutson Street are additional commercial retail and office uses with retail generally occupying the ground floor and office on the upper floors.

This area represents a district of mixed-use commercial, retail, office, hotels, and entertainment including various restaurants. The block between King, Hutson, Meeting, and John Streets also includes another parking garage, The Hampton Inn, and the Charleston Music Hall auditorium. Further north on the other side of John Street includes the Charleston Visitors Center and the new Children's Museum.

This entire area is attractive and ideal for the location of a new hotel based upon the surrounding land uses.

- 6 Proximity of residential neighborhoods to the facility

This proposed hotel site is not within any residential neighborhood but is between the Wraggborough neighborhood to the east and Radcliffeborough to the west. The Wraggborough neighborhood is on the east side of Meeting

Accommodations Overlay Zone
January 16 2004
Revised February 13 2004
Page 3 of 6

Street The Radcliffeborough neighborhood is west of King Street with few residences in close proximity to King Street with the majority west of St Phillip Street a block from King Street.

- 7 Accessory uses proposed for the facility and their impact on traffic generation and the existence of comparable uses within the service area

The hotel is planned to be a full service hotel and as such will have restaurant(s) and some retail space on the ground floor as well as conference space. The retail and restaurant will cater to both hotel guests and outside customers with the conference space serving primarily hotel guests. In addition, the plan also anticipates a rooftop function that would include a bar and additional meeting/activity space. All these uses are compatible with surrounding uses and guests staying in other hotels such as The Embassy Suite and Hampton Inn would likely use some of the facilities in this proposed hotel.

Refer to the traffic study regarding the traffic impact.

The demonstrated provision of off-street parking at the rate of two spaces for each three hotel rooms.

It is proposed that this new hotel will have a lower level parking garage below grade to accommodate the required number of spaces for the number of hotel rooms provided. The planned parking will be valet parking.

The presence of industrial uses and uses which use, store or produce toxic or hazardous materials in quantities in excess of those specified by the EPA listing of toxic and hazardous materials within five hundred feet (500') of the facility.

There are no known facilities which produce toxic or hazardous materials within (500') of the proposed building.

Accommodations Overlay Zone

January 16, 2004

Revised February 13, 2004

Page 4 of 6

10 The commitment to environmental sustainability and recycling

The design will incorporate environmental sustainable principal where practical including types of materials used, building orientation, sun shading devices and others as may be appropriate as the building is being designed. Recycling of paper, plastics, metals, etc. will be incorporated in the practices of operating the building when it is completed.

11 The distance of the facility from major tourist attractions

This proposed hotel is within walking distance to such attractions as,

a	The Visitors Center	one block
b	The Charleston Museum	one block
c	King Street Shopping area	either direction
d	The Aquarium	five blocks
e	College of Charleston	two blocks
f	The Market	six blocks

12 The distance of the facility from existing or planned transit facilities

The site is located on King Street, which is a major transit street with a variety of stops nearby. Likewise, Meeting Street is within one block and easy access to transit stops north of Calhoun Street. Current buses include the downtown area shuttle and countywide buses. The Visitors Center one block away is a major hub for DASH and other buses. There are also two existing parking garages nearby on King Street and between Hutson and John Streets, which add to the available on-street parking available to visitors of the hotel.

13 The long term provision of on site or off site parking for employees who drive vehicles to work.

Though we obviously do not have staff for this hotel currently we anticipate many of the housekeeping and maintenance staff will use public transportation via taxi or bus. We anticipate

Accommodations Overlay Zone
January 16 2004
Revised February 13, 2004
Page 5 of 6

hotel management and some other staff will park in our garage (9 spaces dedicated for staff) and use nearby garages (There are over 1300 spaces in nearby garages)

The staff on the largest shift based upon comparables such as the Embassy Suite Hotel is anticipated to be approximately 40. The number of staff who may drive is 18. The additional spaces for staff parking over those spaces provided on our site will be accommodated in the nearby parking garages. The Camden Exchange garage and the Visitors Center garage have monthly lease spaces available totaling over 130-140 spaces. The Marion Square garage has some daily spaces available. We anticipate we need 9 off site spaces. Republic Parking, the operator for garages has indicated they can accommodate our needs.

- 14 The location of the proposed facility will contribute to the creation of a diverse mixed-use community.

This proposed hotel with a variety of uses planned within will reinforce the already existing commercial and entertainment area developing in the vicinity of Marion Square. It will provide an opportunity for a food service/restaurant use adjacent to Marion Square, which will enliven the square throughout the day and evening. It is one of the last sites on Marion Square to provide a vibrant use appropriate to the heart of Charleston a place where both residents and guest can enjoy the hotel and related uses.

- 15 The number of rooms in the facility based upon A-1, A-2 or A-3 designations on the zoning map.

Our site is not within the A-1, A-2 or A-3 designated districts, which limits the number of hotel rooms. Therefore, our site has no limitations of rooms based upon the areas limitations stated above. Our planned number of rooms and/or suites is 185. The underlying restraint will be the size of the site, zoning height envelope restrictions and/or any applicable or approved variances. The concept plan submitted would require height variances to accommodate the uses proposed based upon part of

Accommodations Overlay Zone

January 16, 2004

Revised February 13, 2004

Page 6 of 6

the site zoned for a 3X height and part in the 50/25 height district. The variance would relate to proposed roof top functions, parapets and mechanical equipment systems. These issues would be resolved at future BAR and BZA hearings. This site is recognized by the owner and the City in general as an appropriate site for a hotel. The current zoning is General Business with an Accommodation Overlay. No rezoning of the site is being requested or necessary. This request is for the approval of the Special Exception for an Accommodation Overlay.

- 16 The provision of shuttle bus service for hotels with 150 rooms or more located beyond the Peninsula area that are not served by DASH.

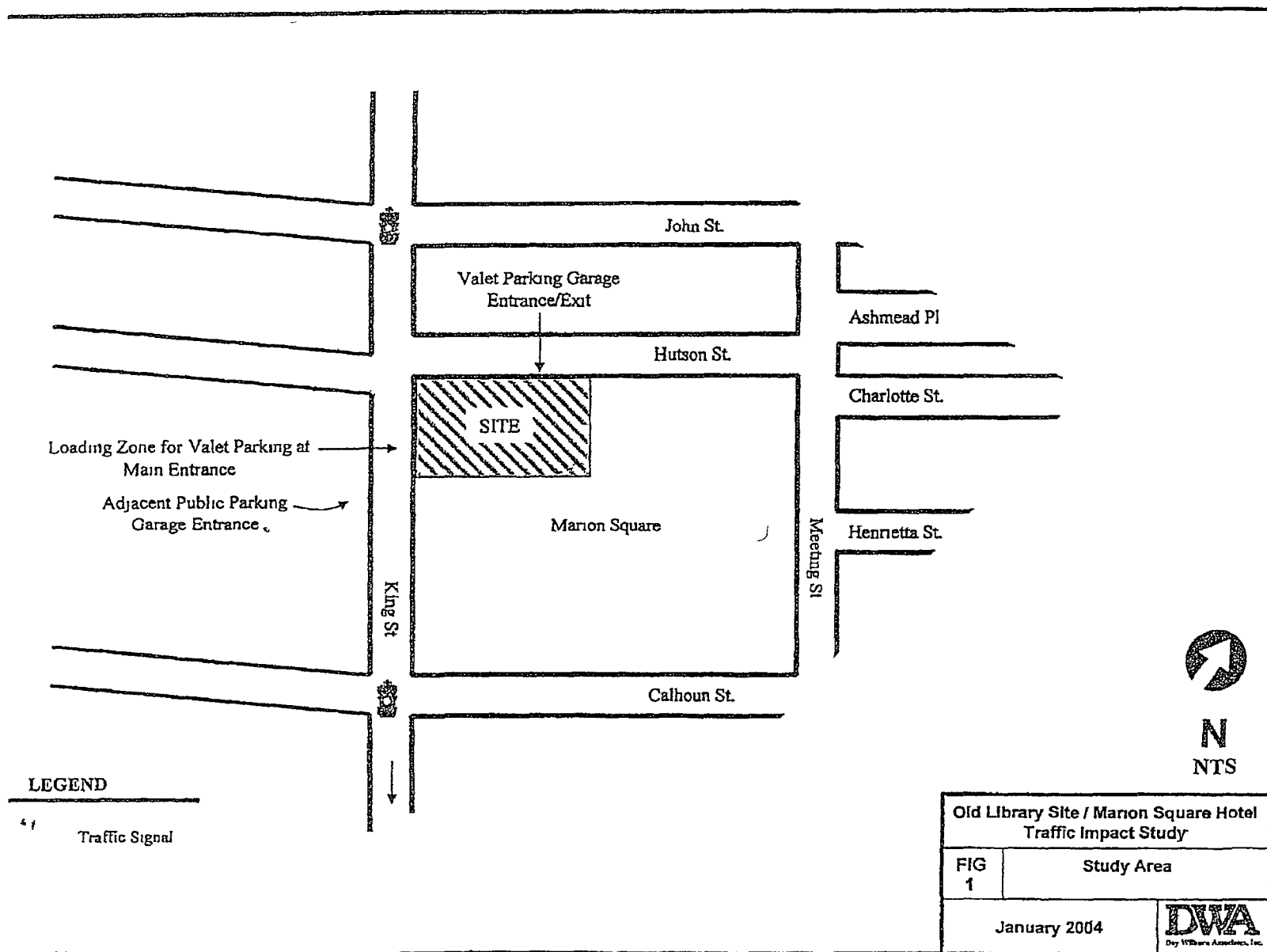
The question/issue is not applicable.

- 17 The commitment to make affirmative good faith efforts to see that construction and procurement opportunities are available to DBE's (Disadvantaged Business Enterprise) and WBE's (Women Business Enterprise) as outlined in Section 2-267 (D) (1), (2) and (3) of the Code of the City of Charleston.

Efforts will be made by the contractor to solicit bids from DBE and WBE companies where possible and available to attempt to meet this provision where applicable.

- 18 The commitment to make affirmative good faith efforts to hire personnel representative of the population of the Charleston Community at all employment levels.

The owner will make this effort through the relationship with the proposed hotel operator.



Old Library Site / Marion Square Hotel Traffic Impact Study

2 Existing Traffic Conditions

The existing roadway conditions and volumes were considered in order to determine the existing traffic operations within the study area. These traffic operations will be used to compare with future traffic operations in order to determine the expected impacts of the proposed development.

Transportation System

Primarily this traffic impact study focuses on the roadway system, which includes several collectors and local access roadways. Additionally, several CARTA bus routes currently have nearby bus stops and several DASH shuttle routes also serve the study area. Pedestrian traffic within the study area is also a significant percentage of the travel mode split.

Roadway Conditions

King Street extends past I-26 to the north and ends at Murray Boulevard to the south. For the purposes of this report, King Street is referred to as having a north / south alignment at its intersections with John Street, Hutson Street and Calhoun Street. South of its intersection with Calhoun Street, King Street becomes one-way southbound. North of Calhoun Street and through the study area, King Street has one travel lane in each direction with on street parking available. According to daily traffic counts taken near the proposed development, the average daily traffic (ADT) volume for King Street on Thursday, December 11, 2003 was 12,346 vehicles per day (vpd). This two-way daily volume included 2,907 northbound vehicles and 9,439 southbound vehicles. This southbound traffic flow orientation reflects the fact that King Street is one-way southbound south of Calhoun Street. The intersections of King Street with Calhoun Street and John Street / Warren Street are signalized. The intersection of King Street at Hutson Street / Vanderhorst Street has side-street stop control.

Meeting Street extends between Morrison Drive to the north and South Battery Street to the south. In the vicinity of the study area, Meeting Street is a four lane two-way roadway and its intersection with Hutson Street has side street stop control.

The existing lane configurations for these intersections can be seen in Figure 2.

Old Library Site / Marion Square Hotel Traffic Impact Study

Existing Conditions Traffic Volumes

Peak hour turning movement counts were recently performed on Thursday, December 11, 2003, at the following locations

- King Street at Calhoun Street (signalized)
- King Street at Hutson Street / Vanderhorst Street (unsignalized)
- King Street at John Street / Warren Street (signalized)
- Meeting Street at Hutson Street (unsignalized)

All turning movement counts were recorded during the weekday morning and evening peak times, from 7 00-9 00 AM and 4 00-6 00 PM respectively. The four consecutive 15-minute interval volumes, summed to produce the highest volume at each intersection, were then determined. These volumes make up the peak hour traffic volumes for the intersections counted. Using these peak hour volumes, existing traffic conditions were examined in the study area during the weekday AM and PM peak hours to determine intersection level of service (LOS) and current operations. Existing traffic volumes are shown in Figure 3.

Traffic Control

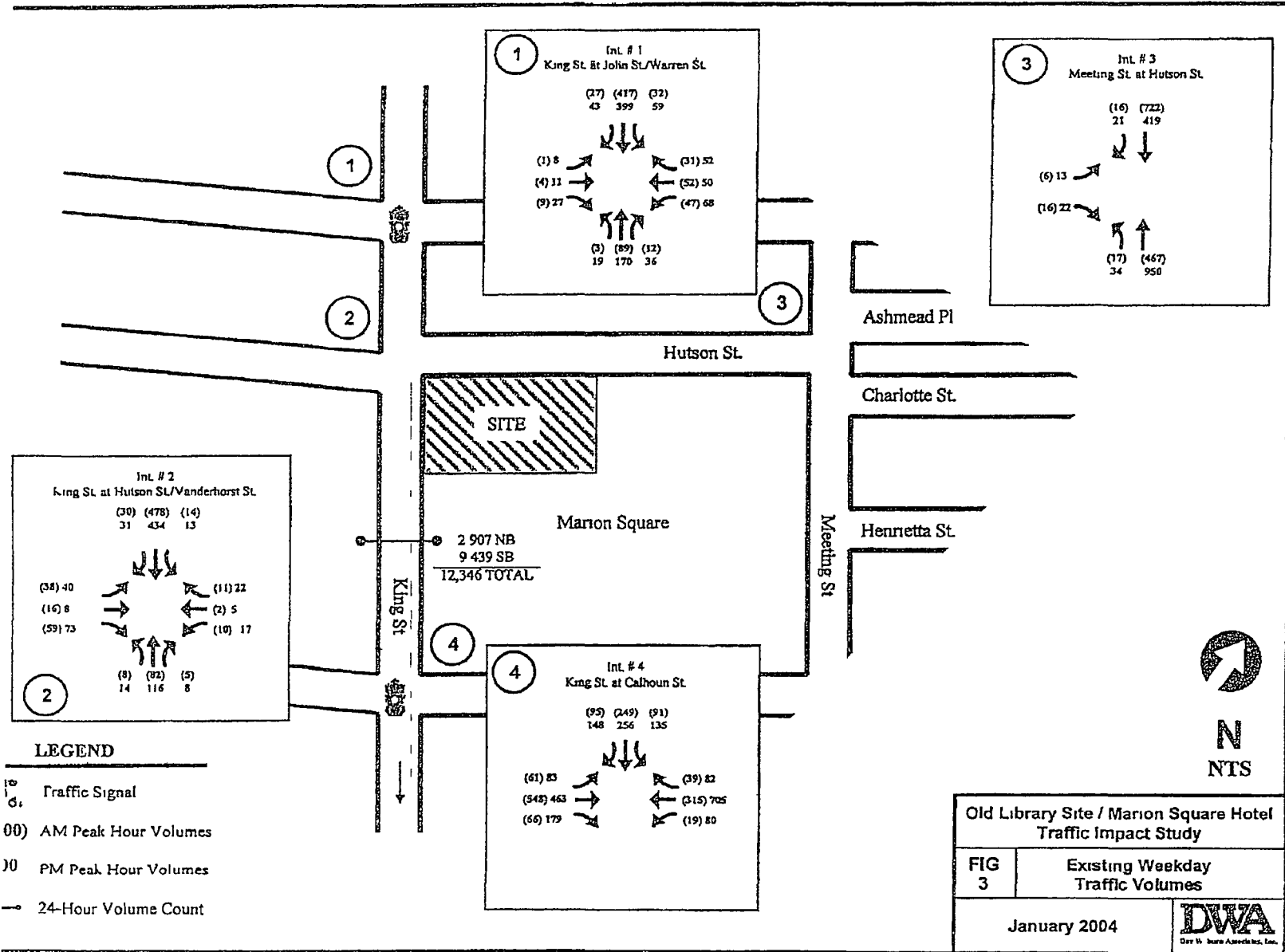
The intersection of King Street at Calhoun Street is controlled by a pre-timed traffic signal. The intersection of King Street at John Street / Warren Street is controlled by a semi-actuated traffic signal. The remaining intersections operate under side-street stop control.

Existing Intersection Level of Service

An analysis of existing peak hour traffic conditions was performed to determine the LOS at the study intersections. LOS for an intersection is based on the vehicular delay at the intersection and is a typical measure of effectiveness used to evaluate intersection operations. The Highway Capacity Manual provides ranges of delay for each LOS definition, spanning from very minimal delays (LOS A) to high delays (LOS F). An LOS F is considered unacceptable for most drivers.

For the signalized intersections, Synchro software was used to determine the LOS based on the following input data:

- Intersection geometry
- Lane configuration
- Turning movement volumes
- Existing signal phasing
- Existing signal timing



Old Library Site / Marion Square Hotel Traffic Impact Study

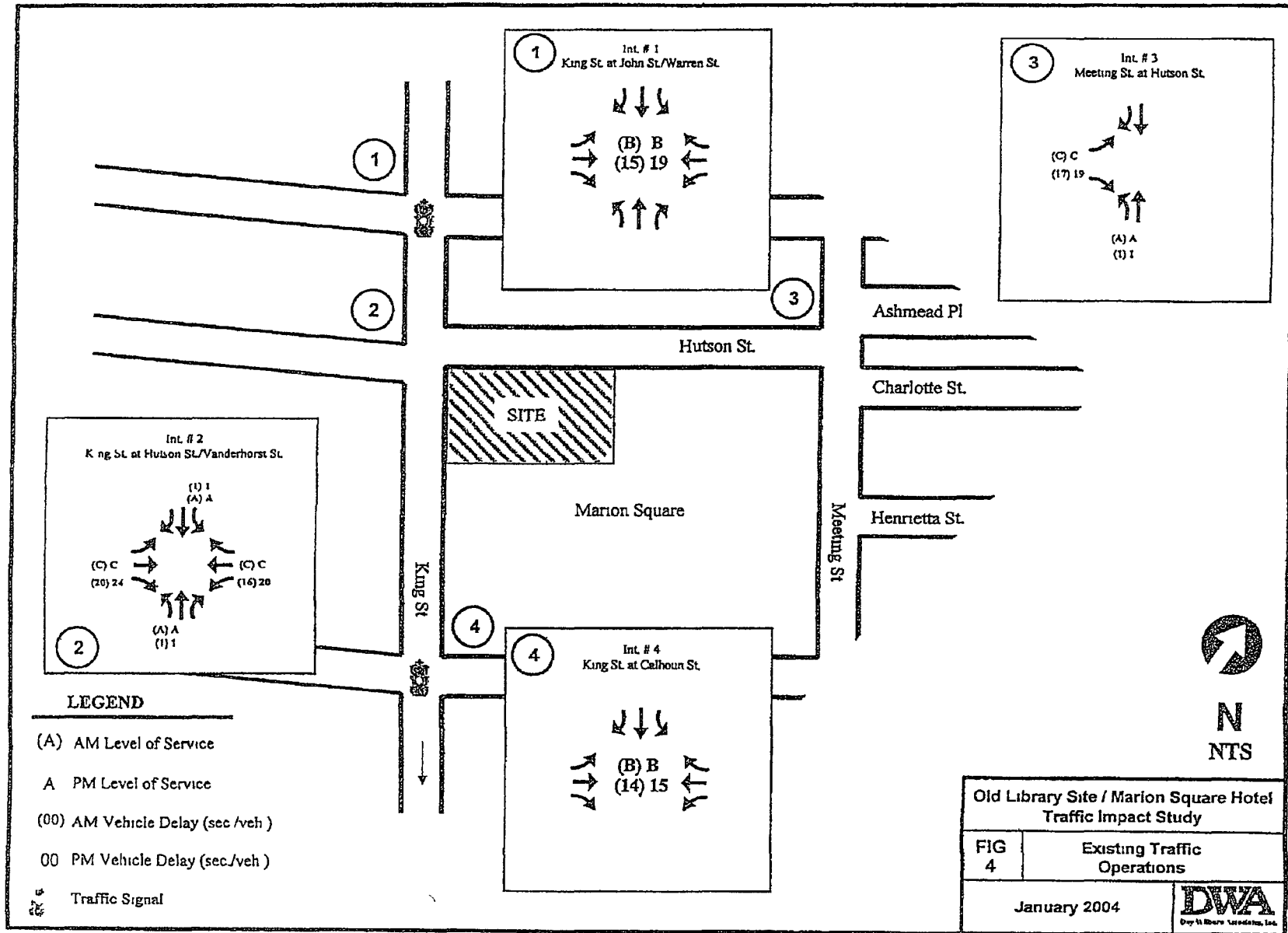
For unsignalized intersections where side streets or minor streets are controlled by a stop sign the criterion for evaluating traffic operations is the LOS for the controlled turning movements at the intersection. Synchro was used to apply the methodology from the Highway Capacity Manual to determine the delay and LOS for these turning movements.

Synchro was used to both estimate LOS under existing and future conditions. The results for existing conditions traffic operations can be seen in Table 1.

Table 1 Existing Intersection Operations				
Intersection	AM Peak Hour		PM Peak Hour	
	LOS	Delay (sec)	LOS	Delay (sec)
King Street at John Street / Warren Street (s)	B	14.6	B	18.5
King Street at Calhoun Street (s)	B	13.5	B	15.2
King Street at Hutson Street / Vanderhorst Street (u)				
Northbound Left Turn	A	0.8	A	1.0
Southbound Left Turn	A	0.3	A	0.3
Eastbound Approach	C	19.6	C	23.7
Westbound Approach	C	16.2	C	20.1
Meeting Street at Hutson Street (u)				
Northbound Left Turn	A	0.4	A	0.4
Eastbound Approach	C	16.7	C	18.5

(s) = signalized, (u) = unsignalized

The traffic operation results are also shown in Figure 4. As shown in the table and figure, the study intersections operate acceptably during the weekday peak periods.



Old Library Site / Marion Square Hotel Traffic Impact Study

3 Proposed Development

The proposed development consists of 185 hotel rooms, 5,150 s f of retail and one 5,200 s f restaurant and is located in the southeast corner of the intersection of King Street at Hutson Street. The hotel also includes conference and meeting rooms that are included in the general hotel facilities. The main entrance for the development is located on King Street at the valet loading zone. The valet parking garage has a full movement driveway on Hutson Street.

Trip Generation

Trip generation for the project was also based on the Institute of Transportation Engineers (ITE) Trip Generation report. The trip generation for the proposed development was based on *ITE Land Use 310 – Hotel*, *ITE Land Use 814 – Specialty Retail Center*, and *ITE Land Use 931 – Quality Restaurant*. Because the expected clientele for the restaurant and retail portions of the development are expected to draw significantly from hotel users and pedestrian traffic, some reductions were made in the trip generation to account for the interaction between the urban mix of land uses. Based on general knowledge of hotel operations, the following mixed-use reduction percentages were applied:

- Restaurant 50%
- Retail 30%

The trip generation for the proposed development is shown in Table 2.

Table 2 Trip Generation								
Land Use	Size	AM Peak Hour			PM Peak Hour			Daily 2 Way
		Enter	Exit	Total	Enter	Exit	Total	
Hotel	185 rooms	53	35	88	58	51	109	1,283
Specialty Retail	5,150 s f	0	0	0	6	8	14	288
-reduction	30%	<u>0</u>	<u>0</u>	<u>0</u>	<u>2</u>	<u>2</u>	<u>4</u>	<u>68</u>
Retail Total		0	0	0	4	6	10	160
Quality Restaurant	5,200 s f	2	2	4	26	13	39	468
-reduction	50%	<u>1</u>	<u>1</u>	<u>2</u>	<u>13</u>	<u>6</u>	<u>19</u>	<u>234</u>
Restaurant Total		1	1	2	13	7	20	234
Total New Trips		54	36	90	75	64	139	1,677

The trips from Table 2 were distributed to the roadway network to obtain the future traffic volumes.

Old Library Site / Marion Square Hotel Traffic Impact Study**Trip Distribution and Assignment**

The trip distribution is the percentage of site traffic that travels on each of the various roadways to and from the site. The trip distribution and assignment percentages for the site-generated traffic volumes were based on the existing peak hour movement counts and the bi-directional ADT count on King Street.

Hotel Traffic

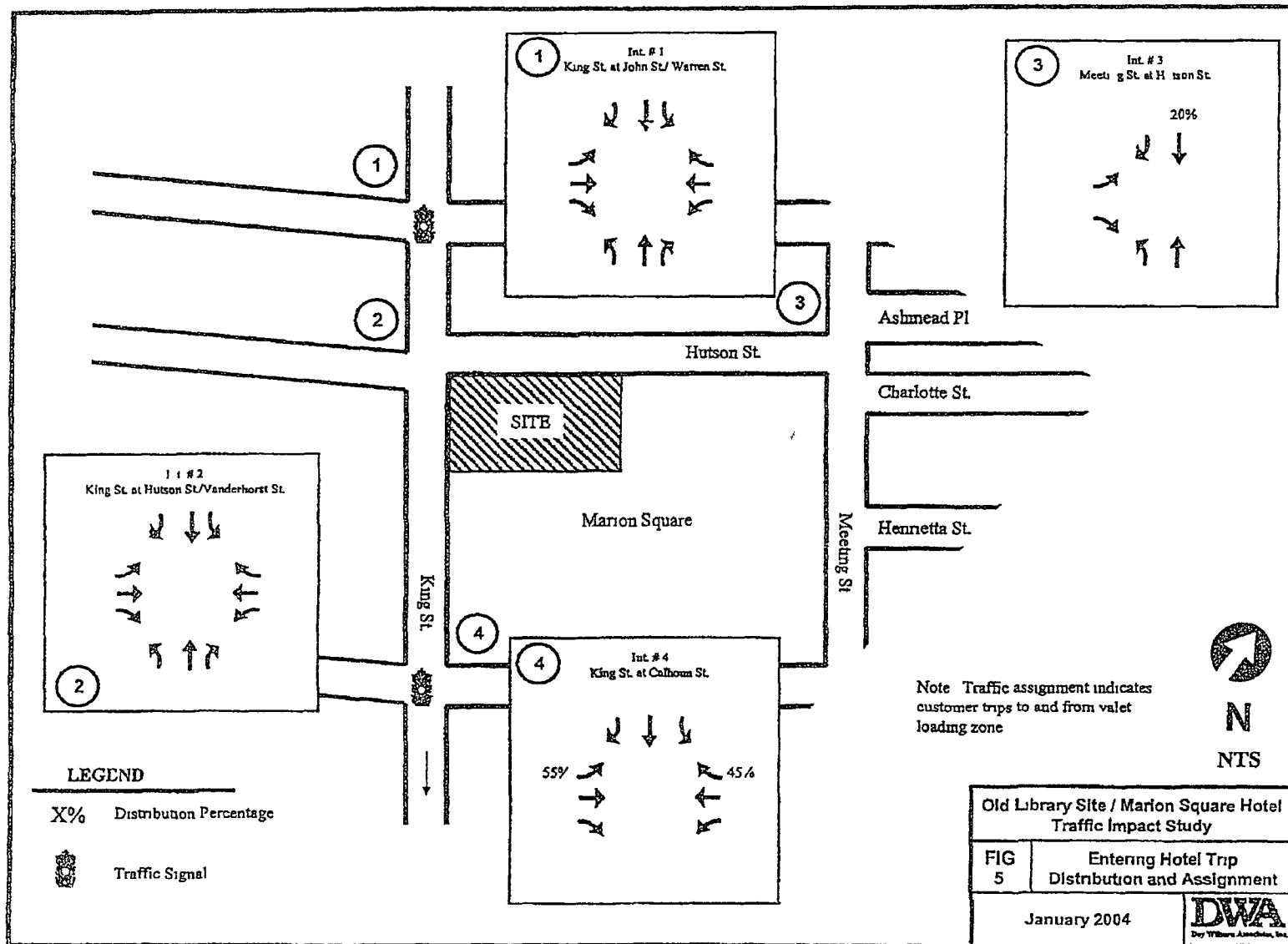
The hotel parking will be handled in a valet area along the east curb lane on King Street, just south of Hutson Street. Because of the valet parking for the hotel, as well as the one-way nature of King Street south of Calhoun Street, the entering and exiting percentage for the hotel traffic are listed separately. Entering traffic must travel northbound on King Street to the valet area and exiting traffic must leave the valet area on northbound King Street. Therefore, all entering traffic will approach the hotel from the King Street at Calhoun Street intersection and all exiting traffic will impact the King Street at Hutson Street intersection. These entering and exiting percentages can be seen in Figure 5 and Figure 6, respectively.

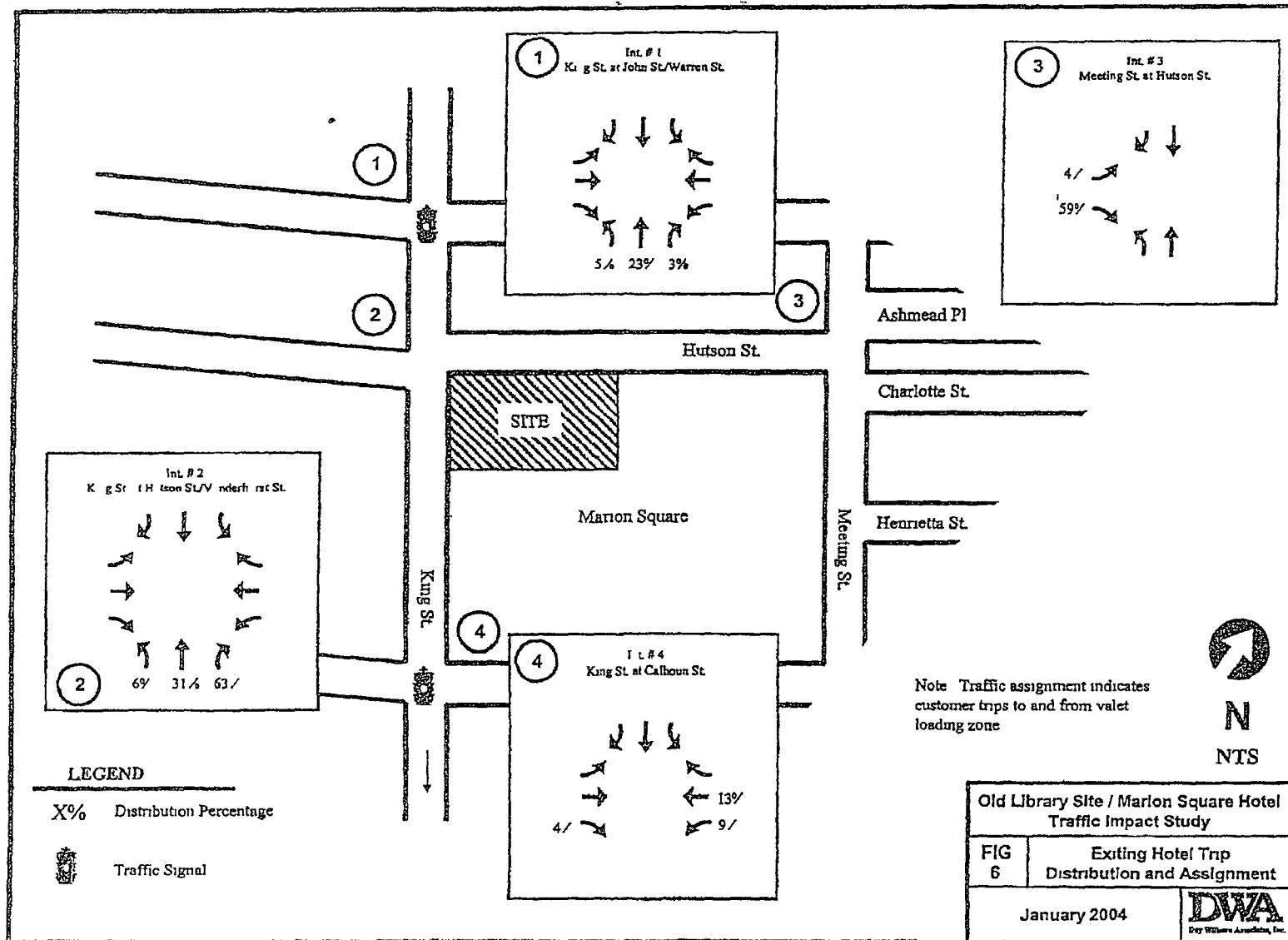
After the vehicle has entered the valet-loading zone, the valet will then drive the vehicle to the King Street at Hutson Street intersection and take a right onto Hutson Street in order to enter the garage. When returning the vehicle, the valet will circle the block, turning right from the garage to Hutson Street, then right from Hutson Street to Meeting Street, then right from Meeting Street to Calhoun Street, then right from Calhoun Street to King Street and returning to the valet area. These additional vehicle movements are also assigned to the roadway network to determine the total impact of the development.

Also as part of the trip assignment, the valet-loading zone was considered. Because of the proximity of the loading zone to the King Street at Hutson Street intersection, it is considered likely that the hotel loading zone will extend to the intersection. Thus, traffic turning right at the King Street at Hutson Street intersection will continue through the loading zone to the intersection and turn right onto Hutson Street without returning to the King Street through lane.

Restaurant and Retail Traffic

The retail areas will have their frontage along King Street and the restaurant main entrance will be off the hotel main entrance, also on King Street. The restaurant fronts on Marion Square, which does not usually have vehicular access. Non hotel users of the restaurant and retail facilities are therefore primarily expected to park along King Street or in the garage facility on King Street across from the proposed development. Based on knowledge of available parking on King Street, it is assumed that 25% of the trips will park in on-street parking and 75% of the trips will park in the adjacent King Street garage. Because King Street is one-way south of Calhoun Street, different entering and exiting percentages were used for these land uses. These entering and exiting percentages can be seen in Figure 7 and Figure 8 respectively. The resulting site generated traffic volumes are shown in Figure 9.





Old Library Site / Marion Square Hotel Traffic Impact Study

4 Future Traffic Conditions

The increases in traffic volumes due to background traffic growth, as well as the traffic volumes generated by the proposed development, were added to the existing volumes in order to determine the future conditions traffic volumes. The existing roadway conditions and future traffic volumes were considered in order to determine the future traffic operations within the study area. These traffic conditions are then compared with the existing traffic operations in order to determine the expected impacts of the proposed development.

Historical Traffic Counts

To estimate future traffic volumes, the existing traffic volumes will be increased to account for background traffic growth not related directly to the proposed development. In order to determine this average annual growth factor, data from several South Carolina Department of Transportation (SCDOT) count stations were analyzed. These historical traffic volumes are shown in Table 3.

TC Station	Street	1997	1998	1999	2000	2001	2002	Average Annual Growth
415	Calhoun Street between Pitt Street and Smith Street	20,500	21,300	21,900	20,500	21,600	19,600	0.9%
437	King Street between Reid Street and Mary Street	10,600	11,200	10,700	10,000	10,200	10,800	0.4%
439	Meeting Street between Ann Street and John Street	19,600	19,800	19,600	19,100	19,700	19,000	0.6%
Average								0.4%

Low traffic growth is consistent with a built out urban environment, as being considered for this study. DWA plans to assume a 1% annual growth rate to apply to the study roadways, to account for minimal traffic growth. The proposed development is expected to be operating by mid 2006, so this growth rate will be applied over 2.5 years.

Future Traffic Volumes

The traffic volumes that will be generated from the proposed development were then added to the increased existing traffic volumes in order to determine the impact of the proposed project after full development. These future traffic volumes are shown in Figure 10.

Old Library Site / Marion Square Hotel Traffic Impact Study

Future Intersection Levels of Service

Each of the intersections included in this study were re-evaluated for the future conditions. The future operations are compared with the existing traffic operations in Table 4. These future peak period results are also shown in Figure 11.

Table 4 Existing and Future Intersection Operations								
Intersection	Existing Traffic Operations				Future Traffic Operations			
	AM Peak		PM Peak		AM Peak		PM Peak	
	LOS	Delay (sec)	LOS	Delay (sec)	LOS	Delay (sec)	LOS	Delay (sec)
King Street at John Street / Warren Street (s)	B	14.6	B	18.5	B	14.5	B	18.9
King Street at Calhoun Street (s)	B	13.5	B	15.2	B	14.1	B	18.1
King Street at Hutson Street / Vanderhorst Street (u)								
Northbound Left Turn	A	0.8	A	1.0	A	0.9	A	1.2
Southbound Left Turn	A	0.3	A	0.3	A	0.3	A	0.3
Eastbound Approach	C	19.6	C	23.7	C	21.0	D	28.8
Westbound Approach	C	16.2	C	20.1	C	17.1	C	23.5
Meeting Street at Hutson Street (u)								
Northbound Left Turn	A	0.4	A	0.4	A	1.2	A	0.5
Eastbound Approach	C	16.7	C	18.5	C	16.6	C	17.2

(s) = signalized, (u) = unsignalized

The future conditions analysis shows some increase in delays from the existing conditions. However, the side-street operations of the unsignalized intersections are not expected to operate at lower than LOS D during the weekday peak periods, which is generally considered acceptable within an urban environment.

The side-street approach delay for Meeting Street at Hutson Street decreases slightly in the future condition. This result is caused by the increased percentage of right turn turning movements, which typically experience lower delays than left-turn turning movements.

Recommendations

It is recommended that the valet loading zone be continued to the intersection of King Street at Hutson Street, as previously discussed in this report, in order to allow smoother right-turn flow from the valet loading zone to Hutson Street.

Old Library Site / Marion Square Hotel Traffic Impact Study

5 Summary of Results

The following results were concluded from this traffic evaluation

- The intersections are expected to have acceptable operations after the completion of the proposed development.
- The valet loading zone extension to the intersection of King Street at Hutson Street is recommended

Exhibit B



Application for Variance, Special Exception, or Reconsideration
to the Board of Zoning Appeals - Zoning [Form 1]

Page 1 of 2

City of Charleston

Instructions - Applicants must complete and submit this form, along with the required information and fee, to the Zoning Division office at 75 Calhoun Street. Applications are due by 3:00 P.M. on the deadline date. A sign will be posted on the property and a public hearing will be conducted by the Board of Zoning Appeals - Zoning, before the Board makes its decision. Each scheduled meeting of the Board is limited to 25 new applications. Additional applications, even if submitted prior to the deadline, will be placed on the agenda of the next scheduled meeting. There is a five (5) business day appeal period following the date of Board action. No permits may be issued until this appeal period has expired. An appeal to the Board stays all further action on the application.

THE APPLICANT HEREBY APPEALS.

- ☐ For a Variance and/or Special Exception as indicated on page 2 of this application.
☒ For reconsideration of a decision of the Board or action of a zoning official as stated on attached Form 2

MEETING DATE REQUESTED: February 21, 2006

Property Address 404 King Street TMS # 460-16-04-009

Property Owner Library Associates LLC Daytime Phone (843) 722-8169

Applicant Historic Charleston Foundation
Preservation Society of Charleston Daytime Phone See Exh A

Applicant's Mailing Address Please see Exhibit "A" attached hereto and
incorporated herein by reference

Relationship of applicant to owner (same, representative, prospective buyer, other) Attorney

Zoning of property GB-A

Information required with application. (check information submitted)

- ☐ Scaled plans or plats, including elevations if applicable, showing the variance(s) being requested (3 copies)
☐ For density variances, scaled floor plans with rooms labeled and the total floor area of each dwelling unit noted (3 copies)
☐ Check or cash (make checks payable to the City of Charleston)

Optional information which will be helpful to the Board:

- ☐ Photographs
☐ Letters or petitions from neighbors or organizations directly affected by your request

I certify that the information on this application and any attachments is correct, that the proposed improvement(s) comply with private neighborhood covenants, if there are any and that I am the owner of the subject property or the authorized representative of the owner. I authorize the subject property to be posted with a notice of the hearing before the Board, and inspected.

Applicant [Signature] Date 2/14/2006

For office use only			
Date application received	<u>2/14/06</u>	Time application received	<u>4:53</u>
Staffperson	<u>[Signature]</u>	Fee \$	<u>150.00</u>
		Receipt #	<u>4221</u>

Dept. of Design, Development and Preservation 75 Calhoun Street, Third Floor Charleston, South Carolina 29401
(843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us

FEB 14 2006

Exhibit "A"
Application for Variance, Special Exception, or Reconsideration to the
Board of Zoning Appeals -- Zoning

Applicant s [Historic Charleston Foundation] Mailing Address/Daytime Phone

All correspondence for Historic Charleston Foundation should be addressed to

Edward K. Pritchard, III
The Pritchard Law Firm Inc
8 Cumberland Street Suite C
Charleston SC 29401

E Mail Address epritchard@p-blaw.com
Phone Number (843) 722 3300
Fax Number (843) 722 3379

Applicant s [Preservation Society of Charleston] Mailing Address/Daytime Phone

All correspondence for Preservation Society of Charleston should be addressed to

G Trenholm Walker
Pratt Thomas Epting & Walker PA
Post Office Drawer 22247
Charleston SC 29413-2247

E Mail Address gtw@wiselaw.com
Phone Number (843) 727 2208
Fax Number (843) 727 2231



Board of Zoning Appeals – Zoning
Form 2 (yellow)

City of Charleston

Applicants appealing for reconsideration of a Board decision or decision of the zoning administrator must submit the following information with Form 1

In the case of an appeal for reconsideration of a Board decision, applicant shall state below the grounds upon which it is considered that the Board misapprehended or misconceived the question or questions involved or the ground or grounds upon which it is considered that the Board has erred in its finding or disposition of the appeal application or matter

Please see Exhibit B " attached hereto and
incorporated herein by reference

In the case of an appeal for reconsideration of a decision of the zoning administrator applicant shall state below the interpretation(s) of the Zoning Ordinance being appealed how the applicant is aggrieved by the interpretation(s) and what the applicant contends is the correct interpretation of the Zoning Ordinance

Applicants Signature Eshel M Date 2/14/2006

For office use only	Date application received <u>2/14/06</u>	Time application received <u>4:53</u>	Staffperson <u>[Signature]</u>
---------------------	--	---------------------------------------	--------------------------------

City of Charleston
Department of Design Development and Preservation
75 Calhoun Street Division 610
Charleston, South Carolina 29401
(843) 724 3781

DO NOT DUPLICATE OR FAX THIS FORM USE ONLY THE ORIGINAL COLOR CODED COPY

10/03

Exhibit "B" – Grounds for Reconsideration

**Application for Variance, Special Exception, or Reconsideration to the
Board of Zoning Appeals – Zoning**

- 1 The provisions of the Vested Rights Act (hereinafter referred to as the "Act") Section 29-510 through 560 Code of Laws of South Carolina, 1976 as amended do not apply retroactively to the special exception that was granted to Library Associates LLC for 404 King Street in February 2004 (hereinafter referred to as the "Special Exception") before the Act was passed and the ordinance adopted as the Act is in derogation of the common law purports to create a new right, and can be applied prospectively only
- 2 The provisions of the Vested Rights Ordinance (hereinafter referred to as the "Ordinance") Section 54-960 through 968 THE ZONING ORDINANCE OF THE CITY OF CHARLESTON (2005) do not apply retroactively to the Special Exception before the Ordinance was passed and the ordinance adopted, as the Ordinance is in derogation of the common law purports to create a new right and can be applied prospectively only
- 3 Application of the Act and the Ordinance to the Special Exception is in violation of the Comprehensive Land Planning Act of 1994 in that it is in derogation of local government's bodies' apparent ability to guide zoning, land uses and impacts in response to changing circumstances
- 4 There have been significant material changes of circumstance since the Special Exception was granted in February 2004 which changes and circumstances include, but are not limited to the massive influx of additional proposed development in the immediate neighborhood of this proposed project, the additional hotels planned and approved and the Grade B status of the intersections of King and Calhoun and King and meeting
- 5 The traffic assessment plan provided by the applicant in February 2004 which is an essential prerequisite for consideration of the request for renewal and/or extension of special exception was outdated incomplete and unresponsive in numerous material respects
- 6 The Special Exception was in violation of the City of Charleston Zoning Ordinances governing Special Exceptions as it does not present a current assessment as required and, as such, the application is incomplete and should not have been acted upon
- 7 The Act and the Ordinance violate the due process clause of U.S. CONST. amend. XIV, § 1
- 8 The Act and the Ordinance violate the due process clause of S.C. CONST. art. I § 3
- 9 The Act and the Ordinance violate the notice and right to be heard provision of S.C. CONST. art. I § 23

Exhibit C

FROM

FAX NO 8437234381

Mar 06 2007 04 53PM P1



Instructions - Applicants must complete and submit this form along with the required information and fee to the Zoning Division office at 75 Calhoun Street. Applications are due by 3:00 P.M. on the deadline date. A sign will be posted on the property and a public hearing will be conducted by the Board of Zoning Appeals - Zoning before the Board makes its decision. Each scheduled meeting of the Board is limited to 25 new applications. Additional applications even if submitted prior to the deadline will be placed on the agenda of the next scheduled meeting. There is a five (5) business day appeal period following the date of Board action. No permits may be issued until this appeal period has expired. An appeal to the Board stays all further action on the application.

THE APPLICANT HEREBY APPEALS

- ☒ For a Variance and/or Special Exception as indicated on page 2 of this application
☐ For reconsideration of a decision of the Board or action of a zoning official as stated on attached Form 2

MEETING DATE REQUESTED February 6, 2007

Property Address 404 King Street TMS # 460-16-04-009

Property Owner Library Associates, LLC Daytime Phone 722-8169

Applicant Buist Moore Smythe McGee P.A. Daytime Phone 720-4610

Applicant's Mailing Address c/o W. Foster Gaillard, 5 Exchange Street, Charleston, SC 29401

Relationship of applicant to owner (same, representative, prospective buyer, other) Attorney/Representative

Zoning of property GB-A

Information required with application (check information submitted)

- ☒ Scaled plans or plats including elevations if applicable showing the variance(s) being requested (3 copies)
☐ For density variances scaled floor plans with rooms labeled and the total floor area of each dwelling unit noted (3 copies)
☒ Check or cash (make checks payable to the City of Charleston)

Optional information which will be helpful to the Board

- ☐ Photographs
☐ Letters or petitions from neighbors or organizations directly affected by your request

I certify that the information on this application and any attachments is correct, that the proposed improvement(s) comply with private neighborhood covenants if there are any and that I am the owner of the subject property or the authorized representative of the owner. I authorize the subject property to be posted with a notice of the hearing before the Board and inspected.

Applicant W. Foster Gaillard Date 1/4/2007

For office use only		
Date application received	<u>1/5/07</u>	Time application received <u>11:36</u>
Staffperson	<u>[Signature]</u>	Receipt # <u>4721</u>
	Fee \$ <u>3,850.00</u>	

Dept. of Design, Development and Preservation 75 Calhoun Street, Third Floor Charleston, South Carolina 29401
 (843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us

Form 1 (continued)

Page 2 of 2

APPLICANTS FOR VARIANCES MUST COMPLETE THE FOLLOWING.

Applicant hereby appeals to the Board for a variance from the strict application of the Zoning Ordinance to the property described on this application so that a zoning permit may be issued to allow use of the property in a manner shown on the attached site plan and described as follows

Applicant must explain how strict application of the ordinance will result in an unnecessary hardship and how the standards for a variance set by the Zoning Ordinance are met by answering the following questions

- a What are the extraordinary and exceptional conditions pertaining to the particular piece of property _____
- b Explain why these conditions do not generally apply to other property in the vicinity _____
- c Explain how because of these conditions the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property _____
- d Explain why authorization of the variance will not be of substantial detriment to the adjacent property or to the public good and the character of the district will not be harmed by the granting of the variance _____

Signature of applicant _____ Date _____

APPLICANTS FOR SPECIAL EXCEPTIONS MUST COMPLETE THE FOLLOWING.

- 1 Applicant hereby appeals to the Board for a special exception to use the property identified on this application as follows Pursuant to Section 54-962 Owner requests a one (1) year extension of the previously approved Special Exception for a 185-room hotel, originally granted by the BZA in February, 2004, and extended for one (1) year in February, 2006
- 2 Applicant will meet the special exception requirements listed in Section 54 220 of the Zoning Ordinance in the following manner

Per previously approved submittals.

- 3 The following documents are submitted in support of this application

Per previously approved submittals (documents enclosed)

Signature of applicant W. John Poirier Date 1/4/2007

Dept. of Design Development and Preservation 75 Calhoun Street Third Floor Charleston South Carolina 29401
(843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us

Exhibit D



Application for Variance Special Exception or Reconsideration
to the Board of Zoning Appeals - Zoning (Form 1)

Page 1 of 2

City of Charleston

Instructions - Applicants must complete and submit this form along with the required information and fee to the Zoning Division office at 75 Calhoun Street. Applications are due by 3 00 P M on the deadline date. A sign will be posted on the property and a public hearing will be conducted by the Board of Zoning Appeals - Zoning, before the Board makes its decision. Each scheduled meeting of the Board is limited to 25 new applications. Additional applications, even if submitted prior to the deadline, will be placed on the agenda of the next scheduled meeting. There is a five (5) business day appeal period following the date of Board action. No permits may be issued until this appeal period has expired. An appeal to the Board stays all further action on the application.

THE APPLICANT HEREBY APPEALS

- ☒ For a Variance and/or Special Exception as indicated on page 2 of this application
☐ For reconsideration of a decision of the Board or action of a zoning official as stated on attached Form 2

MEETING DATE REQUESTED January 2, 2007

Property Address 404 King Street **TMS #** 460-16-04-009

Property Owner Library Associates, LLC **Daytime Phone** 722-8169

Applicant Regan and Cantwell, LLC **Daytime Phone** 762-8282

Applicant's Mailing Address 105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

Relationship of applicant to owner (same representative prospective buyer other) Attorney

Zoning of property GB-A

Information required with application (check information submitted)

- ☒ Scaled plans or plats including elevations if applicable showing the variance(s) being requested (3 copies)
☐ For density variances scaled floor plans with rooms labeled and the total floor area of each dwelling unit noted (3 copies)
☐ Check or cash (make checks payable to the City of Charleston)

Optional information which will be helpful to the Board

- ☒ Photographs
☐ Letters or petitions from neighbors or organizations directly affected by your request

I certify that the information on this application and any attachments is correct, that the proposed improvement(s) comply with private neighborhood covenants if there are any and that I am the owner of the subject property or the authorized representative of the owner. I authorize the subject property to be posted with a notice of the hearing before the Board and inspected.

Applicant Frances J Cantwell **Date** 12/4/06

For office use only	Date application received <u>12/4/06</u>	Fee <u>\$ 400⁰⁰</u>	Time application received <u>1:10</u>
Staff person <u>[Signature]</u>			Receipt # _____

Dept. of Design, Development and Preservation 75 Calhoun Street, Third Floor Charleston South Carolina 29401
(843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us

APPLICANTS FOR VARIANCES MUST COMPLETE THE FOLLOWING.

Applicant hereby appeals to the Board for a variance from the strict application of the Zoning Ordinance to the property described on this application so that a zoning permit may be issued to allow use of the property in a manner shown on the attached site plan and described as follows:

A height variance is requested for a 185-room, full service hotel with retail along King Street and Hutson Street, a restaurant overlooking Marion Square, 5,500 sq ft conference space, and a roof terrace

Applicant must explain how strict application of the ordinance will result in an unnecessary hardship and how the standards for a variance set by the Zoning Ordinance are met by answering the following questions:

- a What are the extraordinary and exceptional conditions pertaining to the particular piece of property? See attached
- b Explain why these conditions do not generally apply to other property in the vicinity?
See attached
- c Explain how because of these conditions the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property
See attached
- d Explain why authorization of the variance will not be of substantial detriment to the adjacent property or to the public good and the character of the district will not be harmed by the granting of the variance See attached.

Signature of applicant

Francis J. Cantwell

Date

12/4/06**APPLICANTS FOR SPECIAL EXCEPTIONS MUST COMPLETE THE FOLLOWING.**

- 1 Applicant hereby appeals to the Board for a special exception to use the property identified on this application as follows _____
- 2 Applicant will meet the special exception requirements listed in Section 54-_____ of the Zoning Ordinance in the following manner

- 3 The following documents are submitted in support of this application

Signature of applicant

Date

Dept. of Design Development and Preservation 75 Calhoun Street, Third Floor Charleston, South Carolina 29401
(843) 724-3781 FAX (843) 724-3772 www.ci.charleston.sc.us

The Proposal The subject property is the site of the old Charleston County Library, at the southeast corner of King and Hutson Streets, facing Marion Square. The Applicant intends to construct a 185 room full service hotel, with retail space along King and Hutson Streets. There are two height districts applicable to the subject property: Height District 3X and Height District 55/30. A variance is being requested to allow a portion of the height otherwise allowed in the 3X district portion of the site to be shifted back from King Street and into the portion of the site subject to the 55/30 height district. The requested variance will not result in a larger building being constructed. In fact, the building contemplated under the variance will be smaller in volume than is allowed under the combined height districts. The height, scale, and mass of the proposed building have received conceptual approval from the Board Architectural Review, which includes shifting the height as contemplated by this variance request.

Applicant must explain how strict application of the ordinance will result in unnecessary hardship, and how the standards for a variance set by the Zoning Ordinance are met by answering the following questions:

- a. **What are the extraordinary and exceptional conditions pertaining to the particular piece of property?**

The subject property is exceptional and unique by virtue of its location. It has prominence on both King Street and Marion Square and is bordered on three sides by historically or architecturally important spaces or structures. To the west are the Aumar Building and St. Matthews German Lutheran Church, to the south is Marion Square, and to the east is the old Citadel Building. Whatever is

constructed on the subject property will require a scale that respects each of these buildings and spaces. And, as every elevation of the building constructed on the subject property will be visible, the shape of the building is of more paramount concern than would be on other properties where typically only one or two elevations are visible to the public.

The subject property is subject to two height districts, Height District 3X and Height District 55/30. The 3X district encompasses the King Street elevation. A strict application of these height districts to the subject property results in a building having a peculiar L-shaped envelope with substantial massing on King Street.

b Explain why these conditions do not generally apply to other property in the vicinity

There is no other vacant property in the vicinity which, when improved, will result in a building with four visible elevations. There is no other property in the vicinity split by height districts where the application of those districts results in a top heavy building with massing concentrated on the street. Other properties with two height districts typically accommodate massing to the interior of the site, which allows for a building to be designed with height stepped back from the street, reducing the visual scale. This result is not possible with the strict application of the height districts to the subject property.

c. Explain how, because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property

The applicant has been granted a special exception to construct a 185 room, full service hotel on the subject property. Being located in the Old and Historic District, construction on the site must satisfy design criteria specified by the Board of Architectural Review. The Board of Architectural Review has given conceptual approval to the height, scale and mass of the project, which approval contemplates shifting some height from the 3X District into a portion of the 55/30 District. Absent a variance, the use of the subject property in accordance with these granted approvals will be unreasonably restricted in that the scale of the project resulting from a strict application of the height districts will not meet the design criteria expected by the Board of Architectural Review, thus compromising the ability of the applicant to effectively utilize its property to construct its project, as approved.

d. Explain why authorization of the variance will not be of substantial detriment to the adjacent property or the public good, and the character of the district will not be harmed by the granting of the variance

The variance will not be of substantial detriment to adjacent property. The design of the project conceptually approved by the Board of Architectural Review contemplates the height of the building being stepped back from all sides. This concept avoids substantial massing along King Street, in the face of the Aymar Building and St. Matthews Church, and results in a building height more typical of the scale of the buildings fronting on King Street. At the same time, the stepped design is similarly respectful to its neighbor to the east, the old

Citadel Building The variance allows for the construction of a building that is deferential to all it neighbors

The variance will not be of substantial detriment to the public good The subject property, as currently zoned, could accommodate a structure larger than that being proposed Thus, the variance will not affect the overall size of the building The addition of a publicly accessible hotel, with amenities, at this location will enhance the ability of the public to more fully enjoy Marion Square by providing grade level dining opportunities and access to a roof top pavilion affording panoramic views of the Square and the peninsula The addition of retail space along King and Hutson Streets furthers the public good by bringing life to the streetscape and improving security on the block, thus contributing to the revitalization of King Street, north of Calhoun

The character of the district will not be harmed by the granting of the variance The subject property is one of the most important locations on the peninsula. It demands a significant, signature structure The variance will accommodate a superior massing for the site that is sensitive to its environs by moving the taller massing to the interior of the site/building, consistent with the overall character and scale of the district

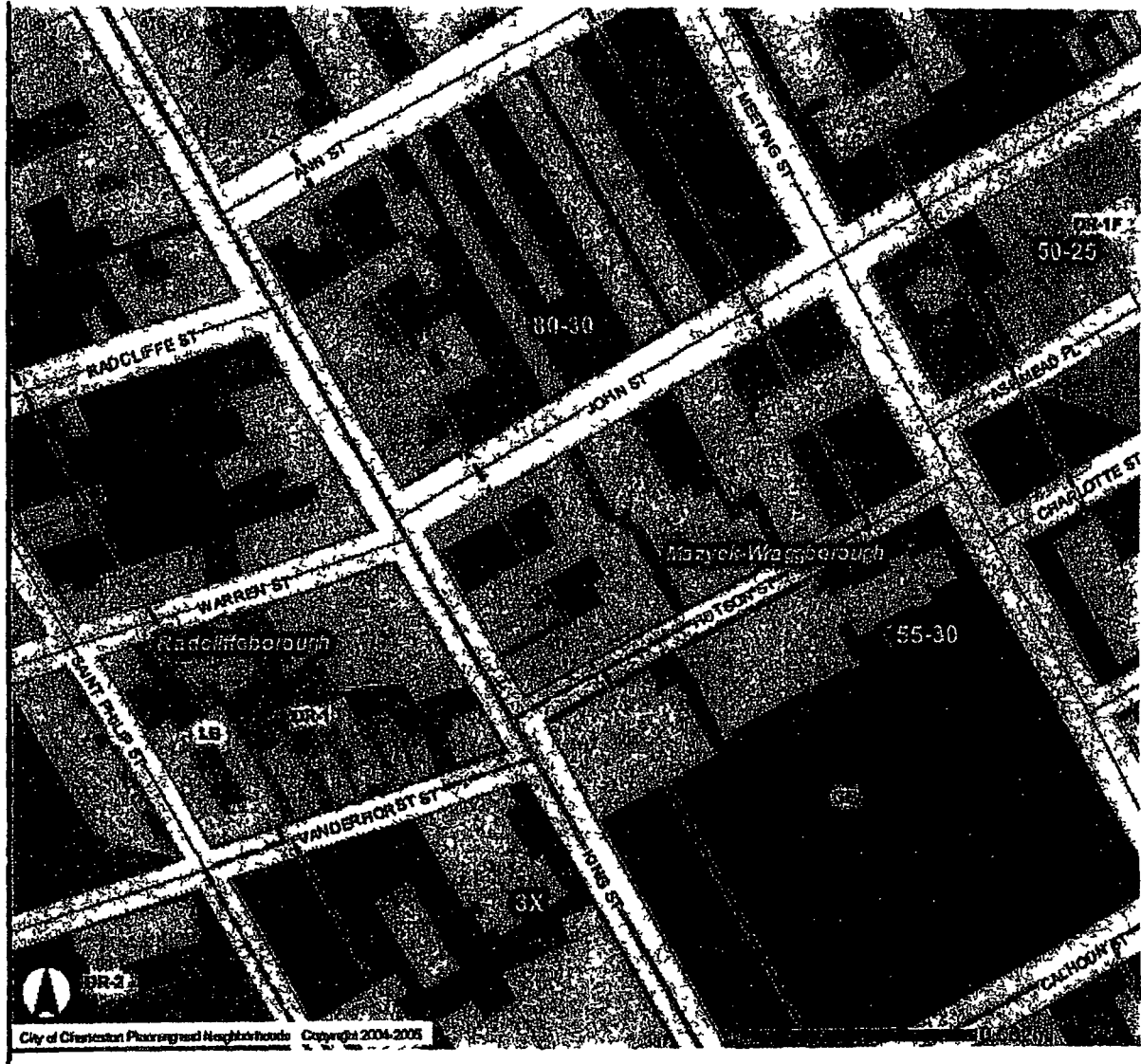


Exhibit E



PROPERTY LOCATION TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S)

404 KING STREET (RADCLIFFEBOROUGH/GARDEN DISTRICT) (TMS# 460- 16-04-009)

Request variance from Section 54-306 to allow construction of a hotel with a maximum building height of 105-feet in the 55/30 height district.

Zoned GB A.

Height District 3X-55/30

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☐ **DENIED** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s) have not been met and therefore orders that the special exception(s) be denied.

☐ **APPROVED** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above which are applicable to the requested special exception(s) have been met and therefore orders that the special exception(s) be granted, subject to the following conditions if any: _____

Date issued: _____ Chairman _____

~~Order on Variance Request~~

The Board of Zoning Appeals Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ **DENIED** The Board concludes that the requirements for granting a variance have not been met and, therefore orders that the variance be denied.

☒ **APPROVED** The Board concludes that:

25 There are extraordinary and exceptional conditions pertaining to the particular piece of property

26 These conditions do not generally apply to other property in the vicinity

27 Because of these conditions the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property and

28 Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance

THE BOARD THEREFORE finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any: _____

Date issued: 1/2/07 Chairman *[Signature]*

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.
8/06

Exhibit F



Application for Variance, Special Exception, or Reconsideration
to the Board of Zoning Appeals - Zoning (Form 1)

Page 1 of 2

City of Charleston

Instructions - Applicants must complete and submit this form, along with the required information and fee to the Zoning Division office at 75 Calhoun Street. Applications are due by 12 Noon on the deadline date. A sign will be posted on the property, and a public hearing will be conducted by the Board of Zoning Appeals - Zoning before the Board makes its decision. Each scheduled meeting of the Board is limited to 25 new applications. Additional applications, even if submitted prior to the deadline will be placed on the agenda of the next scheduled meeting. There is a five (5) business day appeal period following the date of Board action. No permits may be issued until this appeal period has expired. An appeal to the Board stays all further action on the application.

THE APPLICANT HEREBY APPEALS

- ☒ For a Variance and/or Special Exception as indicated on page 2 of this application.
☒ For reconsideration of a decision of the Board or action of a zoning official as stated on attached Form 2.

MEETING DATE REQUESTED 2-20-07
 Property Address 404 King St TMS # 460 16-04 009
 Property Owner Library Associates, LLC Daytime Phone 722-8167
 Applicant Historic Charleston Foundation Daytime Phone 720 1186
 Applicant's Mailing Address P.O. Box 1120
Char, SC 29402 E-mail Address l.w.hughes@historiccharleston.org
 Relationship of applicant to owner (same representative, prospective buyer other) other
 Zoning of property GB-A

Information required with application: (check information submitted)

- ☐ Scaled plans or plats, including elevations (if applicable) showing the variance(s) being requested (3 sets)
☐ For density variances scaled floor plans with rooms labeled and the total floor area of each dwelling unit noted (3 sets)
☐ Check or cash (make checks payable to the City of Charleston)

Optional information which will be helpful to the Board:

- ☐ Photographs
☐ Letters or petitions from neighbors or organizations directly affected by your request

I certify that the information on this application and any attachments is correct, that the proposed improvement(s) comply with private neighborhood covenants, if there are any and that I am the owner of the subject property or the authorized representative of the owner. I authorize the subject property to be posted with a notice of the hearing before the Board, and inspected.

Applicant [Signature] Date 1-9-07

For office use only			
Date application received	<u>1/9/07</u>	Fee \$ <u>150.00</u>	Time application received <u>5:00</u>
Staffperson <u>[Signature]</u>			Receipt # <u>6928</u>

Department of Planning Preservation & Economic Innovation 75 Calhoun Street, Third Floor Charleston, South Carolina 29401
 (843) 724-3781 FAX (843) 724-3772 www.charlestoncity.org

Board of Zoning Appeals – Zoning
(Form 2)

Page 1 of 2

City of Charleston

Applicants appealing for reconsideration of a Board decision or decision of the zoning administrator must submit the following information with Form 1.

In the case of an appeal for reconsideration of a Board decision, applicant shall state below the grounds upon which it is considered that the Board misapprehended or misconceived the question or questions involved or the ground or grounds upon which it is considered that the Board has erred in its finding or disposition of the appeal, application or matter

See attachment.

In the case of an appeal for reconsideration of a decision of the zoning administrator applicant shall state below the interpretation(s) of the Zoning Ordinance being appealed how the applicant is aggrieved by the interpretation(s) and what the applicant contends is the correct interpretation of the Zoning Ordinance

Applicants Signature

Date

1/9/07

For office use only

Date application received

1/9/07

Time application received

5:00

Staffperson

Department of Planning, Preservation & Economic Innovation

75 Calhoun Street, Third Floor

Charleston, South Carolina 29401

(843) 724-3781

FAX (843) 724-3772

www.charlestoncityinfo.com

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
Historic Charleston Foundation and
Preservation Society of Charleston

Plaintiffs

vs

The City of Charleston, The City of
Charleston City Council, and
Library Associates, LLC,

Defendants

IN THE COURT OF COMMON PLEAS

CASE NO 07-CP-10-4692

**ANSWER
(Non-Jury)**

BY

JULIE J. A. LONG
CLERK OF COURT

2007 NOV -2 PM 1 22

FILED

The Defendants The City of Charleston and The City of Charleston City Council,
above named answering the Complaint of the Plaintiffs above named alleges and says
as follows

- 1 Upon information and belief, the Defendants admit the allegations contained in
paragraph 1 of the Complaint
- 2 Upon information and belief the Defendants admit the allegations contained in
paragraph 2 of the Complaint
- 3 Upon information and belief, the Defendants admit the allegations contained in
paragraph 3 of the Complaint
- 4 Upon information and belief, the Defendants admit the allegations contained in
paragraph 4 of the Complaint
- 5 The allegations of paragraph 5 of the Complaint are legal conclusions and need not
be admitted or denied If said response is required the same are denied
- 6 Upon information and belief the Defendants admit the allegations contained in
paragraph 6 of the Complaint

7 Upon information and belief the Defendants admit the allegations contained in paragraph 7 of the Complaint

8 Upon information and belief, the Defendants admit the allegations contained in paragraph 8 of the Complaint

9 Upon information and belief the Defendants admit the allegations contained in paragraph 9 of the Complaint

10 Upon information and belief, the Defendants admit the allegations contained in paragraph 10 of the Complaint

11 Upon information and belief, the Defendants admit the allegations contained in paragraph 11 of the Complaint

12 Upon information and belief, the Defendants admit the allegations contained in paragraph 12 of the Complaint

13 Upon information and belief the Defendants admit the allegations contained in paragraph 13 of the Complaint

14 Upon information and belief, the Defendants admit the allegations contained in paragraph 14 of the Complaint

15 Upon information and belief the Defendants admit the allegations contained in paragraph 15 of the Complaint

16 Upon information and belief, the Defendants admit the allegations contained in paragraph 16 of the Complaint

17 Upon information and belief, the Defendants admit the allegations contained in paragraph 17 of the Complaint

18 Upon information and belief, the Defendants admit the allegations contained in

paragraph 18 of the Complaint

19 Upon information and belief, the Preservation Society has a conservation facade easement on 409 King Street but any remaining allegations of paragraph 19 are denied

20 The allegations of paragraph 20 of the Complaint are conclusions of law which need not be admitted or denied If said response is required the same are denied

21 That the City would admit that the property in question was split zoned as to height Approximately half the property is subject to a 3x height district and the other half subject to a lower height district

22 That the City would admit that any newly constructed building would have to conform with what height restrictions are created by the City's Zoning Ordinance Any remaining allegations of paragraph 22 are denied

23 That these Defendants lack sufficient information to admit or deny the allegations of paragraph 23 of the Complaint and accordingly deny the same

24 That the City would admit that prior to the acquisition by Library Associates the building was the site of the main branch of the Charleston County Library

25 That the Defendants admit the allegations contained in paragraph 25 of the Complaint

26 That the allegations of paragraph 26 of the Complaint are not clear and accordingly the City would deny the same and would request clarification of the allegation of paragraph 26

27 The City would admit that the BZA granted the special exception under Section 54-220

28 That the law and applicable ordinance of the City provided for certain expirations of

the special exception which were thereafter modified by the City of Charleston amending its zoning ordinance and state law changing all of which is the subject of another suit

29 That the City would admit that Library Associates sought a special exception extension in 2006 Any remaining allegations of paragraph 29 are denied

30 The City of Charleston responding to paragraph 30 would state that the Library provided such information as was necessary to obtain an extension

31 That the City would admit that representatives of HCF and Preservation Society attended the February 7 2006 public meeting and were going to oppose the extension, but that the extension was required as a matter of state law

32 That the City would admit so much of paragraph 32 as it indicated that one year extension was granted, all of which is the subject of another action

33 That the Defendants admit the allegations contained in paragraph 33 of the Complaint

34 That the Defendants admit the allegations contained in paragraph 34 of the Complaint

35 That the Defendants admit the allegations contained in paragraph 35 of the Complaint

36 That the Defendants admit the allegations contained in paragraph 36 of the Complaint

37 That the Defendants admit the allegations contained in paragraph 37 of the Complaint

38 That the Defendants admit the allegations contained in paragraph 38 of the Complaint

39 That the Defendants admit the allegations contained in paragraph 39 of the Complaint

40 That the 2007 application provided the information required to obtain the extension
Any remaining allegations of paragraph 40 are denied

41 That the City would admit that representatives of HCF and Preservation Society were going to oppose the extension, which again had to be granted because of changes in state law and in City Ordinance

42 That the City would admit so much of paragraph 42 as it indicates the BZA approved the additional one year extension

43 That the Defendants admit the allegations contained in paragraph 43 of the Complaint

44 That the Defendants admit the allegations contained in paragraph 44 of the Complaint

45 That the Defendants admit the allegations contained in paragraph 45 of the Complaint

46 That the Defendants admit the allegations contained in paragraph 46 of the Complaint

47 That the Defendants admit the allegations contained in paragraph 47 of the Complaint

48 That the Defendants admit the allegations contained in paragraph 48 of the Complaint

49 That the Defendants admit the allegations contained in paragraph 49 of the Complaint

50 That the Defendants admit the allegations contained in paragraph 50 of the Complaint

51 That the Defendants deny the allegations contained in paragraph 51 of the Complaint

52 The City would admit that the interests at stake are germane to both organizations respective missions, but denies any remaining allegations of paragraph 52

53 That the Defendants deny the allegations contained in paragraph 53 of the Complaint

54 That the Defendants admit the allegations contained in paragraph 54 of the Complaint

55 That the Defendants deny the allegations contained in paragraph 55 of the Complaint

56 That the Defendants deny the allegations contained in paragraph 56 of the Complaint

57 That the Defendants deny the allegations contained in paragraph 57 of the Complaint

58 That the Defendants deny the allegations contained in paragraph 58 of the Complaint

59 That the Defendants deny the allegations contained in paragraph 59 of the Complaint

60 That the Defendants deny the allegations contained in paragraph 60 of the Complaint

61 That the Defendants admit the allegations contained in paragraph 61 of the

Complaint

62 That the Defendants deny the allegations contained in paragraph 62 of the Complaint

63 That the City would admit that HCF and the Preservation Society though various members spoke in opposition to the rezoning of the property when it was considered by the Planning Commission and City Council Any remaining allegations of paragraph 63 are denied

64 The City would admit that on or about August 21 2007, City Council adopted a zoning ordinance rezoning half of the property subject to the 55/30 height districts of the entire property and was zoned as a 3x height district

65 The City would admit that other properties were not rezoned at the same time the City denies that there was any spot zoning

66 That the Defendants deny the allegations contained in paragraph 66 of the Complaint

67 The allegations of paragraph 67 are conclusions of law which need not be admitted or denied If said response is required the same are denied

68 The allegations of paragraph 68 are conclusions of law which need not be admitted or denied If said response is required the same are denied

69 That the Defendants deny the allegations contained in paragraph 69 of the Complaint

70 That the Defendants deny the allegations contained in paragraph 70 of the Complaint

71 That the Defendants deny the allegations contained in paragraph 71 of the

Complaint

72 That the Defendants deny the allegations contained in paragraph 72 of the Complaint

73 That the Defendants deny each and every allegation not specifically admitted

FURTHER ANSWERING THE COMPLAINT

AND AS AN AFFIRMATIVE DEFENSE THERETO,

THESE DEFENDANTS ALLEGE AND SAY

(Legislative Act)

74 That the City would crave reference to the fact that its rezoning of the subject property was a legislative act and entitled to the presumptions of a validity and regularity afforded legislative acts under South Carolina law



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City Council

Charleston South Carolina

October 31, 2007

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Historic Charleston Foundation and Preservation)
Society of Charleston,)
Plaintiffs)
vs)
The City of Charleston, The City of Charleston)
City Council, and Library Associates, LLC)
Defendants)

COURT OF COMMON PLEAS

CASE NO 2007-CP-10-4692

ANSWER TO COMPLAINT
(Library Associates, LLC)

FILED
2007 NOV 20 PM 2 53
JULIE J. PRISTONG
CLERK OF COURT

The Defendant Library Associates, LLC, in answer to the Complaint alleges and says

FOR A FIRST DEFENSE

1 Each and every allegation of the Complaint not herein admitted modified, or explained is
denied and strict proof thereof is demanded

AS TO BACKGROUND

2 Paragraphs 1 2, 3 and 4 of the Complaint are admitted

3 Paragraph 5 of the Complaint is denied

4 Paragraphs 6 7 8 9, 10 11, 12, 13, 14 15, 16 and 17 of the Complaint are admitted
upon information and belief

5 Paragraph 18 of the Complaint is admitted

6 Answering Paragraph 19 of the Complaint, it is admitted, upon information and belief
that the Preservation Society holds a façade easement on 409 King Street All other allegations
of said paragraph are denied

7 Paragraph 20 of the Complaint is admitted

8 Answering Paragraph 21 of the Complaint, strict proof is demanded of all allegations thereof

9 Paragraph 22 of the Complaint is admitted

10 Answering Paragraph 23 of the Complaint, strict proof is demanded of all allegations thereof

11 Paragraph 24 of the Complaint is admitted

AS TO THE SPECIAL EXCEPTION, ITS EXTENSIONS AND THE APPEALS

12 Paragraphs 25, 26 and 27 of the Complaint are admitted

13 Answering Paragraph 28 of the Complaint, the law and applicable ordinances cited therein speak for themselves and reference is craved thereto for their wording, meaning, application and interpretation. All allegations of Paragraph 28 of the Complaint inconsistent with the foregoing are denied

14 Answering Paragraph 29 of the Complaint, so much thereof that alleges that on January 9, 2006, this Defendant, through its representative made an application for extension of its Special Exception is admitted. All allegations of Paragraph 29 of the Complaint inconsistent with the foregoing are denied

15 Answering Paragraph 30 of the Complaint, the 2006 Application referenced therein speaks for itself. All allegations of Paragraph 30 of the Complaint inconsistent with the foregoing are denied

16 Answering Paragraph 31 of the Complaint, this Defendant is without sufficient information to be able to form an opinion or belief as to the same, and therefore denies the same and demands strict proof thereof

17 Answering Paragraph 32 of the Complaint, it is admitted that at the Board of Zoning Appeals meeting held on February 7, 2006, a one year extension of the Special Exception was approved. All other allegations of said paragraph are denied.

18 Paragraphs 33, 34, 35 and 36 of the Complaint are admitted.

19 Answering Paragraph 37 of the Complaint, it is admitted that an appeal of the extension of the Special Exception is currently pending in the Court of Appeals.

20 Answering Paragraph 38 of the Complaint, the terms of the Special Exception speak for itself. All allegations of Paragraph 38 of the Complaint inconsistent with the foregoing are denied.

21 Answering Paragraph 39 of the Complaint, so much thereof that alleges that on January 5, 2007, this Defendant made application for a second extension of its Special Exception is admitted. All allegations of Paragraph 39 of the Complaint inconsistent with the foregoing are denied.

22 Answering Paragraph 40 of the Complaint, the 2007 Application cited therein speaks for itself. All other allegations of Paragraph 40 of the Complaint inconsistent with the foregoing are denied.

23 This Defendant is without sufficient information to be able to form an opinion or belief as to the allegations of Paragraph 41 of the Complaint, and therefore denies the same and demands strict proof thereof.

24 Answering Paragraph 42 of the Complaint, so much thereof that alleges that, at the February 6, 2007 meeting of the Board of Zoning Appeals, a one year extension of the Special Exception was approved is admitted. All other allegations of said paragraph are denied.

25 Paragraphs 43 and 44 of the Complaint are admitted.

AS TO THE HEIGHT VARIANCE

- 26 Paragraph 45 of the Complaint is admitted
- 27 Answering Paragraph 46 of the Complaint, reference is craved to the laws and zoning provision cited therein for their wording meaning, interpretation and application
- 28 Paragraph 47 of the Complaint is admitted
- 29 Answering Paragraph 48 of the Complaint, reference is craved to the transcript of the proceedings of the Board of Zoning Appeals of January 2, 2007 as to testimony deliberation and the decision
- 30 Paragraphs 49 and 50 of the Complaint are admitted
- 31 Paragraphs 51, 52 and 53 of the Complaint are denied
- 32 Paragraph 54 of the Complaint is admitted
- 33 Paragraphs 55 and 56 of the Complaint are denied
- 34 Answering Paragraph 57 of the Complaint, reference is craved to the application cited therein for its contents and to proceedings of the Board hearing referenced therein as to the testimony, deliberation and decision
- 35 Paragraphs 58, 59, and 60 of the Complaint are denied
- 36 Paragraph 61 of the Complaint is admitted

AS TO SPOT ZONING

- 37 Paragraph 62 of the Complaint is denied
- 38 Answering Paragraph 63 of the Complaint, reference is craved to the proceedings of the Planning Commission and City Council referenced therein for the testimony, deliberation and the decision rendered

39 Answering Paragraph 64 of the Complaint, it is admitted that on August 21, 2007 the
City Council of Charleston acting in a legislative capacity, adopted an ordinance rezoning the
height of the subject property

40 Paragraph 65 of the Complaint is admitted

41 Paragraph 66 of the Complaint is denied

42 Answering Paragraphs 67 and 68 of the Complaint, reference is craved to the statutes
cited for their wording, meaning, interpretation and application

43 Paragraphs 69, 70, 71 and 72 of the Complaint are denied

FOR A SECOND DEFENSE

44 The Complaint should be dismissed for failure to state a claim upon which relief could be
granted

FOR A THIRD DEFENSE

45 Paragraphs 25 through 61 of the Complaint should be struck due to irrelevancy, and for
the additional reason that other actions are pending between these parties on the claims set forth
in those paragraphs

WHEREFORE, having set forth their Answer Defendant Library Associates, LLC prays
for dismissal of the Complaint, entry of judgment on its behalf, for costs and disbursements of
this action, and such other and further relief as the Court may deem appropriate

Charleston, South Carolina

November 16 2007



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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Historic Charleston Foundation and Preservation
Society of Charleston,

Plaintiffs,

vs

The City of Charleston, The City of Charleston
City Council, and Library Associates, LLC,

Defendants

COURT OF COMMON PLEAS

CASE NO 2007-CP-10-4692

MOTION TO ALTER,
AMEND OR RECONSIDER

2010 SEP -9 AM 11:49
JULIE J ARMSTRONG
CLERK OF COURT

FILED

Defendants, pursuant to Rule 59 (e), SCRPC move the Court to alter amend or
reconsider its order in the within matter entered on August 20, 2010, notice of entry of which
was received by counsel on August 30, 2010 for the following reasons and on the following
grounds

This case concerns a challenge to the validity of an ordinance enacted by the City
Council of Charleston (herein "City") amending the height districts applicable to a property
located at 404 King Street. The effect of the amendment was to extend across the entire
property one height district, that being the 3X height district. Prior to the ordinance, the property
was subject to two different districts, those being the 3X district and the 55/30 district.

Zoning is a legislative decision, even when applicable to but one parcel of land, and is
presumed valid. A zoning ordinance will not be overturned if the actions of the council in
enacting it are but fairly debatable, because the City's action is presumed to have been a valid
exercise of power and it is not the prerogative of the court to pass upon the wisdom of the
decision. Rushing v City of Greenville 265 S C 285 288, 217 S E 2d 797, 799 (1975). A

decision is fairly debatable where evidence provides a basis for a fair difference of opinion or where reasonable minds could differ on the issue Salkin, American Law of Zoning, 5th ed § 15 10

In its order, this Court annulled the legislative determination of the City as to the appropriate height for 404 King Street. A review of the order suggests that this Court misconstrued evidence, overlooked salient facts and committed an error of law.

FINDINGS

In Finding 16, this Court found the rezoning ordinance was pursued to avoid concerns over a lawsuit pertaining to the variance previously awarded the property. The Court misconstrued the testimony on this issue. Mayor Riley testified as follows:

Q Mayor, why would you advocate for the zoning change if the variance had already been approved? What was the logic and reasoning there?

A There was a couple of reasons. First of all, we're in the business of civic life, getting things done. It's not – so to have a lawsuit over a variance that you felt was correct and withstood any public policy test and to spend a few years on that. When we met in my office, the legal staff and all, and said, well, what's – you know, is there something that's being varied from that is __ does it need to be something that requires a variance? Is it __ we said no. You know, we realized that all the stuff I've just said about the fine paint brush and the microscope, and so, then, we don't – let's don't have a game going on here, waste everybody's time and money if the – if we had been smarter when we did the 3X we would have included the whole site realizing it fronted on both Marion Square and King Street, so we should rezone it so that you don't need a variance to accomplish the public purpose that I've outlined.

And secondly if you – the variance is project dependent So let's say you say, well we go to the variance route and it succeeds Then for some reason the development can't go forward You know, whatever, the economy or something like that Then the next person goes back to square one and here's the City and it's main street and the public policy you're trying to achieve, you know, risking another several years So it was wasteful and better to go ahead and have it zoned the correct way

(March 9, 2009 Transcript p 206, line 19-p 208, line1)

Mayor Riley's testimony demonstrates he entertained the rezoning not because of concerns with the legitimacy of the variance litigation but as a way to avoid the delay necessarily involved by a lawsuit that he felt the City would ultimately win, which it did

More fundamentally however, it is error to delve into the motives behind legislative decisions Precedent could not be clearer

A governmental body's decision on the use of land is a legislative function *Hampton v Richland County*, 292 S C 500, 357 S E 2d 463 (Ct App 1987) Judicial inquiry into legislative motivation is to be avoided *South Carolina Educ Ass'n v Campbell*, 883 F 2d 1251 (4th Cir 1989) "Such inquiries endanger the separation of powers doctrine, representing a substantial judicial 'intrusion into the workings of other branches of government'" *Id* at 1257 (quoting *Village of Arlington Heights v Metropolitan Housing Dev Corp*, 429 U S 252, 268 n 18, 97 S Ct 555, 50 L Ed 2d 450 (1997))

In finding 17, the Court notes that the 3X height district had been referred to in a 2005 Council meeting as "prehistoric" Even without resort to the context of that statement, an opinion of a single member of Council even if the Mayor, cannot be projected or imputed to other members of Council, and certainly not to the body as a whole It is for this very reason that

courts refrain from inquiring into the motivation behind legislation Bear Enterprises v. County of Greenville, 319 S. C. 137, 139, 459 S. E. 2d 883, 885 (FN1). We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach the Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.) And site must not be lost of the circumstance that, in 2005, City Council chose not to remove the 3X district from 404 King or other properties immediately adjacent to it.

Finding 21 states that property with two height districts exists all around the area of 404 King Street. Defendants never contended otherwise. What Defendants contended and what the evidence demonstrated was that the application of split height districts differed at 404 King because all the height was massed along its King Street frontage, without the ability to step height back from the street as is the case with virtually all other properties subject to split zoned heights in the vicinity. The building envelope created by the split height districts at 404 King was incongruous and not in keeping with how split zones applied to other properties. Plaintiffs introduced no evidence to the contrary.

Finding 23 notes that section 8.4 of the Downtown Plan states that 3X is overly permissive and should be replaced. This finding requires scrutiny, for a number of reasons. First, this plan, as any others, provides a general direction for rezoning. Peterson v. City of Clemson, 312 S. C. 162, 170, 439 S. E. 2d 317, 322 (Ct. App. 1993). Second, the Downtown Plan does not say that the 3X district should be replaced entirely. Thirdly, and this fact is unrefuted, when the City revisited height districts a conscious decision was made to allow a generous height for 404 King.

CONCLUSIONS

The standard of review of a zoning decision is whether it is fairly debatable. The arbitrary and capricious standard set forth by this Court in the Conclusions of its order is that applicable to administrative bodies, not legislative bodies.

Most respectfully, Conclusions 5, 6 and 7 all address what this Court perceives to have been the motivation for passing the ordinance. For reasons herein stated, the consideration of motive is improper. Pressley v. Lancaster County, *supra*; Bear Enterprises v. County of Greenville, *supra*. In any event, the only "evidence" of motive was a statement made by one councilman in a city council meeting and the reasoning proffered by Mayor Riley at trial which did not suggest any concerns with legal deficiencies pertaining to the variance. In fact, Mayor Riley testified the opposite to be true because the variance would withstand judicial review; its litigation would unnecessarily delay progress and result in a waste of time and money. (March 9, 2009 Transcript p 206, line 19 – p 207, line 15)

As for spot zoning, the Court rested its determination on the fact that only one property was subject to the ordinance, thus constituting 'the spot' (Conclusion 12). This conclusion is inconsistent with precedent and is but half the equation. The Knowles Court set forth the parameters of spot zoning in this State. In Knowles, the Supreme Court held

This Court has defined 'spot zoning' to be the process of singling out a small parcel of land for use classification totally different from that of the surrounding area for the benefit of owners of such property and to the detriment of others'. Bob Jones University v. City of Greenville, 243 S.C. 351, 361, 133 S.E.2d 843, 848 (1963), dismissed for lack of Fed. Q., 378 U.S. 581, 84 S.Ct. 1913, 12 L.Ed.2d 1036 (1964). In Bob Jones this Court also noted that "it could not be considered as spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed classification." *Id.* at 362, 133 S.E.2d at 848.

Knowles v City of Aiken, 305 S C 219, 221-222, 407 S E 2d 639, 621 (1991)

The facts are undisputed. The 3X height district not only applied to more than half of 404 King Street before the ordinance was enacted, but this same height district applied to properties directly across the street from 404 King Street for an entire city block. No classification totally different from that of the surrounding area" resulted as a consequence of the ordinance. Because of this circumstance, the Knowles decision dictates there was no spot zoning as a matter of law.

Even if, however, it were appropriate to weigh whether the property owner was benefitted to the detriment of others, the record is replete with evidence that the appropriate development to of 404 King, to include a use semi-public in nature, would serve to jump start revitalization in the area, a circumstance hardly of detriment to other property owners.

The Court implies that because the property zoned 3X across from 404 King is not eligible for development this somehow mitigates against allowing the same height at 404 King Street. That a parcel is "available for development" has no relevancy to the issue before the Court, that being whether the decision of Council to rezone was fairly debatable. Moreover, a natural disaster could render these properties "available for development" at a moment's notice.

The Court's Conclusions 19 and 20 are based on speculation. There was no evidence introduced at trial that established that a tall building at 404 King Street, stepped back from the street, would jeopardize any historic status designation of any building or would jeopardize any national register or other historic designation within the area. All testimony on this issue was that such might or could happen. Additionally, the Court's Conclusions 19 and 20 that a 105 foot building would "dwarf" the old Citadel and Saint Matthews Lutherans Church must be

reconsidered, as the relationship of buildings to one another is not a judicial matter, but one of urban planning and design

Conclusion 18 constitutes an error of law South Carolina precedent is clear in this respect The rezoning of a single parcel of land is legislative and not quasi-judicial Precedent of this State has specifically rejected the so called Fasano doctrine

Regarding the question of whether a local zoning authority's rezoning of a single tract of land is a legislative or a quasi-judicial act is frequently associated with a decision of the Oregon Supreme Court in *Fasano v Board of County Commissioners*, 264 Or 574 507 P 2d 23 (1973), overruled in part *Neuburger v City of Portland*, 288 Or 585, 607 P 2d 80 (1980) See N Shortlidge, *The Fasano Doctrine Land Use Decisions as Quasi-Judicial Acts* INST ON PLANNING, ZONING, AND EMINENT DOMAIN, § 3 01 [2] at 3-4 (1985) Several states have adopted the so-called *Fasano* doctrine *Id* § 3 03 [2] at 3-27-3-33 The majority of the jurisdictions however, still consider rezoning a legislative act *Id* § 3 03 [5] at 3 40 South Carolina lines up with the majority See *Conway v City of Greenville* 254 S C 96, 104, 173 S E 2d 648, 652 (1970) (action by landowner to have municipality rezone a portion of landowner's property in which the Supreme Court stated that it "recognize d] that the adoption of zoning ordinances is a legislative function

In any case, we reject the *Fasano* doctrine

Hampton v Richland County, 292 S C 500, 506, 357 S E 2d 463, 466-467 (Ct App 1987)

As for the rezoning complying with City plans, the Court focused on the Downtown Plan As to Marion Square in general and 404 King in particular the Downtown Plan identified it as a development node', eligible for an intense use As for height, the Downtown Plan suggested the preservation of higher buildings along King and Meeting Streets The testimony revealed

height was a function of intensity and that the 3 X height at 404 King was consistent with furthering the goals of the Plan to preserve the existing height regime of higher buildings along the King and Meeting spines and to encourage an intense use at 404 King. The Court's holding that the ordinance did not comport with the City's plans is error.

Conclusion 36 states the zoning would have a negative impact on the common welfare and does not promote the good of the common welfare. This conclusion does not square with the Order affirming Variance, wherein this Court affirmed the Board of Zoning Appeals' finding that a project with height of up to 105 feet would benefit Upper King Street and Marion Square and the surrounding neighborhood and that the variance accommodated a building that better relates to the Old Citadel and St. Matthews Church, all to the benefit of the district. In this case there was similar, if not identical, evidence as to the zoning accommodating revitalization and a better building envelope.

In Conclusion 37, this Court opines how the goals of the Comprehensive Plan are to be achieved. Most respectfully, how and where the preservation of a colonial skyline is to be accomplished is a legislative matter, not a judicial one. Conclusion 37 implies that this rezoning is but one of many to follow where lessened height standards will, ultimately and inevitably, result in the loss of the unique and historic skyline of the City of Charleston. There is simply no basis in the record for this finding or conclusion. If anything, the evidence in the record is the uniqueness of this site's location is what contributed to rethinking its zoning.

This case is on all fours with Knowles, supra. Expansion of the 3X height district across the entirety of 404 King Street did not introduce a new use or new height. The objective evidence dispels any contention to the contrary. That there may be disagreement as to the decision only underscores that the decision of the council was fairly debatable.

Expansion of the 3X height district across the entirety of 404 King Street was not for the sole benefit of its owner, to the detriment of others. The evidence is pervasive that allowing a larger building at the site stands to improve the economy and the area as a whole and result in a better designed building. A revitalized, robust, well designed space could hardly be considered a detriment to neighboring properties.

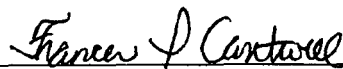
Expansion of the 3X height district across the entirety of 404 King Street is not inconsistent with City plans. The temptation to cherry pick from portions of plans is real and understandable. Yet when viewed together, it is undeniable that this site was contemplated for an intense, robust, public use that would draw visitors and shoppers across Calhoun Street and up the spine of King Street. A hotel was specifically proposed for this site and the rezoning allows for that to occur in lock step with the premise outlined in the City's plans.

It is evident that the Court disagrees with the decision of the Council to rezone 404 King Street. Such, however, does not provide legal basis for annulling its legislative decision when evidence on both sides of the issue is inarguably present. In such an instance, where there is fair disagreement, the decision of the elected body prevails.

For the reasons set forth, it was respectfully submitted that the order of this Court should be reconsidered, and altered and amended to uphold the validity of the ordinance at issue.

Charleston, South Carolina

September 8, 2010



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January 12, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

FOR THE NINTH JUDICIAL CIRCUIT

HISTORIC CHARLESTON
FOUNDATION AND PRESERVATION
SOCIETY OF CHARLESTON,

Plaintiffs,

VS

THE CITY OF CHARLESTON, THE
CITY OF CHARLESTON CITY
COUNCIL AND LIBRARY
ASSOCIATES, LLC,

Defendants

COPY

CASE NO 2007-CP-10-4692 and 451

Trial before the

Honorable Mikell R Scarborough, reported by Bernadette A
Call, CSR and Notary Public, at 9 30 a m on January 12,
2009 at 100 Broad Street, Charleston, South Carolina

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Bernadette A Call, CSR

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I N D E X

Opening Statement by Mr Pritchard	5
Mr Walker	9
Mr Domin	11
Ms Cantwell	16

I N D E X T O E X A M I N A T I O N S

Bradish J Waring, sworn	20
Direct Examination by Mr Pritchard	20
Cross Examination by Mr Domin	34
Cross Examination by Ms Cantwell	38
Redirect Examination by Mr Pritchard	43
Examination by The Court	49
Jonathan H Poston, sworn	50
Direct Examination by Mr Pritchard	50
Cross Examination by Mr Domin	66
Cross Examination by Ms Cantwell	70
Redirect Examination by Mr Pritchard	74
Recross Examination by Ms Cantwell	78
By Mr Pritchard	81
Examination by The Court	82
Robert Gurley, sworn	84
Direct Examination by Mr Walker	84
Cross Examination by Mr Pritchard	136
Cross Examination by Ms Cantwell	136
Cross Examination by Mr Domin	159
Redirect Examination by Mr Walker	162
Recross Examination by Ms Cantwell	165
Recross Examination by Mr Pritchard	168
By Ms Cantwell	168
Examination by The Court	172
Winslow Hastie, sworn	174
Direct Examination by Mr Pritchard	174

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INDEX TO EXHIBITS

E= In Evidence

Plaintiff's Exhibits 1 through 7 are premarked

Plaintiff's Exhibit 1 (Height District Chart)	
Plaintiff's Exhibit 2 (Base Zoning Overlays)	
Plaintiff's Exhibit 3 (Proposed Height Districts)	
Plaintiff's Exhibit 4 (Existing 3X Districts)	
Plaintiff's Exhibit 5 (HCF Trustees)	E
Plaintiff's Exhibit 6 (HCF Easements)	E
Plaintiff's Exhibit 7 (Photos Library Site)	E
Plaintiff's Exhibit 8 (Historic Preservation Plan)	E
Plaintiff's Exhibit 9 (Minutes 9/27/05)	E
Plaintiff's Exhibit 10 (Minutes 9/26/06)	E
Plaintiff's Exhibit 11 (BZA Position Statement 2/17/04)	E
Plaintiff's Exhibit 12 (BAR Position Statement 12/14/05)	E
Plaintiff's Exhibit 13 (BZA Position Statement 1/2/07)	E
Plaintiff's Exhibit 14 (Conservation Easement)	E
Plaintiff's Exhibit 15 (Conservation Easement)	E
Plaintiff's Exhibit 16 (Letter 6/19/07)	E
Plaintiff's Exhibit 17 (BAR Minutes 12/14/05)	E
Plaintiff's Exhibit 18 (BAR Minutes 2/20/08)	E
Plaintiff's Exhibit 19 (City Council Minutes 6/19/07)	E
Plaintiff's Exhibit 20 (Planning Commission 7/18/07)	E
Plaintiff's Exhibit 21 (HCF Covenants and Easements Map)	E
Plaintiff's Exhibit 22 (Hotel Design Packet)	E

Defendant's Exhibit 1 (An Ordinance)	E
Defendant's Exhibit 2 (City Council Minutes 6/19/07)	
Defendant's Exhibit 3 (City Council Minutes 8/21/07)	E
Defendant's Exhibit 4 (Public Hearing)	
Defendant's Exhibit 5 (Map Proposed Height Districts)	E
Defendant's Exhibit 6 (Carolopolis Maps and Photos)	
Defendant's Exhibit 7 (Charleston Downtown Plan)	E
Defendant's Exhibit 8 (Commercial Market Analysis)	

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1 (Hearing convenes)

2 THE COURT We're here today in the case of
3 Historic Charleston Foundation and the Preservation
4 Society of Charleston versus The City of Charleston,
5 the City Board of Zoning Appeals and Library
6 Associates Case number 2007-CP-10-451 It's been
7 consolidated with 2007-CP-10-4692

8 I've had a chance to speak to the lawyers
9 They're ready to go We'll start with two issues here
10 One is a rezoning, and the other is the question of the
11 variance that was granted by the Board of Zoning
12 Appeals, is what I've been informed

13 Mr Domin, I don't think we will finish our case
14 today Let me give you some additional dates We'll
15 just have to see how they look

16 (Discussion off the record)

17 THE COURT Are there any motions or any matters
18 to come before me before we commence?

19 MR PRITCHARD None, Your Honor

20 MR WALKER Your Honor, Trenholm Walker for the
21 Preservation Society We had talked in chambers about
22 our firm's representation of you and a number of other
23 people in an unrelated matter and we talked about
24 stating something on the record

25 I had circulated to all counsel in the case a

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1 (inaudible) that our firm is representing you and a
2 number of other people in state court that is entirely
3 unrelated in subject matter, couldn't be any more far
4 removed from this case

5 I spoke to Ms Cantwell last week I understand
6 she's responded to the Court, and opposing counsel,
7 that her client doesn't have an objection We didn't
8 think it would cloud your impartiality in any way or
9 objectivity in any way But we merely wanted to bring
10 up that that had been disclosed, Your Honor

11 THE COURT It's in state court now? Mr Walker
12 and his firm are representing me, I believe,
13 individually in that case arising from a shareholder

14 MR WALKER You and about 35 other similarly
15 situated

16 THE COURT It's a corporation I used to be on the
17 board of directors of That's ongoing We're not in
18 constant contact It wouldn't have anything to do with
19 this case, but I need to disclose that to you, and I
20 appreciate you bringing that to my attention Let me
21 ask from the Preservation Society's standpoint, any
22 objection?

23 MR PRITCHARD Actually, Historic Charleston No
24 objection

25 MS CANTWELL Library, no objection

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1 MR DOMIN As long as you feel you can be fair,
2 that's no problem

3 THE COURT No problem I don't know it needs to
4 be anything other than on the record If I need
5 something in writing I'll look into that That would
6 suit me If I could find the litigation file I'll
7 disclose what the names and numbers are if you need
8 that Thank you for bringing that to my attention
9 Okay Anything further?

10 MR PRITCHARD Nothing for Historic Charleston

11 THE COURT Mr Pritchard? Mr Walker? You've
12 got everybody's name and who they represent?

13 MS CANTWELL She's on top of it Brief opening
14 statement?

15 THE COURT Sure

16 OPENING STATEMENT BY MR PRITCHARD

17 MR PRITCHARD This involves a case, as you
18 correctly noted earlier, involves a challenge to a
19 rezoning of a piece of property located at 404 King
20 Street And it also involves an appeal of a variance
21 created by the City of Charleston Board of Zoning
22 Appeals to the then existing height ordinance 404,
23 which is owned by Library Associates, is located at the
24 corner of Hutson and King Street where the old
25 Charleston County Library used to sit adjacent to

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1 Marion Square On the map it's a little yellow spot
2 right here That's where it's actually located

3 Library Associates proposes to build a hotel
4 105 feet in height on that parcel of property And, by
5 way of background, the process really got rolling in
6 February of 2004 when they sought a special exception
7 to the zoning district to allow them to build a
8 185-room hotel on the site

9 That special exception was granted and two years
10 later or maybe it was a year later Anyway, it's in
11 the Pleadings -- it came up for an extension It would
12 have been 2006, for an extension under the Vested
13 Rights Act of the Special Exception That was
14 challenged, went to Circuit Court on appeal The court
15 of appeals affirmed the Board of Zoning Appeal, went to
16 the South Carolina Court of Appeals which affirmed the
17 Circuit Court and now awaits action by the Supreme
18 Court by a Writ of Certiorari

19 In the interim Library Associates sought and
20 received, from the City of Charleston Board of Zoning
21 Appeals, a height variance Essentially, prior to the
22 rezoning this property sat along -- was split zoned
23 It had 3X zoning on the side fronting King Street and
24 it had, I believe it was, 50/30 on that section of the
25 property A height variance was granted by the Board

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1 of Adjustment to allow them to build the hotel
2 uniformly based on the 3X height zoning limits That
3 was appealed Subsequent to the appeal the City of
4 Charleston rezoned the remaining section of the parcel
5 so it's a uniform 3X across the parcel which, of
6 course, would enable them to build the hotel as
7 proposed without any form of variance, in terms of
8 height, anyway

9 In any event, because of the nature of the two
10 cases they have to be considered together Of course,
11 the initial hurdle we have to get over is whether or
12 not the rezoning was improper For if it was not then
13 the variance issue is now rendered moot

14 If, however, it is determined that the zoning is
15 improper then you have to go on and consider the issue
16 of the appeal to the height variance because, of
17 course, that would now then come into play

18 It's our position, and I think the witnesses will
19 bear out as well as the evidence, that the rezoning was
20 improper in that you've got - it singled out one piece
21 of property If you notice, this line was uniform all
22 the way through, and this one property alone was the
23 subject of the rezoning And we think it meets the
24 test necessary to be rendered invalid under the spot
25 zoning in that, number one, it does not meet with the

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1 City's comprehensive zoning plan and we will elicit
2 testimony and evidence to that

3 Number two, it's inappropriate for the welfare and
4 well being of the overall architecture of the City of
5 Charleston, in particular its skyline and the
6 surrounding properties And both Historic Charleston
7 Foundation and the Preservation Society I'll let
8 Trenholm speak for the Preservation Society - have a
9 rich history of involvement in the zoning matters of
10 the City of Charleston as it relates to the
11 preservation of structures in the Old and Historic
12 District and even outside the Old and Historic
13 District And both have easements throughout the
14 Historic District in close proximity to this property,
15 preservation easements which are valuable property
16 rights which we feel are negatively impacted by this
17 hotel

18 So, to recap, basically we're going to bring out
19 testimony to show that this property was illegally spot
20 zoned and we're going to show, on the record, the Board
21 of Zoning Appeals -- we may not do that today I
22 think, Your Honor, we can wait until after the Mayor's
23 testimony on one of the dates We're going to show
24 that it does not meet the test for the Board of Zoning
25 Appeals in order to grant the special exception under

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1 state law and City ordinance

2 And that is our case I'll turn it over to my
3 esteemed counsel, Trenholm Walker

4 THE COURT Mr Walker?

5 OPENING STATEMENT BY MR WALKER

6 MR WALKER Your Honor, I would like to start by
7 introducing my cocounsel Lindsay Smith-Yancey is
8 sitting next to me And over here in the corner is
9 Sarah DeWolfe(phonetic) who started with us in
10 September This is her first trial, so go easy on her
11 Behind me Cynthia Jenkins, who is Executive Director of
12 the Preservation Society, and Robert Gurley who is
13 Sub-Executive Director or Associate Executive
14 Director - Assistant Executive Director You'll hear
15 from Robert Robert is the one charged with going to
16 all the board meetings and commenting on the issue of
17 the Preservation Society

18 I won't go over everything that Edward said We
19 submit, Your Honor, when you've heard the proof you
20 will come to the same conclusion we have

21 This rezoning of the parcel was simply to
22 accommodate the property owner As Edward said, the
23 property owner had already obtained a variance which
24 would have allowed the construction of this hotel It
25 was evident that this zoning change was merely meant to

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1 clean up that By clean up that I mean to give them
2 legal protection to eliminate the uncertainty of the
3 variance request It was not an extension of the 3X
4 District pursuant to the Comprehensive Plan The
5 exhibit that Mr Pritchard showed you was after the
6 rezoning Before the rezoning the districts within the
7 City in this area looked like this And I know it's
8 just a bunch of colors to you up there But this is
9 Marion Square and you will hear testimony that the 3X
10 District is a leftover zoning district that really has
11 no well considered application in today's urban
12 planning

13 A year or two before this the City sought to
14 eliminate it and in most areas it allowed it to remain
15 here But never before, never, ever before in the
16 history of the City has the 3X District been expanded
17 It was expanded for one reason It was expanded to go
18 the entire square footage of this parcel simply to
19 accommodate this project, simply to eliminate a legal
20 problem they had

21 You'll hear that actually the Comprehensive Plan,
22 the Downtown Plan that was adopted as the land use
23 element of our Comprehensive Plan in the City,
24 considered for Marion Square that the elevations be
25 considerably lower and that they be consistent with the

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1 Old Citadel Building which Your Honor is familiar with

2 Thank you, Your Honor

3 THE COURT Thank you, Mr Walker Mr Domin?

4 MR DOMIN Your Honor, Exhibit Number 1, that I
5 think the parties have already agreed would be into
6 evidence, would be the ordinance that's under
7 challenge That's just an extra copy And I hand it
8 to you because it shows a map, a before and after map
9 that hones in on this specific area, and I think does
10 it a little bit better than what you can see at a
11 distance from the diagram

12 As it relates to this specific case, Your Honor,
13 the Plaintiffs are contending that this is an
14 unreasonable and illegal spot zoning, plain and simple
15 As a zoning decision you've got to keep in mind what
16 the standard is here, Your Honor The standard here is
17 that zoning, even a rezoning of a single piece of
18 property is a legislative act, and it should not be
19 over turned based on the Court's perception of what is
20 best for the property, but instead we must give
21 deference to the legislative decision-making process
22 here and if there is a rational basis to uphold that
23 decision you must uphold

24 In fact, in the zoning area the courts have gone a
25 step further and said you should not over turn a zoning

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1 decision unless it unreasonably impairs constitutional
2 rights

3 With respect to spot zoning, Your Honor, I believe
4 that the parties are going to agree that the operative
5 case is the case of Knowles, K-N-O-W-L-E-S, versus City
6 of Aiken, which is a 1991 Supreme Court case 407
7 Southeast 2cd 639

8 Spot zoning, Your Honor, is to single out a small
9 parcel of land for use classification completely
10 different than that of the surrounding properties The
11 court goes on to say, even if you do that it may still
12 be valid if the spot zoning is consistent with the
13 general plan and for the common welfare So the Court
14 sets out this test saying if it is different than all
15 the surrounding properties then it could be spot
16 zoning

17 Then you go on to the second part of this test
18 Now, respectfully, Your Honor, I would submit that the
19 first item of business you have to determine, is this a
20 piece of property that has been singled out differently
21 than all the surrounding properties?

22 The 3X height district was reduced in the City of
23 Charleston and that was done in the timeframe of 2006
24 But it was not eliminated The 3X height district
25 remained in this area that is shown on Plaintiff's

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1 Exhibit Number 3 So this would be the Francis Marion
2 Hotel on up to the church extending on to the back of
3 that property and as well the front half of the Library
4 Associates' site

5 When this rezoning decision that's before you
6 today came about, we already had an existing 3X height
7 district that covered a total of seven TMS numbers in
8 whole or in part, one of those being Marion Square Park
9 itself You know, that's private property but it's not
10 really -- it's used in the public fashion But you
11 have six to seven TMS numbers that are already under
12 the 3X zoning at the time that this rezoning decision
13 came before the City of Charleston Including, Your
14 Honor, approximately 60% of the subject site was
15 already under the 3X height classification So what
16 City Council did was merely extend that 3X height
17 district across the remaining 40% of the property

18 We would submit, first, under the Knowles case,
19 that is not spot zoning It is contiguous to an
20 existing group of parcels in a 3X height zone, the same
21 zoning class as is before you The extension of that
22 zoning classification, although it applies to a single
23 property, is in no way spot zoning

24 Even if you found, however, that it was some form
25 of spot zoning, you'll find that there is consistency

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1 / with the Comprehensive Plan and that this project is
2 for the common good of the City of Charleston, its
3 citizens and visitors

4 Your Honor, no doubt the Comprehensive Plan is a
5 broad brush document You pull out any Comprehensive
6 Plan you're going to find things in it which you can
7 read as being inconsistent with the project and
8 consistent with the project We would submit, we're
9 going to put up testimony from Mr Lee Batchelder, the
10 zoning administrator, he's going to address the City's
11 Comprehensive Plan documents and show you why this
12 project and rezoning of this property is appropriate

13 Let's get down to the reality of the situation,
14 Your Honor, as to why is it that this property should
15 even be considered for this treatment Why should a
16 City Council rationally think this is a good approach?
17 Well, you've got to keep in mind -- this partially goes
18 to the variance the uniqueness of the site being
19 bordered on Hutson Street, being bordered on King
20 Street and also being bordered on Marion Square itself
21 It certainly has a face on three sides It has to
22 present itself on three sides Some would say given
23 the historical significance of the Old Citadel Building
24 it has to present itself on all four sides

25 So what you have, Your Honor, is a situation where

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1 before this rezoning, if you were looking at this site
2 from Marion Square and heading north, you're looking
3 facing north, the zoning that would have existed on
4 that property would have forced a building that would
5 have the 3X zoning that would then drop down to the 55
6 foot height zoning and would make, quite frankly, an
7 asymmetrical building as it faces one of its most
8 prominent and most important faces, that of the park
9 That is unacceptable and unreasonable

10 Your Honor, City Council looked at this, weighed
11 the policy considerations and realized that we needed a
12 larger project there that would have public meeting
13 areas We reviewed the options and said that from a
14 long term standpoint this needs a symmetrical building
15 on the site and we need to extend the 3X height zoning
16 across the entirety of the site so that we can have a
17 building that has an attractive open feel from the
18 Marion Square side, because it is a very prominent
19 side We cannot ignore the fact that this building is
20 fronting on three, maybe four, sides

21 When City Council made that decision it showed the
22 thought and reason that you would hope a City Council
23 would do Look at the City Council minutes we'll put
24 in evidence They will discuss the positives of the
25 project and the importance of this project It's very

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1 clear that they are entering into a legislative,
2 deliberative process and that they are discharging
3 their duties to the City as a whole

4 Now, I would wind up by saying that Historic
5 Charleston, Preservation Society are good friends and
6 they are good for the City We certainly value their
7 contribution and input We're quite often on the same
8 side of the aisle as those groups However, as it
9 relates to this project in particular, the legislature
10 has spoken and the decision of the legislature should
11 not be over turned unless you find it is completely
12 unreasonable, violates constitutional rights, is spot
13 zoning and exceeds the bounds of what is a legitimate
14 legislative decision

15 Thank you

16 THE COURT Thank you, sir Ms Cantwell?

17 OPENING STATEMENT BY MS CANTWELL

18 MS CANTWELL Thank you, Your Honor I'm Frances
19 Cantwell here on behalf of Library Associates

20 Michael Bennett, who is a member of Library
21 Associates, is in the courtroom as are Kim Brown and
22 Tracy Rate(phonetic) Mr Bennet, is going to try to
23 be here for the entire trial, although I'll tell the
24 Court he has to leave this afternoon He's being
25 presented with a Martin Luther King Award at Burke High

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1 School, I think at 2 o'clock If he's not here that's
2 the reason for it

3 Your Honor, the special exception You can't
4 build a hotel in Charleston at all unless you're in the
5 zoning that allows for it, and then you've got to go to
6 the Board of Adjustment to get a special exception
7 Well, Library Associates did that in 2004 and proposed
8 to construct not just a 185-room hotel, but it is a
9 full-service hotel The reason that's important is
10 because a full-service hotel has lots of public spaces
11 where you and I are welcome to go and enjoy and share
12 and be a part of This is not a hotel for transients
13 only, not a hotel where somebody comes in, stays a
14 night and leaves You're going to have full-service
15 restaurants, roof top bars, meeting space, and the
16 reason I bring this up, because I think it's important,
17 because it relates to where this project is located
18 just north of Calhoun Street and the role that this
19 site plays in the continued revitalization of King
20 Street

21 Mr Batchelder and Mr Maher, witnesses for the
22 City, will testify about plans of the City that
23 recognize this site and what types of appropriate use
24 should go there, which would include the type of
25 facility proposed by Library Associates

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1 Mr Domin explained to you that before this
2 rezoning occurred that the property was subject to two
3 different height districts All along King Street and
4 proceeding about 60% back you could have a height of
5 105 feet, then it dramatically dropped off to 50 feet
6 or 55 feet as the maximum The result of that was that
7 you've got, call it peculiar -- I will call it a
8 bizarre building envelope It's an L-shaped envelope
9 as you look at this building from Marion Square The
10 reality of it is that that type of building isn't good
11 for the Square and in truth would never have been
12 approved by any board or commission in the City I
13 hope not

14 Mr Domin - before I get to that Even though
15 we're trying these cases together, they are two
16 separate cases here I need to reiterate that two
17 different standards apply You're well familiar with
18 that but the zoning, as far as the variance is
19 concerned, we are restricted to the record If there
20 is evidence to support what the Board did the decision
21 stands

22 With respect to rezoning Mr Domin outlined very
23 clearly what the issues are, what spot zoning is and
24 what the burden of the Plaintiffs are But one thing
25 that I think needs to be mentioned is that this zoning

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1 ordinance is presumed valid And the burden of the
2 Plaintiffs is not just to show that maybe, well, maybe
3 it's got a little bit of a problem They have to
4 convince this Court by clear and convincing evidence,
5 high standard, that the order constitutes spot zoning
6 in the first instance, and then doesn't comply with
7 plans or isn't in the common good For reasons already
8 stated we don't believe it's spot zoning

9 I think the map defies any contention that it's
10 spot zoning But even if you were to find it was spot
11 zoning the question would turn on whether or not we've
12 complied with plans

13 The testimony will show you that given the
14 constraints that the split districts put on this site,
15 as Mr Pritchard pointed out, the rezoning had the
16 effect of making the height applicable to this site
17 uniform And that has the effect of allowing for a
18 building that makes sense, that's balanced, that's
19 symmetrical, that pays deference, if you will, to the
20 neighbors on all four sides

21 So without getting into who is going to say what,
22 we submit to the Court that given the standard of
23 review to keep in mind, that we believe that the
24 evidence will show you unequivocally that City Council
25 looked at this site, they looked at it from a design

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1 perspective, they looked at it from an economic
2 development perspective, they debated the issue The
3 records of the proceedings are clear in that regard
4 And if their decision is fairly debatable, then it must
5 be sustained, and we would submit to you that the
6 minutes of the proceedings of counsel, as well as the
7 testimony that you will hear from both sides today,
8 will demonstrate that decision was just that

9 THE COURT All right Mr Pritchard, are you
10 ready to start?

11 MR PRITCHARD Yes, I am

12 THE COURT Call your first witness

13 A We would call Bradish Waring

14 (Bradish J Waring, duly sworn testifies as follows)

15 DIRECT EXAMINATION BY MR PRITCHARD

16 Q Good morning, Mr Waring Mr Waring, how
17 long have you lived in Charleston?

18 A Since 1966

19 Q You were educated here in Charleston?

20 A Yes

21 Q Where did you attend college?

22 A USC

23 Q What did you do beyond USC?

24 A Went to law school at USC as well

25 Q Upon graduation from law school what did

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1 you do?

2 A Began practice of law with Young, Clement,
3 Rivers and Tisdale for 25 years For the last five,
4 six years have been with Nexen-Pruitt

5 Q You've been here some 43 years now?

6 A Yes

7 Q And your whole professional career has
8 been spent in Charleston?

9 A Yes

10 Q And tell us just a little bit, very
11 briefly, about your practice area

12 A I started out as a traditional defense
13 lawyer handling insurance defense cases As I
14 became more and more adept at handling -- just
15 handled a variety of civil litigation, all types,
16 plaintiffs, defendants Have handled zoning cases,
17 property cases, breach of contract cases, insurance
18 claims, you name it, product liability work, that
19 type of thing

20 Q Do you have a position with the Historic
21 Charleston Foundation?

22 A I am the President of the Board of
23 Trustees

24 Q How long have you been affiliated with the
25 Historic Charleston Foundation?

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1 A I think this is my ninth year on the
2 Board

3 Q You were a regular trustee?

4 A Yes, then I was Treasurer, Vice-chair,
5 then Chairman

6 Q You've been affiliated with the Foundation
7 ever since this 404 King Street came to light?

8 A Yes

9 Q Tell me a little bit about - first off
10 let's -- who is on the Executive Committee of
11 Historic Charleston Foundation?

12 A The Executive Committee consists of
13 Richard Salmons(phonetic), immediate past president,
14 me as President, Vice chair, Sam Applegate, local
15 lawyer in town Treasurer is Foster Gaillard Our
16 Secretary is Anne McCleod Smith

17 Q I'll hand you what's been marked as
18 Plaintiff's Exhibit 5 and ask if you recognize that

19 A Yes, I do This is right off of our web
20 page

21 Q What is it?

22 A This is Board of Trustees in toto with
23 Executive Committee or Executive Director, Katherine
24 S Robinson, life members Frances R Edmunds,
25 Elizabeth J Young and our active past presidents,

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1 then the department heads

2 Q Ms Robinson is here in the courtroom
3 today?

4 A Yes

5 MR PRITCHARD I would like to move in
6 Plaintiff's Exhibit 5
7 (Whereupon Plaintiff's Exhibit 5 is marked in evidence)

8 Q Tell the Court a little bit about the
9 Foundation's mission and what it does, what role it
10 plays

11 A Rather than paraphrase the mission I
12 thought -- I've got our annual statement from last
13 year up here, in anticipation of your question
14 Mission statement of the Historic
15 Charleston Foundation is dedicated to preserving and
16 protecting the historical architecture and cultural
17 character of Charleston and its historic environs
18 and to educating the public about Charleston history
19 and benefits derived from preservation We seek to
20 do that in a variety of ways

21 Q What year was the Foundation founded?

22 A 1947

23 Q Who founded it?

24 A Frances Edmunds

25 Q Has it adhered to the mission you just

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1 read, from 1947 to the present?

2 A Sure like to think so

3 Q And just give a brief handful of examples
4 of things the Foundation has done throughout the
5 years

6 A Probably one of the most visible would be
7 the Ansonborough District I said earlier I came in
8 '66 but I never really left Charleston My dad was
9 in the shipping business, so I was here from birth
10 on But we moved away for a while and came back, so
11 being familiar with Charleston especially when I was
12 a teenager, Charleston High School, the Ansonborough
13 district was in sorry, sorry shape And Historic
14 Charleston Foundation lead the effort to save
15 Ansonborough and to save the buildings there One
16 of the ways we do that is through a revolving fund
17 that was established that allows Historic Charleston
18 to actually go and purchase the properties then put
19 easements on those properties, and of late, the last
20 ten years, we've actually been working very hard for
21 interior easements as well as exterior easements
22 That process in large part is what saved
23 Ansonborough

24 Q Has the Foundation played a role in
25 legislation and zoning?

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1 A Absolutely One of the major roles that
2 the Historic Charleston Foundation, along with the
3 Preservation Society, does is we advocate at the
4 legislative bodies where inappropriate construction
5 or destruction by neglect, improper zoning, size,
6 height, scale, mass, we advocate all of the zoning
7 boards but also the BAR as well We try to educate
8 the public about the fabric of the City, the reason
9 we have what we have in this courtroom in this
10 courthouse is classic examples of collaboration
11 between the preservation community and the City in
12 trying to maintain what Charleston has, and at the
13 same time allow interesting new and modern
14 architecture into the mix as well

15 So it's not all about historic
16 buildings It's about advocating for structures and
17 cultural elements that will enhance the City,
18 whether they're modern or whether -- so it runs
19 across the board

20 Q You mentioned a minute ago about
21 easements Would you explain to the Court exactly
22 what we refer to when we say an easement?

23 A Sure The easement process, basically we
24 have exterior and interior easements In other
25 words, what happens is the property owner, whether

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1 or not their property is in our Revolving Fund, we
2 saved and then turned around the easements -- the
3 property owner can come to us and say I want to
4 donate, to Historic Charleston Foundation, an
5 easement on my property which will restrict the
6 exterior changes or interior changes to that
7 property so we can maintain the historical fabric
8 and look of that structure The IRS grants that
9 owner a tax deduction for that easement And
10 Historic Charleston Foundation actually owns that,
11 and it's a very, very valuable property right and
12 one that we maintain with vigorous advocacy In
13 other words we wouldn't -- we will prosecute if we
14 have to By that I mean we will civilly prosecute
15 an owner that violates those easements once they're
16 granted Of course that's what the IRS requires
17 We have easements all throughout the City, all over
18 the place Certainly in and around this particular
19 location

20 Q Does the Foundation have full-time staff
21 dedicated to the management and enforcement of those
22 easements?

23 A Certainly does It is a full time
24 operation I believe the Preservation Society does
25 the same

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1 Q You mentioned that we have or the
2 Foundation has easements in and around 404 King
3 Street I would hand you what is marked Plaintiff's
4 Exhibit 6 and ask if you recognize that

5 A I do This is a list of easements held by
6 Historic Charleston Foundation that is in close
7 proximity to the location that's being discussed
8 here, 404 King Street It includes a location on
9 Alexander Street, one on Calhoun, three on
10 Charlotte, looks like five on King Street, two on
11 Mary, 309 through 313 Meeting Street which is a
12 three address location One, two, three, four,
13 five, six, seven, eight locations on Warren which is
14 right across the street

15 Q I would like to move --

16 MR DOMIN No objection

17 (Whereupon Plaintiff's Exhibit 6 is marked in evidence)in

18 Q Now, the property with which we're
19 concerned today, 404 King Street, is this, marked as
20 Plaintiff's Exhibit 1, is this the property?

21 A That is

22 Q When you first became involved what is the
23 Foundation's position with regard to this particular
24 piece of property?

25 A The first position had to do with what was

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1 mentioned in opening statements Our first position
2 was the extension of the vested rights, overlay zone
3 for the hotel initially and that case is pending as
4 you already stated, waiting if the Supreme Court
5 will grant certiorari So first knowledge of this
6 particular site came up at that point back in '04,
7 '05 somewhere in that vicinity I recall that we
8 were opposed to the extension of that granting of
9 that particular application for the hotel there
10 That's how I first became involved

11 Later as the process moved forward
12 and while that case was out there, I became aware,
13 again through the staff at HCF, that there was a
14 variance being requested for the height, height
15 variance requested for that property It is a split
16 zoned property The back 40% is 55/30 which
17 basically means that you can have a structure as
18 high as 55 feet on that parcel but no lower than 30
19 feet on that parcel

20 The front was in the 3X zone which,
21 to my understanding and looking at the Ordinance,
22 it's a little more complicated but basically allows
23 three times the height from the face of the building
24 to the middle of the street, so if that -- in this
25 case it works out to be 105 feet

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1 So I became aware that they were
2 applying for a variance to allow a hotel to be built
3 across that entire parcel at the 105 foot or 3X
4 zone And the position that you asked about for HCF
5 that that is -- there is no shown hardship in this
6 particular case, and four prong case requires to go
7 through -- that should fail outright for a no
8 showing of hardship The reason for that is very
9 simple

10 MR DOMIN Your Honor I think we would object
11 because the variance at this point in time is
12 determined strictly on the records in the legal
13 arguments of counsel I have no objection to
14 Mr Waring stating the reasons why they're here and
15 they're challenging the variance just by matter of a
16 standing comment, but I don't think we get into
17 testimony from him as to why the variance fails

18 MR PRITCHARD I think he can testify why the
19 Foundation believes the variance shouldn't have been
20 granted and the basis upon which they made that
21 determination You understand the purpose of the
22 Foundation's objection to this

23 MS CANTWELL I would submit to the Court that
24 the variance case, we're not trying the variance case,
25 we're trying the rezoning case In the variance case

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1 you cannot accept evidence

2 MR PRITCHARD We're not asking --

3 MS CANTWELL Cannot accept testimony

4 Restricted to the record What Mr Waring said to the
5 Board of Zoning Appeals as reflected in the record of
6 the variance case is relevant, but it's improper for
7 him to testify in this case why the Historic Charleston
8 Foundation thinks the variance was not warranted That
9 is restricted to the record before the Board

10 MR PRITCHARD I think Your Honor is sufficiently
11 legally trained to separate the two cases, and all
12 we're asking is the position of the Foundation and the
13 basis for that position be submitted into the record
14 for the purposes of understanding the Foundation, why
15 it's there, what it's purpose for being in this case
16 is, and certainly when you consider the zoning appeal,
17 when that becomes necessary, then you can restrict
18 yourself to the record at that time

19 THE COURT All right I'll allow it for now
20 I'll over rule the objection If it gets any further
21 I'll allow you to remake that objection You need to
22 have him restate --

23 THE WITNESS No, I think I was asked why --
24 second part of Mr Pritchard's question was why did the
25 Historic Charleston Foundation take the position it

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1 did, and I was simply explaining because we viewed this
2 as not in other words, the City and the Library
3 Associates had not -- excuse me Library Associates
4 had not shown an unnecessary - or a hardship The
5 reason for that is very simple The two zones looking
6 together you could put a 55 foot building all the way
7 across that property This whole notion of an L is, we
8 thought -- I'm talking now for the Foundation --
9 thought that was not sensible because there is no
10 hardship here In other words, the variance was
11 granted to allow a 105 foot building across the parcel
12 What's wrong with allowing a 55 foot building across
13 the parcel? So that was our position That's still
14 our position That's why we took the position as to
15 the variance

16 Having said that, what happened after that, and
17 this is still in response to your question, the next
18 thing we knew the City was proposing to rezone the
19 entire property Our position was that that was an
20 attempt to get around the defects that were so evident
21 in the granting of the variance in the first place

22 In other words, it was the position of Historic
23 Charleston Foundation, and it still is, and the entire
24 Board of Trustees that the original variance was
25 defective, should not have been granted The City

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1 realized they had a problem, because you could build a
2 55 foot building across the entire parcel So what did
3 they do? They came in and said, we're just going to
4 rezone the whole thing That is not consistent with
5 the Comprehensive Plan that -- I think it's the '99
6 plan, nor is it consistent or in the best interest of
7 the welfare of the citizens The building is too big
8 It dwarfs it's neighbor which is the historic Citadel
9 Building which - with the crenulated top The
10 argument all along was, well, we've got to build it
11 this way Only way we can build it is go 105 feet
12 across the whole property That's nonsense You could
13 have gone 55 feet across the whole property

14 The arguments that we heard were all economic
15 They were all about, you can't put a full service hotel
16 in that envelope that you're talking about or it would
17 end up looking like the L or the chair, which I call
18 it It's not the case So we believe that the
19 property was spot zoned illegally to accommodate an
20 economic need for the owner That is just, we think,
21 against the best interest of the citizenry and best
22 interest of the community as a whole

23 I will say that the other position -- the other
24 reason for the position is, and we heard a lot in the
25 meetings about, well, they're going to step back the

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1 top floors Just like they did at Charleston Place
2 Well, the difference between this, and this is the real
3 feeling of the trustees uniformly, I think, is the
4 difference between Charleston Place being stepped back
5 and the effect of that you can't get far away from the
6 Charleston Place Hotel You can only back up on
7 Beaufain Street, then you bump into a store or
8 restaurant So when you're standing on the street the
9 perspective is you don't see those top two floors
10 Here you're going to be looking across all of Marion
11 Square at this structure So you've got an eighth of a
12 mile view of this building Stepping back the top two
13 floors has no effect to diminishing the size or making
14 it seem shorter than it is, and the position of HCF is
15 that the building is too big, it's too tall The
16 height, scale, mass is too big and it's going to dwarf
17 its historic neighbors It's almost two times as tall
18 as the building next to it And we just believe it's
19 too big So that's sort of the third element of it

20 Looking across from Marion Square it's going to be
21 a monolith and we think it's too big

22 Q Was the Foundation involved or did it
23 participate or have any role in the preparation of
24 the Comprehensive Plan you just referred to?

25 A Yes I'm probably not the best to testify

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1 on the ins and outs of our input Either John
2 Poston or Will Cooke or one of the others prepared
3 to testify can certainly talk about that but, yes,
4 we've had -- played a vital role in all the plans,
5 Calhoun-Carter Plan, the 1999 Comprehensive Plan
6 We recently helped to fund the historic assessment
7 and new plan, the brand new historic plan for the
8 City, paid \$75,000 towards that completion of
9 that study So we've been heavily involved, in the
10 beginning, on the zoning, the height, all those
11 types of things going on within the City As has
12 the Preservation Society

13 MR PRITCHARD Your Honor, I have no further
14 questions of this witness

15 THE COURT Mr Domin?

16 CROSS EXAMINATION BY MR DOMIN

17 Q Very briefly The 404 King Street site of
18 this proposed hotel is not a historically
19 significant structure, is that correct?

20 A That's a tough question Of late we have
21 taken the position even that the Federal Building is
22 a historically significant structure, so to say that
23 the Library Associates building, the current
24 structure there, is one of our favorite structures,
25 I would be -- I don't think that would be an

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Charleston, South Carolina 29401
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1 accurate statement but that's in my eyes There are
2 members of our Board that might believe that that is
3 a salvageable building

4 Q The Foundation has not taken an official
5 position that 404 King Street is a building to save?

6 A No, to the contrary We have said
7 repeatedly and will continue to say that the Board
8 believes that that site and the best, highest best
9 use is probably a hotel We don't - no problem
10 with a hotel being there

11 Q So what we're talking about is the size,
12 shape and scale of that hotel?

13 A Mass of the building, yes

14 Q And the position that the Foundation has
15 taken is you can just do a 55 foot structure across
16 the board?

17 A No, that's not the position of the
18 Foundation The Foundation would probably not have
19 objected had the building had one or two less floors
20 on it Even if it was between 55 and 105 feet We
21 have never taken the position, you know, across the
22 board We were willing to compromise with that
23 The owners who we met with were not The whole
24 reason was, well, you got to have a full-service
25 hotel and the economics don't work without those top

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1 two floors

2 Q Do you, on behalf of the Foundation,
3 disagree with the proposition that a full service
4 hotel would potentially provide economic benefit to
5 that area?

6 A I think any hotel would provide economic
7 benefit to that area I think any hotel would
8 provide a benefit to that area This whole notion
9 of full-service hotel, there are plenty of hotels I
10 consider to be full-service that aren't 105 feet in
11 height

12 Q But a full-service hotel provides certain
13 amenities that a transient hotel does not
14 necessarily provide?

15 A In terms of a full-service hotel, yes, I
16 would say there are ballrooms, convention
17 facilities, yes

18 Q Those can provide important parts of our
19 social and civic life here in Charleston?

20 A Don't doubt that for a minute

21 Q As it relates to size, scale, and mass,
22 the Foundation spoke at the Board of Architectural
23 Review, correct?

24 A Yes

25 Q Ultimately the Board of Architectural

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1 Review approved the project for size, scale, and
2 mass, correct?

3 A They did I will say, Mr Domin, I can't
4 recall There was a dispute I think or some
5 question about where they went first and, again, I'm
6 not the best person to ask about that, but I
7 understand there is a question about they went - my
8 memory serves, I think they went to the BOA first
9 before they had the appeal or vice versa and there
10 was some question about the legitimacy of that
11 process Having said that, yes, they did to go the
12 BOA

13 Q The BAR approved the size, scale, and mass
14 of the project and neither of the Plaintiffs in this
15 case appealed that decision, is that correct?

16 A That's correct but, again, my recollection
17 is that what was approved at the Board of Zoning
18 Appeals and what was approved at the BAR were
19 different And there is a dispute about that In
20 other words, one approved one plan looking one way,
21 but the variance that was granted was given on
22 another plan looking a different way, so I think,
23 unless I'm totally mistaken, I think that's part of
24 our suit

25 Q Is the size, scale, and mass as approved

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1 by the BAR acceptable to the Foundation?

2 A Was it?

3 Q Is it?

4 A No

5 Q But no appeal was made of that decision?

6 A I'm not sure of that I don't know

7 MR DOMIN No further questions

8 CROSS EXAMINATION BY MS CANTWELL

9 MS CANTWELL Very briefly

10 Q Brad, when City Council is considering a
11 rezoning it's not inappropriate for it to consider
12 the economic impact of that particular rezoning, is
13 it?

14 A No, I don't think it's inappropriate for
15 them to consider the economic impact It is
16 inappropriate to base the entire spot zone or to
17 rezone a single parcel outside of the Comprehensive
18 Plan based solely on an owner's economics

19 Q You would agree that the economic decision
20 associated with any rezoning is a valid
21 consideration for a City Council to consider?

22 A I think it's something for them to
23 consider but it's certainly - I'm not here as an
24 expert so I wouldn't say -- but certainly a
25 legislative body should look at the economic impact

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1 of whatever it's doing, but I don't think it should
2 be the sole basis upon what's happened here I'm
3 afraid that's what happened

4 Q You were at the City Council meeting in
5 August where they held the public hearing on this
6 rezoning?

7 A I was, and I spoke against the project on
8 behalf of the Foundation at that time

9 Q You heard the presentation that was given
10 by the staff with respect to this site?

11 A I did

12 Q It's location?

13 A I did

14 Q What was surrounding it?

15 A Yes

16 Q What was being proposed for the site?

17 A Yes

18 Q And the direct economic benefit the City
19 would receive from that site Do you recall that?

20 A I recall that

21 Q And the spin off that the property owners
22 and the people in the vicinity of the site could
23 expect from a development of this scale and mass?

24 A Yes, I heard that

25 Q City Council discussed that, did they not?

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1 A Yes, and seemed to me that's about all
2 they discussed

3 Q Did I hear you right that the Historic
4 Charleston Foundation does think that the site
5 warrants some extra height above 55 feet but not
6 105 feet?

7 A I would say that we would not have
8 objected to a building that was, say, take a stab,
9 you know, 80-foot range We probably would not have
10 ever filed this suit We were looking for
11 compromise and didn't get it

12 Having said that, from a legal
13 standpoint, and I'm not going to testify as an
14 expert, the position of Historic Charleston is,
15 again, going back to the variance that was initially
16 granted was that, wait a minute, you can build a 55
17 foot building all the way across that site without
18 asking for a single variance, so this whole notion
19 of this weird looking building, my word, is
20 poppycock There is no unnecessary hardship there

21 Q But I want you to answer the question
22 You would have supported extra height on this site
23 where the former 55 foot height limitation was?

24 A Yes, I think we would have compromised

25 Q And so the end result is you just disagree

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1 with how high they went?

2 A No, I think the mass of the building, the
3 location that you mentioned, I think it's the very
4 location across from Marion Square that makes it a
5 problem And it's that very location, because
6 you're looking across an eighth of a mile to this
7 massive structure, and I don't care how you set the
8 upper floors back, it's still too high, too wide,
9 too big

10 Q My point was is that you testified that
11 the Historic Charleston Foundation was amenable to
12 extra height at the site, just didn't want to go to
13 the height the City Council chose to give them?

14 A I think that's a fair statement but,
15 again, we never got a vote on that, and I don't want
16 to bind my trustees What I testified to was is
17 unanimity among our trustees with one exception and
18 that would be Mr Gaillard who represents the owner
19 who has abstained throughout all of these
20 proceedings But I will say that what I've
21 testified to heretofore has been uniformed on behalf
22 of the trustees We never got to the position of
23 voting, if you will, or built a consensus on whether
24 or not we would agree to less than 105 feet

25 I think, though, to be fair, we would

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1 have brought that to the trustees and as President
2 and as an officer I would say more than likely we
3 probably would have agreed to some form of
4 compromise As a matter of fact, I think we talked
5 about that with you and with your client in their
6 office with about, look, isn't there a way to
7 compromise on this, and I think it was suggested
8 that we take a floor or two off the building and we
9 could get behind it We would take it to our
10 trustees But to say that's the position of HCF I
11 think is unfair, because I haven't polled my
12 members

13 Q I didn't say it I'm just asking your
14 testimony

15 A I think we probably could have gotten
16 there, but I don't want to bind my fellow trustees
17 without a vote There may be some that believe that
18 no compromise should be made on that property

19 Q Let me just ask you from a design
20 standpoint, whether you go 55 feet or whether you're
21 going 80 feet or 105 feet, if you have a uniform
22 height district that applies to the site, it does
23 give you the opportunity to have a more balanced and
24 symmetrically designed building, doesn't it?

25 A Yes, you can have a balanced and

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1 symmetrically designed building at 55 feet or you
2 can have a balanced, symmetrically designed building
3 at 105 or at 80

4 MS CANTWELL Thank you

5 MR PRITCHARD Few redirect?

6 THE COURT Yes

7 REDIRECT EXAMINATION BY MR PRITCHARD

8 Q The Foundation, its focus is not just on
9 individual buildings?

10 A No

11 Q On the entire -

12 A Fabric of the City as a whole Not just
13 the City, it's Charleston and its historic environs
14 Been involved in Berkeley County, been involved in
15 Dorchester, been involved in saving plantations, you
16 name it, all over the place

17 Q City of Charleston, does it have an old
18 and historic district?

19 A Yes

20 Q And this property is located within that?

21 A Yes

22 Q And your concern -- I believe you
23 testified a minute ago, that perhaps this particular
24 structure currently located there isn't or may or
25 may not be of a historic nature, but the Foundation

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Charleston, South Carolina 29401
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1 is not concerned if it's demolished?

2 A No

3 Q So why are we worried about this one
4 building?

5 A You mean -

6 Q This structure, this location?

7 A Because it's a very significant location
8 in the City I believe it is the gateway to the
9 upper King Street area We believe a hotel is not a
10 bad use Never objected to a hotel being there
11 But it's a gateway to the upper part of the City and
12 we believe that structure should be a reasonable
13 size and shape for the surroundings and neighbors
14 It's an important site

15 Q Is this about the entire district?

16 A Yes

17 Q Is the Foundation concerned at all with
18 the skyline?

19 A We are As a matter of fact, in testimony
20 before -- I won't say testimony, but in statements
21 before City Council that was exactly then President
22 Rich Salmons' (phonetic) point, is you need to be
23 aware of what you're doing to the skyline of the
24 City and I work on the water all day, every day and
25 you should see it from my perspective These

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1 parking garages and other buildings that have been
2 approved where height variances have been granted,
3 it is in, at least Richard's opinion, ruining the
4 skyline I think that view is pretty widely shared
5 on the Foundation Board

6 Q There has been some discussion about
7 economics I believe you testified earlier that a
8 potential hotel could provide economic stimulus to
9 upper King Street?

10 A Yes

11 Q The converse is true if it's not an
12 appropriate project? Can it also harm it?

13 A Very much so

14 Q Is that a concern to the Foundation?

15 A That is a significant concern There have
16 been some structures built over our objection and I
17 believe over the Preservation Society's objection in
18 the past where we have -- now starting to see the
19 canyon effect See it a little bit on Calhoun I
20 can go on and on about what started to happen We
21 are very vigilant about what's happening to the
22 skyline, what's happening to the character of the
23 City This is a landmark site It's very
24 sensitive It's just as sensitive a site, in my
25 view, as the Charleston Place Hotel was And that

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(843) 958 5071

1 was desolate Remember there you were dealing with
2 empty lots there, and there was a lot of problems on
3 that corner But, again, there's a classic example
4 of the preservationists coming together with the
5 City to build something that we can all enjoy and
6 live with There has been no compromise on this
7 particular structure It's very disconcerting to
8 us

9 Q When the project is inappropriate it can
10 cause an economic negative?

11 A Yes

12 Q Harm surrounding --

13 A It harms the fabric of the surrounding
14 properties and its neighbors I believe that this
15 particular structure -- I think the Board shares
16 this view -- harms the historic nature of the
17 Citadel Building next door The same owners own,
18 for example, the El Chico Apartments converted into
19 the Hampton Inn All substantially lower than this
20 structure All of the surrounding buildings, with
21 the exception of St Matthews across the street and
22 the hotel, which was somewhat of an aberration, if
23 you will, in terms of height I just think it does
24 harm the character of the City Certainly harms the
25 character of the Square which is one of the things

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(843)958 5071

1 we're trying to protect

2 When you look at that 3X zone one of
3 the frightening things about it is it runs across,
4 right across the face of Marion Square I don't
5 know what the thinking was about whether they're
6 going to put 105 foot buildings all along the edge
7 of Marion Square I don't know It certainly is an
8 odd district One, that I know that the Mayor,
9 because he had to defend himself on it, called
10 archaic He called the 3X zoning, himself, back in,
11 I think it was in '96 or '94, called it archaic and
12 it is archaic It's an odd zone, but there it is
13 And to spot zone the back end of this thing so you
14 can put a 105 feet all the way across it is what we
15 object to

16 Q Are there other properties around Marion
17 Square that are primed for development?

18 A Yes All across the street in the 80/30
19 zone, on across from Calhoun, you have Millennium
20 Music, all those buildings along that street are in
21 play Obviously, at some point the bank on the
22 corner, that's a valuable site, across the way, down
23 to the BP Station and up and down here, of course,
24 we're protected but, yes, we're very concerned about
25 what's going to take place over the next few years

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1 along Calhoun Street I've already mentioned the
2 canyon effect down where the school buildings are
3 We don't want to see that along Calhoun Street

4 Q How about the Federal Building?

5 A Federal Building is, of course, in play
6 We have recently taken the position that there may
7 be a way to save the architectural elements of the
8 Federal Building Initially I think the Board was
9 kind of -- it's a modern building but it's probably
10 one of the best of its type for its era I know
11 that's not very artfully said, but it is a good
12 example of 60's architecture It's done very well
13 The window elements were taken and were reminiscent
14 of, I think, one of the old -- might be the
15 Charleston Hotel We have recently advocated trying
16 to take a look at that building to try and save it
17 Setback from the street, respects it's neighbors I
18 think the Board feels the Federal Building may be
19 worth saving as it is Nice plaza in front, parking
20 behind It doesn't disrespect the church next door,
21 Citadel Square, nor does it disrespect its neighbors
22 to the north So we've recently kind of revisited
23 that particular structure and believe maybe it
24 should remain

25 Q Is it the Board's feeling that if this

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Charleston, South Carolina 29401
(843) 958 5071

1 project is inappropriate for the site it could have
2 an adverse economic impact?

3 A Yes

4 MR PRITCHARD No further questions

5 EXAMINATION BY THE COURT

6 THE COURT Mr Waring, do you know -- I'm not
7 sure you're the right person to ask - what the
8 relative size of the adjoining hotel is, the Old
9 Citadel? What the height is?

10 THE WITNESS The Old Citadel Building? Winslow
11 Hastie is here He's Director of Preservation,
12 probably knows exactly, but it is significantly less
13 It's almost, not quite, almost two times the height so
14 I would guess the Citadel Building is somewhere in the
15 neighborhood of, 50, 55 maybe 60 feet at the outset,
16 but it's in that 55/30 zone but, of course, it was
17 grandfathered It's been there for such a long time
18 I believe the Chico Apartments is lower, so it's
19 probably 55 to 60 feet, be my guess

20 THE COURT Those are across Hutson Street?

21 THE WITNESS Yes

22 THE COURT Okay That's all the questions I
23 have

24 MR PRITCHARD If Your Honor has questions, I
25 have witnesses I didn't prepare that could testify to

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1 the height

2 THE COURT I'm interested because I'm just trying
3 to figure out the scale There is a building not yet
4 been built that seems to be part of the question,
5 what's the size, mass, and scale of the building

6 MR PRITCHARD I would ask that this witness be
7 excused

8 THE COURT Mr Waring - any objection?

9 MR DOMIN No objection

10 MS CANTWELL No objection

11 MR PRITCHARD The Foundation now calls Jonathan
12 Poston to the stand

13 (Jonathan Hughett Poston, duly sworn testifies as follows)

14 DIRECT EXAMINATION BY MR PRITCHARD

15 Q Mr Poston, will you begin with college
16 and tell -- give the Court a little background about
17 where you were educated and what degrees, if any,
18 you received?

19 A I have a Bachelor's Degree in History and
20 Speech Communication from the University of Richmond
21 in Richmond, Virginia I have a Masters Degree in
22 history, Early American History with a concentration
23 in the administration of historic sites --
24 administration and interpretation of historic sites,
25 joint program of the College of William and Mary and

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1 Colonial Williamsburg Foundation I have a JD
2 Degree from the University of Richmond, School of
3 Law

4 Q And, Mr Poston, when did you first move
5 to Charleston?

6 A October 1982

7 Q And was that your first job after
8 completing your formal education?

9 A I worked for a law firm, briefly

10 Q Which law firm?

11 A In my native Bluefield, West Virginia

12 Q How long did you work in West Virginia as
13 a lawyer?

14 A I was clerking for them while taking the
15 West Virginia Bar and then was a member of the West
16 Virginia Bar, so about a year between the two

17 Q Are you licensed in any states other than
18 West Virginia?

19 A I'm inactive in West Virginia and licensed
20 in South Carolina

21 Q So in 1982 you came to Charleston and what
22 did you do when you moved to Charleston?

23 A I moved to Charleston to take my job with
24 the Historic Charleston Foundation, and I was hired
25 as Director of Programs

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1 Q And how long were you - are you still
2 employed with the Historic Charleston Foundation?

3 A No, I'm not

4 Q What do you do now?

5 A I am a lecturer in Historic Preservation
6 for the Department of Planning and Landscape
7 Architecture of Clemson University

8 Q How long have you held that position?

9 A Since the summer of 2006

10 Q And when did you leave the Historic
11 Charleston Foundation?

12 A End of February 2006

13 Q Were you employed continuously by Historic
14 Charleston Foundation from October 1982 to February
15 of 2006?

16 A I was

17 Q Did you remain in the same position from
18 '82 to 2006 or did you or was your title --

19 A My title evolved It was Director of
20 Programs It was Director of Preservation Programs
21 It was Director of Preservation And then in the
22 last five or more years it was Director of Museums
23 and Preservation and Initiatives

24 Q All right Did your duties change during
25 the course of time or did they remain relatively the

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1 same and your title change?

2 A Stayed the same Except they increased

3 Q When they added the museums to the
4 position?

5 A Yes, and also just through the different
6 directors that were executive directors There was
7 some evolution in the degree of preservation duties
8 Mrs Edmunds had her own carve out of what she did,
9 then the next director had a different sort of
10 allocation, et cetera

11 Q So depending on the director, what he or
12 she was interested in?

13 A Yes

14 Q Okay Throughout time were you involved
15 in the preservation of Charleston in your capacity
16 as --

17 A I was

18 Q Tell us a little bit about your duties,
19 responsibilities, what you did

20 A Well, from the beginning I was charged
21 with helping -- in fact, being in direction of the
22 beginning of the Foundation's conservation easement
23 program, which I studied conservation easements
24 elsewhere to help get that program started The
25 Foundation had one conservation easement when I

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1 came They had protective covenants on more than
2 sixty buildings in Ansonborough and elsewhere, but
3 the Easement Program was just started There was
4 also the Revolving Fund programming We had seven
5 or eight properties on the market, through that ,
6 program and the home ownership program So those
7 were two of my principle duties The third was to
8 attend all the city boards and commissions that were
9 relevant to the Foundation's mission

10 Q And when you say boards and commissions
11 tell us a little bit about which boards and
12 commissions

13 A Board of Architectural Review What we
14 used to call the Board of Adjustments It became
15 the Board of Zoning And then now Board of Zoning
16 Appeals, the Planning and Zoning Commission and even
17 occasionally things like the Coastal Council, as it
18 was called then, what became OCRM Any boards and
19 commissions that involved the historic preservation
20 interest of the Foundation

21 Q Roughly how often were you called upon to
22 attend one of these board or commission meetings?

23 A I was pretty much required to go to every
24 one, unless for some reason there was nothing on the
25 agenda that was not relevant, and that was rare So

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1 pretty much every week there was a meeting Every
2 two weeks of the Board of Architectural Review and I
3 think twice a month for Board of Adjustment Once a
4 month for Planning and Zoning

5 Q So typically the Historic Charleston
6 Foundation would have a representative at a Board of
7 Zoning Appeals or Board of Adjustment, Board of
8 Architectural Review, Planning and Zoning, virtually
9 every meeting?

10 A Correct

11 Q That went on throughout your entire 24
12 years of Historic Charleston Foundation?

13 A Correct

14 Q Did you attend these meetings all the way
15 through?

16 A I generally did If they were really
17 important -- I generally went to all of them
18 Towards the latter part of the '90's, maybe early
19 2000's, I had some staff that would sometimes attend
20 if there was nothing major on the agenda that
21 required additional bodies in the room, as Mrs
22 Edmunds would have said

23 Q Now, in your -- throughout your
24 professional career have you published any articles,
25 books, anything having to do with preservation?

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1 A I have

2 Q Can you tell the Court a little bit about
3 that?

4 A I published a number of articles in
5 journals, book reviews, preservation, architectural
6 books I have a book of mine that's in third
7 printing that's the Buildings of Charleston,
8 717-page book on the City's architecture Just went
9 into the third printing this past year with some
10 revisions I have a chapter in a national
11 publication that's been in print for more than 15 --
12 I think about 15 years, which is called The Elements
13 Of Style, chapter on Federal and Empire America I
14 have a number of articles about preservation issues,
15 one in the French Preservation Journal One in
16 Historic Monuments

17 In some other preservation journals
18 I - I did do, in more recent times, some more local
19 articles Had one published in Preservation
20 Progress, I think a little over a year ago, called
21 the Renewed Challenge to Charleston

22 Q Safe to say that preservation has pretty
23 much been your life?

24 A For better or worse, yes

25 Q And have you ever written or elaborated on

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1 any preservation issues having to do with height,
2 building height?

3 A Yes, I've cited that issue in a number of
4 articles Most recently in the one for the
5 Preservation Progress I wrote about it also in at
6 least one or more pieces for Historic Charleston
7 Foundation annual reports during my tenure And it
8 was a constant theme It's been probably one of the
9 most consistent themes throughout my career with
10 Historic Charleston and beyond And it was
11 something I learned from Frances Edmunds knee about
12 height scale in the City

13 Q Any editorials written about your
14 positions?

15 A Yes, there was one really nice editorial
16 that I've got stuck in a drawer somewhere where, in
17 more recent years, the Post and Courier referred to
18 some statements I had made about the -- I think it
19 was the erosion of the City's skyline and the
20 appearances of the City and it's historic buildings
21 by a steady accretion of ever taller structures

22 Q And is height an important factor with
23 dealing in preservation issues?

24 A Height is very much an important factor
25 It's not just important in Charleston, it's

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1 important everywhere in the world And I was going
2 back through my notes when we were where I could
3 find them on this issue, and looking at the fact
4 that at some point I said, as we began to approach
5 the issue that's before the Court today, that we
6 needed to bring out the Venice Charter and the
7 Secretary of Interior's treatments on annual
8 preservation and specifically the standards --
9 Secretary standards which derive after the Venice
10 Charter which is a world wide charter on historic
11 resources and cultural landmarks and monuments And
12 on the need to protect historic buildings and
13 structures and cities from out-of-scale structures
14 that would harm those buildings in those settings

15 Q I believe you were in the courtroom when
16 Mr Waring testified, were you not?

17 A I was

18 Q Did you hear him testify about the
19 Historic Charleston Foundation easement program?

20 A I did

21 Q I'm going to hand you what's been marked
22 as Plaintiffs 6, which he identified as a list of
23 easements in and around the area Are you familiar
24 with the properties listed on Plaintiff's Exhibit 6?

25 A Most of them Almost all of them

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1 Q Based on your experience would a building
2 that was too tall in height, scale, mass, would that
3 have any kind of impact on those easement
4 properties?

5 A Yes, it would It would have specifically
6 impacts on particularly 309, 313 Meeting Street
7 which are just south of Marion Square on that side
8 of the street It would on a couple of the King
9 Street properties, but also on the historic low rise
10 residential areas, Radcliffe on one side and
11 (inaudible) on the other

12 I might I'm sorry I might add
13 that - I don't know if this is relevant,
14 Mr Pritchard, but Historic Charleston Foundation
15 owns a property in the vicinity as well

16 Q Which property is that?

17 A That's the Aiken Rhett House, corner of
18 Elizabeth Street and Judith Street and is a museum
19 property that I formerly directed

20 Q For the Court's background tell the Court
21 a little bit about that property and why the
22 Foundation acquired it and what it is

23 A The Aiken Rhett House was constructed
24 circa 1820 It was the first built by John Robinson
25 who built a number of houses that are still standing

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1 in the Mazyck Wraggsboro neighborhood and, it was
2 acquired by the Aiken family who owns substantial
3 property across Meeting Street in the
4 King-Street-John Street Anne Street area associated
5 with the South Carolina Railroad, and 456 King
6 Street which is the Senior Aiken's residence and the
7 Aiken Rhett house became the residence of William
8 Aiken Jr , by the late 1830's, and then it was in
9 the hands of that family and their descendants until
10 the end of the 1960's First went into the hands of
11 the Charleston Museum who operated it for a number
12 of years as a house museum Then with a lack of
13 funding and great preservation restoration needs at
14 the house, it was passed to Historic Charleston
15 Foundation in the 1990's and reopened to the public
16 as a museum house

17 Q Is that structure of significance to the
18 City of Charleston?

19 A It's of great significance to the City

20 Q In what particular ways?

21 A Its national register I don't remember
22 if it's national historic landmark, but it might
23 be -- but it's been recorded by the Historic
24 American Building Survey because of its importance
25 and particularly because of its importance not only

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1 the house itself but amazing and rare survival of
2 its out buildings, in tact out buildings And it's
3 a fairly significant sized property as well on that
4 whole end of that block

5 Q Retains its kitchen houses, out buildings
6 within this property?

7 A It does

8 Q When did you first become aware of this
9 project at 404 King Street which we're concerned
10 with today?

11 A My earliest recollection and my earliest
12 notes that I could see from my calenders and email
13 of the period was in early 2004

14 Q And this piece of property identified on
15 this map where I've got the pen, is that the
16 property we're referring to?

17 A Yes

18 Q Tell me what -- or tell the Court what -
19 when you first became aware How did you become
20 aware? What exactly did you learn in terms of what
21 was proposed?

22 A There have been rumours about that
23 property for years When the library left that
24 site, which was partly advocacy of the Historic
25 Charleston Foundation that the library moved to the

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1 site that they ended up moving to on Calhoun Street
2 with the new library, there were rumours, but the
3 real knowledge of what was going to go there came
4 through meeting I believe it came to Historic
5 Charleston Foundation from Foster Gaillard
6 representing or, at least, maybe the developers and
7 their architects, but there was a meeting to look at
8 some schematic plans or concepts for the site

9 Q Do you know when that meeting took place?

10 A I think it was early February 2004,
11 because it was followed soon thereafter by a BZA
12 hearing It may not have even been reduced to
13 plans May have been more of a schematic or overall
14 scheme for what was going to transpire

15 Q Who is Foster Gaillard?

16 A He was representing -- he's an attorney
17 representing - I don't remember if it was Foster
18 who called that meeting There was a meeting I
19 just saw a notation

20 Q Was Foster there?

21 A I think so

22 Q He represents Library Associates?

23 A Yes He did, then He did through the
24 meeting I know in 2005, so -

25 Q And what was the Foundation's position on

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1 the - was it a special exception they were seeking
2 in 2004?

3 A Yes, a special exception GBA is the
4 accommodations zone, special exception for a hotel

5 Q You were here in the courtroom earlier
6 when I made my opening statement, correct?

7 A Yes

8 Q Did you hear when I made reference to the
9 special exception and the appeal process?

10 A Sort of think it went -

11 Q I was just wondering if it was the same
12 special exception

13 A It's the initial special exception
14 granted, as opposed to the extension

15 Q Was the Foundation opposed to it?

16 A Yes, my notes say we did, concerned about
17 it for particularly a couple of reasons

18 Q What were -

19 A Reasons involved, one was traffic but most
20 importantly it was the fact that we were concerned
21 that the hotel was coming in so large, 185 rooms,
22 and we had a concern that there was going to be a
23 variance needed in order to facilitate the hotel
24 that was called for in the special exception

25 Q Was the Foundation opposed to the variance

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1 or any potential variance?

2 A We were already worried we would have a
3 variance to oppose I don't know we formulated our
4 opposition to the variance yet, but there was a
5 variance obviously, going to be a need for a
6 variance with a 185 room hotel

7 Q Did you attend the special exception
8 meeting?

9 A I did

10 Q Who represented

11 A According to my records I did I think I
12 remember that

13 Q Do you recall attending the meeting?

14 A I remember attending it because I remember
15 that we expressed these concerns or oppositions
16 about that particular aspect My memory says that
17 we were sort of told, well, yes, but that will be
18 another hearing Those concerns aren't really
19 relevant to the special exception We were not
20 successful in our opposition of the special
21 exception

22 Q Was the potential zoning variance, was
23 that raised at the special exception meeting?

24 A My memory is it was I can't remember how
25 specifically we knew about the height variance, the

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1 exact height that would be called for We were just
2 concerned about - I can't remember now the sequence
3 of when we got the exact height clarified, because
4 it was some time between that hearing and the Board
5 of Architectural Review

6 Q Were there any discuss at that time about
7 possibly rezoning that property?

8 A No, but I remember that we always used to
9 take a position we were concerned if a variance was
10 so large that it was also like a rezoning And it
11 was one of those situations that I remember that
12 there was some expression of there being a variance
13 that would be called for, and in looking at the file
14 I looked at a position paper that was offered by the
15 applicants that was required, and I don't remember
16 whether I had that position paper in that form then
17 or whether I just heard it orally at the meeting
18 But it said in it -- and I don't want to confuse
19 what I had more recently reread with what
20 happened -- what I read before that particular
21 hearing, but it said that there would be a zoning
22 variance needed, but that a rezoning would not be --
23 I think it said would not be anticipated or
24 contemplated That is in the document that is
25 proffered towards meeting the special-exception test

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1 where the Board liked to get the whole explanation
2 of all the points in the special-exception test to
3 make their decision

4 Q So at the time of the special exception
5 application your position was no rezoning of this
6 property would be needed or necessary?

7 A According to that document, and I don't
8 remember that specifically I just remember we were
9 concerned about a variance coming, but we didn't yet
10 have any concept of a rezoning ^

11 MR PRITCHARD I don't have anything further of
12 this witness Answer any questions Mr Walker or
13 Ms Cantwell or Mr Domin have

14 MR WALKER No questions, Your Honor

15 THE COURT Mr Domin?

16 CROSS EXAMINATION BY MR DOMIN

17 Q Are you familiar with a citizen initiated
18 effort called Rally Around The Square?

19 A I am

20 Q Do you remember about what timeframe that
21 was, whether it resulted in the formation of any
22 study groups related to Marion Square and the
23 buildings around Marion Square?

24 A I didn't participate in that I knew
25 about it It was an effort by a group called the

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1 Committee To Save The City It was in the mid 2000
2 period I don't remember earlier than that or later
3 than It was in that particular time range

4 Q Are you familiar whether, as it relates to
5 the documents that may have come out of that
6 project, whether City planning documents, that there
7 is a planning effort to create a node or a hub of
8 activity to draw energy towards Marion Square?

9 A I have known that and written about it,
10 actually

11 Q Is that a valuable concept?

12 A We did not agree with the Rally Around The
13 Square or the Committee To Save the City's plans
14 that came out As both the staff -- and I've
15 actually written about it in the recent Preservation
16 Society Architectural --

17 Q There plans would tend to encourage larger
18 buildings towards Marion Square, is that correct?

19 A Yes We had problems with that

20 Q Those people, they just have a different
21 vision than you do Is that a fair statement?

22 A Yes

23 Q They're not lunatics?

24 A No

25 Q Okay Let's talk about what's already

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1 existing in the City of Charleston Do you believe
2 that the Mills House, for example, detracts
3 significantly from the historic character of that
4 area based on the size of the Mills House?

5 A I don't believe it significantly detracts
6 Had I been in Charleston at the time I might have
7 had concerns about the Mills House, because it was a
8 demolition of an historic hotel, to build it new
9 with two more floors

10 Q What about Charleston Place Hotel? Do you
11 believe the size and mass of that hotel takes away
12 significantly from the area around it?

13 A I think it overall impacts the skyline
14 I'm not one of the most - I've never personally
15 been absolutely starry-eyed about Charleston Place
16 for all sorts of reasons, but I think it doesn't
17 impact King Street, Meeting Street, Market Street in
18 terms of its significant scale, per se' It impacts
19 it from various views from across bridges and water
20 views, but there is one thing I would say that, if
21 you don't mind my extrapolating One thing that was
22 explained to me, because when I first came I didn't
23 really understand the Charleston Hotel project which
24 had been a long controversy and there was different
25 views and Historic Charleston Foundation was

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1 generally supportive if it It was lowered in
2 height And one of the rationales that was
3 explained to me about it particularly was that the
4 topographical position of it on the Peninsula
5 would not have the same effect as larger buildings
6 would in other areas of the Peninsula

7 Q Let me bring this closer to this project
8 of - what about the Francis Marion Hotel? Have any
9 problem with the size of the Francis Marion Hotel
10 creating a disconnect with the other buildings
11 surrounding it and detracting from that part of the
12 City?

13 A Francis Marion Hotel is a major detraction
14 but it was built before there was a historic zoning
15 ordinance or a Historic Charleston Foundation

16 Q As I understand your position, you believe
17 that is a detraction, but that it is just because of
18 its grandfathered status that it should be accepted?

19 A Yes, and it is a historic building

20 Q Actually, that's what I thought you would
21 say It is -- it's a historic building?

22 A By age

23 Q Certainly between the Francis Marion Hotel
24 to the south of the park and then the church and
25 it's spire on the northern side of King Street you

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1 do have large structures in the vicinity of this
2 proposed hotel site Is that fair to say?

3 A You said the church What was the other?

4 Q And the Francis Marion Hotel

5 A Yes

6 Q Certainly have large --

7 A Historic large structures

8 Q That's all the questions I've got

9 CROSS EXAMINATION BY MS CANTWELL

10 Q Across the street, continuing on that same
11 line, you have the Baptist Church That's a pretty
12 big structure

13 A Yes

14 Q As well as the Federal Building?

15 A It is

16 Q And certainly we hope that neither
17 churches are going anywhere any time soon I think
18 you would agree with that?

19 A Yes

20 Q What I heard this morning, probably the
21 Federal Building is here At least there will be a
22 fight about it, isn't that right?

23 A Yes

24 Q So that's going to be here for awhile
25 Then the Francis Marion is in place?

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1 A Yes

2 Q So in and around Marion Square there are
3 large tall buildings?

4 A A few

5 Q You said that this building would effect
6 your easements on Meeting Street I think they were
7 the 300 block Were they on the east or west side
8 of the street?

9 A On the west side of the street

10 Q You have facade easements?

11 A Facade easements on 309 and -- it's the
12 old Conlines(phonetic) property in toto

13 Q That's in the block south of Marion
14 Square?

15 A It is

16 Q So certainly this building isn't going to
17 shadow that facade easement, is it?

18 A I don't know I don't know how the light
19 plays there Can I say, Frances, the reason I
20 brought that up is that the visioning project that
21 was mentioned did include all sides of the Square as
22 being an in toto, and one of the concerns we had was
23 the impact on the historic buildings

24 Q You said it was going to have an effect
25 I was wondering what it was Certainly the

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1 Foundation has as much control over that facade now
2 as if nothing is ever built at 404 King Street,
3 correct?

4 A Right

5 Q You would have the same amount of control
6 regardless of what's built there You can't testify
7 today as to any direct physical impact that a
8 building that's eight stories high, that's sited at
9 404 King Street, would have on the property on which
10 the Foundation holds a facade easement that's across
11 Marion Square on Meeting Street?

12 A Ms Cantwell, as a preservationist we
13 think about setting in a fairly significant way and
14 the overall setting, in my view, the setting of 313
15 Meeting would be impacted because of its relation to
16 the Square

17 Q That same impact would be on any buildings
18 in that area It's not singled out to Historic
19 Charleston?

20 A Those are buildings which the Historic
21 Charleston Foundation has a property interest

22 Q When you were talking about -
23 Mr Pritchard was asking you about the special
24 exception that was the initial special exception
25 with the hotel approved for 185 rooms?

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1 A Yes

2 Q You had a concern that there might require
3 variance?

4 A Yes The special-exception test, when it
5 contemplated a variance

6 Q But the Historic Charleston Foundation
7 didn't appeal that decision of the Board to allow
8 for a hotel of 185 rooms at that site?

9 A Not at that time

10 Q They didn't appeal and neither did the
11 Preservation Society?

12 A Not to my knowledge

13 MS CANTWELL Thank you Hold on ,

14 Q Were you - did you attend any of the BAR
15 meetings where this project was presented?

16 A Yes, I spoke in opposition at the
17 December 2005 meeting

18 Q Would that have been where height, scale,
19 and mass would have been approved preliminarily?

20 A Yes

21 Q Or conceptually?

22 A Exactly

23 Q There was no appeal from the decision the
24 BAR made there by either you personally or Historic
25 Charleston Foundation?

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1 A I don't really remember, and I don't
2 remember -- I don't think there was but in the next
3 month or two I was finishing up and transitioning

4 Q Thank you

5 A Thank you

6 MR PRITCHARD Follow up

7 REDIRECT EXAMINATION BY MR PRITCHARD

8 Q Earlier there was some questioning about
9 the -- I think it's the Committee To Save The City
10 Is that the correct name?

11 A Yes

12 Q Are you familiar with it at all?

13 A The group?

14 Q Yes

15 A Yes

16 Q Is it an organization or just a group of
17 people? Did it have a staff, an office?

18 A I don't know whether they ever -- might
19 have had a part-time -- I don't know if they had a
20 staff It was a voluntary organization, when it was
21 started, of a number of people including some people
22 who had recently moved to Charleston and some other
23 people, and it actually, I think in their own - I
24 read something not long ago that was tracing the
25 roots of their organization back to a similar

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1 organization, I think, in New York City that some of
2 the founders had been involved with

3 Q To your knowledge has it ever had any
4 professionally trained preservationists on as staff
5 members?

6 A I don't recall any

7 Q To your knowledge are any of them
8 professional-training preservationists?

9 A Not the ones I have met

10 Q So it's just a group of people that get
11 together?

12 A Well, they have meetings

13 Q Now, in your tenure -- there has been some
14 questioning about various appeals and litigation
15 Throughout your tenure at the Foundation did the
16 Foundation ever take any - appeal any of these BAR
17 meetings decisions or BAR decisions to your
18 recollection?

19 A Yes, we appealed a number of zoning
20 decisions over my tenure We appealed -- want me to
21 name --

22 Q Sure

23 A I remember all that stuff much better than
24 what I did last week I remember that we appealed a
25 decision over the intersection of Meeting and

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1 Market, what was to become later the First Union
2 Bank site over some variances We appealed some
3 variances over the Harleston Green project in which
4 Mr Walker represented the other side We
5 appealed --

6 MR WALKER I found the Lord, Your Honor

7 MR PRITCHARD We're trying to bring Ms Cantwell
8 with us

9 A We appealed the Bridge Of Size case, I
10 guess we called it The bridges, for the new
11 proposed hotel, and the site lines to the water

12 Q Is that where the Waterfront Park is?

13 A Yes, where ultimately it was built, the
14 newer condominium projects And we appealed --
15 those are the ones I know there were more

16 Q So the Foundation has a tradition and
17 history of litigating these zoning matters?

18 A We would file a number of requests for
19 reconsideration Sometimes we didn't go forward
20 with court appeals

21 Q There was some discussion about church
22 spires Are church spires subject to the height
23 ordinance?

24 A No, the height ordinance -- well, the
25 Preservation Plan of 1974 and the height ordinance

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1 which derived from the Preservation Plan -- the
2 height ordinance of 1978, which was passed in
3 December of 1978, which was a big pet project of
4 Frances Edmunds and people, as a result of their
5 sponsorship of the Preservation Plan of '74, there
6 is a statement in there which appears in the
7 Foundation's -- in our statements relating to why we
8 were opposed to this hotel to begin with, which is
9 the statement that Russel Wright made in that
10 Preservation Plan saying that not to be rudely
11 tampered with That was the exact language Was
12 the City's historic skyline including its church
13 steeples And that's a historic preservation
14 principal That guides a lot of the historic world,
15 historic cities, religious structures, spires,
16 domes, that were considered to be important as the
17 predominating feature in historic cities You see
18 it world wide

19 Q Follow that up Is it a problem to
20 basically encase church spires in higher structures
21 surrounding it?

22 A Well, the primary reasons for the height
23 ordinance and for the philosophy surrounding it was
24 not to block church steeples and vistas to church
25 steeples

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1 Q Now, there were some -- I believe you were
2 asked questions earlier about taller buildings in
3 the neighborhood, specifically the Francis Marion,
4 the Federal Building There was one other You
5 recall that testimony just a minute ago by
6 Ms Cantwell and Mr Domin?

7 A Right

8 Q I believe you testified the Francis Marion
9 is probably too tall for the area?

10 A The Francis Marion?

11 Q Yes, Hotel

12 A Yes

13 Q And what about the Federal Building? If
14 you were dealing with that today would you view that
15 as a problem or would it be objected to?

16 A It would be objected to on height

17 Q Enabling a 105-foot building on the 404
18 Library site, would it alleviate the problems caused
19 by these two buildings or exacerbate?

20 A Accentuate them, make them rather than
21 exceptions to the rule, more part of the rule

22 MR PRITCHARD No further questions

23 RECROSS EXAMINATION BY MS CANTWELL

24 Q I take it you are in favor of taking the
25 Federal Building down?

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1 A I have mixed feelings about it I see
2 historic preservation principles but I have mixed
3 feelings because of its height scale more than its
4 construction

5 Q Let me ask you about Save the City
6 That's a group of citizens that probably live in
7 Charleston, that they care about their community,
8 don't they?

9 A Yes

10 Q And citizen input is very important I'm
11 sure you've witnessed that with the various boards
12 and commissions the City has and the City Council?

13 A Yes

14 Q The Historic Charleston Foundation has no
15 membership, does it?

16 A Its Board is considered its membership

17 Q There are no -- you could not petition to
18 become a member of the Historic Charleston
19 Foundation It has no constituencies other than the
20 self-perpetuating board?

21 A And its donors and friends It has a
22 constituency, not --

23 Q Not a membership group?

24 A Not a membership group

25 Q The bridge variance, unsuccessful? The

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1 challenge to it?

2 A The bridges, over putting the buildings --
3 I think -- I can't remember how that one ended I
4 know it was largely unsuccessful but the project
5 never occurred, and I can't remember -- I remember
6 some meetings that involved maybe withdrawal of the
7 suit and I don't remember

8 Q You don't know the outcome of the lawsuit?

9 A I remember it did not result in a victory

10 Q First Union building, the variances around
11 the Market Hall building, that litigation was
12 unsuccessful as well, wasn't it?

13 A Building never was built but there was no
14 success to the litigation, but I don't remember how
15 it ended

16 Q I'm assuming Mr Walker's representation
17 proceeded with the variances he defended

18 A Yes

19 Q Okay We talked about -- you talked about
20 the locating the buildings in and around Marion
21 Square and, as I understand it, the concept of
22 height - and I know it's a very delicate subject --
23 isn't the basic concept of the heights the City
24 plans is to have the major buildings focused up and
25 along the King Street-Meeting Street corridor then

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1 height tapering down as you go to the water's edge
2 on either side of the Peninsula?

3 A I remember that being said to me I don't
4 remember a codification of that I remember saying
5 there could be taller buildings at the center of the
6 spine, but I don't remember if the spine runs
7 through Calhoun Street I don't remember exactly
8 how that was phrased, but I remember something to
9 that effect, is in the back of my head

10 Q You would agree that where the spine of
11 the Peninsula is, you recall that suggestion being
12 made whether in study or public discussion that was
13 a more appropriate place to have the taller large
14 buildings in the City?

15 A I remember that pertaining to Charleston
16 Place, is where I remember that That particular --
17 because I don't remember topographically how it ran
18 otherwise

19 MS CANTWELL Okay Thank you

20 MR PRITCHARD One

21 BY MR PRITCHARD

22 Q Rally Around The Square, was that ever
23 codified?

24 A I think it was -- not to my knowledge

25 Q Is there any difference between -- from a

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1 preservation standpoint, between a steeple and a
2 building?

3 A Well, a steeple is not usually an occupied
4 structure except for the person who climbs up to fix
5 the bells They are traditionally ornaments, but
6 useful ornaments for buildings that served as look
7 out towers or places for bells to signify important
8 public events They're different because they're
9 not considered part of the body of the building

10 MR PRITCHARD No further questions

11 EXAMINATION BY THE COURT

12 THE COURT Mr Poston, you might be able to help
13 me You wrote the book on the buildings of Charleston
14 Was the library in the book?

15 THE WITNESS It was

16 THE COURT When was that structure built?

17 THE WITNESS Early 1960's

18 THE COURT The Old Citadel next door, been there
19 how long?

20 THE WITNESS Since the 1820's and there had been
21 a wing of the Old Citadel but it was torn down and they
22 built the library in the early 1960's

23 THE COURT What's the approximate height of the
24 Old Citadel?

25 THE WITNESS We were just discussing that in the

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1 Gallery Review Somewhere 60's, 70's Somewhere in
2 that vicinity

3 THE COURT As you come around the block you have
4 the old Federal Building, go east and then south
5 That's a what? Five story structure, six story
6 structure? I can't recall

7 THE WITNESS I have the height in my file I
8 can't - I can't remember We can get that for you

9 THE COURT The property you mentioned on Meeting
10 Street, do those abut or adjoin the Holiday Inn?

11 THE WITNESS They are across the street They
12 abut a very low nonconforming bank structure, Citizen's
13 Bank

14 THE COURT So they're on the west side of Meeting
15 Street?

16 THE WITNESS Right

17 THE COURT What about Francis Marion? It's been
18 there how long?

19 THE WITNESS Francis Marion was built in the late
20 1920's, I believe

21 THE COURT That would have been prior to zoning?

22 THE WITNESS It was prior to any zoning in the
23 City Can I clarify one thing, Your Honor, about the
24 library? We did express concerns of the demolition
25 If not out and out opposition, we expressed Charleston

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1 was not saving it's more recent architecture, and one
2 of the major movements I deal with as a professor and
3 that we deal with in the Historic Charleston Foundation
4 is the DOCOMOMO movement, the acronym for Documenting
5 20th Century Modernist buildings, and we expressed
6 concerns about that

7 THE COURT What's the exterior of that? Marble?

8 THE WITNESS Marble and aluminum, I believe?
9 Cast aluminum

10 THE COURT All right

11 MR DOMIN And plywood for the last ten years

12 THE COURT It's been boarded up I know that
13 That's all the questions I had Thank you very much

14 THE WITNESS Thank you

15 MR PRITCHARD I would ask this witness be
16 excused

17 (Discussion off the record)

18 THE COURT Let's take a break until 2 00

19 (Lunch break)

20 THE COURT Ready to proceed?

21 MR WALKER Plaintiffs call Robert Gurley

22 (Robert Gurley, duly sworn, testifies as follows)

23 DIRECT EXAMINATION BY MR WALKER

24 Q Mr Gurley, where are you employed?

25 A I'm with the Preservation Society of

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1 Charleston

2 Q How long have you been with the
3 Preservation Society?

4 A Started with the Society in May of 1994

5 Q What is your position with the
6 Preservation Society?

7 A I'm Associate Director

8 Q What was your background before coming to
9 the Preservation Society in 1994?

10 A I graduated from the University of North
11 Carolina, Chapel Hill, got a BA Degree in American
12 History and then I went -- had companions, went to
13 work for the bank for some years as a loan officer
14 and branch administrator

15 Q Did you go back to school at that point?

16 A Yes, after I had been with the bank eleven
17 years I realized I wanted to combine my love of
18 history with - my avocation with my vocation

19 Q How did you do that?

20 A I went to the University of South
21 Carolina, Columbia got a Master's Degree in Applied
22 History

23 Q Did you have a special emphasis for that
24 degree?

25 A Yes, it's a three track program I chose

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1 the historic preservation track

2 Q I would like you to give us an overview of
3 what the Preservation Society does When I say what
4 it does, what its mission is with respect to the
5 history and cultural resources of the City of
6 Charleston?

7 A The Society's mission is to foster an
8 appreciation for our historic resources,
9 architectural resources and also to take any means
10 necessary to protect those resources and to protect
11 this view corridor and district from any sort of
12 improper alterations, demolition or defacements

13 Q Does the Society have a rich history?

14 A Yes

15 Q Who is founder of the Preservation
16 Society?

17 A Susan Pringle Frost found the Preservation
18 Society with a group of other concerned citizens,
19 April 1920, specifically as a result of the threat
20 to certain buildings, the Joseph Manigault House

21 Q Would it be fair to say she and the others
22 who participated mobilized historic preservation in
23 the City of Charleston?

24 A Yes, I certainly think they did They
25 were the first organized group to do that in

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1 Charleston We are the oldest membership base,
2 historic preservation organization in America We
3 were fundamental in assisting the City in advocating
4 the Historic District in 1931 We've been very much
5 involved with the historic preservation from the
6 beginning of the 20th Century

7 Q Since founding in 1920 through the years
8 has the Preservation Society always been a voice in
9 matters that involve preservation, public matters
10 that involve preservation within the City?

11 A Yes, we've been involved since 1989
12 Years now, the Society has been involved in every
13 major issue in historic preservation

14 Q We heard about the Historic Charleston
15 Foundation, how that's structured Is the Society a
16 membership organization? What is the structure?

17 A The Society is public It's a public
18 membership Anybody can join the Preservation
19 Society We have over 2500 members from most states
20 in the United States, some from overseas We have a
21 voluntary board of directors and I am part of a paid
22 staff that works for the voluntary organization

23 Q Does it have tax exempt status?

24 A Yes, it's a 501(c)(3)

25 Q What does that mean with respect to its

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1 recognition in the pursuit of charitable purposes?

2 A All of our missions and all of our
3 programs are for charitable purposes We're a
4 non-profit We are formed, and our function is to
5 participate and to encourage the preservation of our
6 historic resources

7 Q Over the years has the City pretty much
8 given you a seat at the table when there is a major
9 planning effort afoot, Comprehensive Plan or new
10 Historic Preservation Plan, these plans that are so
11 integral to the preservation of the City?

12 A Yes, we have been very much involved with
13 those plans

14 Q We heard earlier about conservation
15 easements, facade easements Does the Society have
16 a program whereby it receives conservation
17 easements?

18 A Yes, it does

19 Q When you came in 1994 what was the status
20 of that program?

21 A That program in 1994 was very active We
22 had probably 75 - 70 to 75 properties in 1994
23 We've grown it since then Probably maybe 65

24 Q Have your responsibilities with the
25 Society involved the Conservation Easement program?

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1 A Yes, I am in charge of administering the
2 conservation easement program

3 Q What does that entail with respect to the
4 actual buildings and properties?

5 A I have several functions I talk to
6 people who are considering giving easements to the
7 Society I work with counsel to develop easement
8 documents working with our volunteer committees
9 Also work with making sure all of our properties are
10 properly maintained We make on site visits to
11 each, 80 properties We make an on sight visit to
12 each of our properties at least once a year Go
13 over the entire property and see that it's being
14 well maintained If we have any issues with it we
15 proceed to write a letter and talk to the property
16 owner to get the property repaired

17 Q Is historical significance a prerequisite
18 before the Society will consider taking a
19 conservation easement on a structure?

20 A Yes The IRS, Federal Government monitors
21 the Federal -- each program In order to get a tax
22 deduction it has to be historic, national district
23 at least 50 years old so, yes

24 Q Does the National Registry district
25 include not only south of Broad but also extend up

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1 to this area of King Street we're talking about
2 today?

3 A Yes, it does

4 Q Now, may we borrow your Sharpie,
5 Bernadette?

6 What I would like to do, with the
7 Court's permission, is have Mr Gurley mark for the
8 Court where the Society has easements and also to
9 mark the subject property
10 (Witness indicates)

11 MR WALKER This is exhibit -- Plaintiff's
12 Exhibit 3 Which is a zoning map before the rezoning
13 THE COURT Okay

14 A Your Honor, this is the hotel site that's
15 404 King Street We have a Category 2 historic
16 property 409 King Street right here So our
17 easement property is going to be drastically
18 impacted by this proposed hotel

19 Q Would you outline with the Sharpie the
20 perimeter of the hotel site of the old library
21 building?

22 A (Witness indicates)

23 Q Put an X across it

24 A (Witness indicates)

25 Q Great

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1 A We also have a second easement property
2 that's a Category 4 that is right here (Witness
3 indicates) So as an easement program administrator
4 I'm very concerned about the impact of this proposed
5 hotel on our easement properties

6 Q Thank you, Mr Gurley I'll ask you in a
7 minute about the impact on the properties but first
8 I have something that's in the City files that
9 includes a photograph of the property, and I
10 understand there is no objection

11 MR DOMIN No objection

12 MS CANTWELL No objection

13 (Whereupon Plaintiff's Exhibit 7 is marked in evidence)

14 Q Plaintiff's Exhibit 7 is three pages,
15 color photocopy of the site Let me ask, are you
16 familiar with the buildings and structures that are
17 depicted in Plaintiff's Exhibit 7?

18 A Yes, I am

19 Q Does that show the entire perimeter of
20 Marion Square, basically?

21 A Yes

22 Q Does it include a photograph of the 409
23 King Street building you're referring to that's
24 across the street?

25 A Yes, it does There is one photograph of

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1 it there and there is a great photograph of it here

2 (Indicates)

3 Q That's page three?

4 A Yes, page three It's number five

5 Q If you would hold that up to the Court

6 (Witness indicates)

7 Q Does that photograph show a shadow coming
8 across 409 King Street?

9 A Your Honor, it's in this corner and, yes,
10 it does It's half in shadow in this photograph

11 Q If this structure is allowed to be
12 constructed up to 105 feet do you expect that
13 105-foot structure to cast a greater shadow on your
14 building?

15 A Yes

16 Q What is the name of that building?

17 A It's the Radcliffe Aimar Building

18 Q You mentioned Category 2 Why is Category
19 2 significant?

20 A Category 2 is a 1974 Preservation Plan
21 Part of that plan was to establish an inventory of
22 structures in the Historic District The City felt,
23 and quite rightly, that before you could have an
24 organized plan that focused on historic resources
25 you need to know what you had So they developed a

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1 category system of Category 1, Category 4 Category
2 2 is the second highest category And the 1974
3 plan, group two is excellent It's high style
4 regional architecture, fine Charleston style, well
5 designed proportion with good detail These are
6 spirited, dignified, frequently innovative, rare and
7 always attractive and interesting, of irreplaceable
8 importance to be preserved in situ at all costs

9 Q Will this structure have a negative impact
10 on the easement that's held by the Society on 409
11 King Street?

12 A Absolutely it will The character of the
13 building - the building's, particularly the
14 building's setting will be very much diluted and
15 diminished when you have a 105 foot building across
16 the street Even though it's setback just a few
17 feet the impact is going to be tremendous and the
18 Society is very concerned about the impact of the
19 building

20 Q We were talking about old buildings I
21 want to switch to new buildings Is the Society
22 just categorically opposed to any new buildings, any
23 new architecture?

24 A Absolutely not

25 Q Is this battle, this case, about new

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1 versus old architecture?

2 A No, absolutely not It is not about new
3 versus old architecture

4 Q Has the Society in several instances
5 supported new architecture downtown?

6 A Yes, we have on many occasions

7 Q What would be a couple of examples?

8 A We have a Carolopolis Award to recognize,
9 we think, good renovation, good construction and we
10 have given a Carolopolis Award for new architecture
11 to the Aquarium, which surprised some people And
12 also to the Market Pavilion Hotel, French Quarter
13 Hotel, 440 and 444 King Street We had a great
14 little house on Ash Street, wonderful new
15 construction on Lockwood Boulevard The Society has
16 always believed that Charleston should evolve as a
17 community There is going to be growth, new
18 construction It's natural for cities to evolve
19 We support that

20 Q So what would be the criteria, so to
21 speak, for the integration of new architecture into
22 the Historic District that the Society would apply
23 to determine whether to probably support or oppose a
24 project?

25 A New architecture, it has the

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1 responsibility to be subordinate to the historic
2 fabric of the City It has a responsibility in
3 terms of its height, scale, and mass, in terms of
4 its detail to contextually weave itself into the
5 existing streetscape In Charleston, in the
6 Historic District, it's a historic district of 18th
7 and 19th Century streetscapes and skylines Those
8 streetscapes and skylines should always be of
9 paramount importance, they should always be the
10 star New construction has a real responsibility to
11 subordinate itself to historic architecture That,
12 essentially - not so much about design details
13 They change depending on location But the height,
14 scale, and mass of the building is fundamental if
15 the building is going to work

16 Q Turning back to the Preservation Society
17 and it's public role, does the Preservation Society
18 monitor applications that come before the City
19 commissions and city boards for projects?

20 A Yes

21 Q Who does that?

22 A I do that

23 Q How long have you been doing that? }

24 A Since May of 1996

25 Q And if an application comes up that is

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1 for, say, new construction do you alone make the
2 decision as to what the Society's position is going
3 to be?

4 A No, the Society is a voluntary
5 organization We have different voluntary
6 committees, finance program One of them we call
7 our Planning and Zoning Commission which is chaired
8 by a member of our Board and is comprised of
9 interested citizens We have architects,
10 contractors, people who have lived here all their
11 lives I talk to the applicant I do the research,
12 present that plan, that request, before our
13 committee and I represent the committee and the
14 Society's opinion at the public meeting

15 Q So the committee's appointed by the Board?

16 A The committee's not appointed by the
17 Board The Board chairman chairs the committee
18 And volunteers, might express interest, this one
19 might be good, and they input the committee

20 Q Once a decision is made are you the
21 spokesman?

22 A Most of the time my Executive Director,
23 Cynthia Jenkins, will do that as well, but most time
24 I represent the Society

25 Q Does what you just described to me apply

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1 as well to changes in the Zoning Ordinance that
2 might have effect on the Old and Historic District?

3 A Yes

4 Q Building and development standards that
5 are within the Zoning Ordinance?

6 A Yes

7 Q Now, I want to talk for a second about the
8 Comprehensive Plan We mentioned the role of the
9 Preservation Society in coming up with plans Did
10 the Preservation Society participate in the
11 development of something known as the Downtown Plan?

12 A Yes

13 Q Tell us what role the Preservation Society
14 had with respect to the Downtown Plan?

15 A Yes, we did

16 Q Tell us what role the Preservation Society
17 has with respect to the Downtown Plan

18 A We attended numerous meetings Very
19 intensive public process And our Executive
20 Director, Cynthia Jenkins, was on the advisory
21 committee so we were intensely involved

22 Q Was the Downtown Plan adopted by the City
23 Council to the best of your knowledge?

24 A Yes, it was

25 Q I don't think there is any objection to

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1 it, in fact it's in, I think, as Exhibit 7 We'll
2 refer to that as Defendant's Exhibit 7 or the
3 Downtown Plan

4 (Whereupon Defendant's Exhibit 7 is marked)

5 Q To your knowledge is the Downtown Plan the
6 land use element of the Comprehensive Plan for the
7 City of Charleston that's now in effect, to the best
8 of your knowledge?

9 A Yes

10 Q Does it address the Historic District?

11 A Yes, it does

12 Q Does it specifically address Marion
13 Square?

14 A Yes, it does

15 Q Does it address height zoning in the City
16 of Charleston?

17 A Yes, it does

18 Q What I want you to do is to walk us
19 through the Plan At my request have you tabbed a
20 couple of places that you think are pertinent to the
21 matters before the Court?

22 A Yes

23 Q I might lead you a little bit if you get
24 bogged down, but why don't you tell us the points
25 that you think are pertinent in this Downtown Plan

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1 to the issues before His Honor?

2 A Okay

3 Q Your Honor, could we give you a copy of
4 it?

5 THE COURT I would appreciate that

6 A Your Honor, there is a graphic on page 62
7 Welcome you to follow along Also page 690 there is
8 a graphic that X's out an undesired streetscape

9 Q Hold on just second

10 THE COURT 62?

11 A You may also see it as 690

12 Q Go ahead, Mr Gurley

13 A At the top left of that page there is a
14 graphic that shows you what's good development,
15 what's poor development Poor development, big X
16 which is poor development, has unusually tall
17 buildings, and it says new development should be in
18 keeping with the City's current skyline This
19 proposed hotel does not do that Also talks about
20 the 3X 3X being too permissive and that we should
21 no longer have -- replace the 3X with a more
22 compatible height district

23 Q Before you go on There has been a
24 witness or two who talked about 3X What is the 3X
25 district? How does that work in terms of setting a

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1 maximum height?

2 A It's determined by the distance between
3 the face of the building to the middle of the street
4 times three equals maximum height

5 Q So from the middle of the building to the
6 street - excuse me If from the face of the
7 building to the middle of the street were 40 feet,
8 it would allow 120 feet?

9 A That's correct

10 Q Continue on

11 A Also on page 692 the goal, it states, is
12 to preserve Downtown Plan existing height

13 Q You mentioned page number?

14 A Page 64 of the Plan

15 Q All right

16 A And on page 65 of the Plan it talks about
17 replacing the over permissive height zones and
18 mentions 3X is one of the overly permissive height
19 zones that should be replaced So in 1999 the
20 Downtown Plan is talking about the idea this 3X is
21 not appropriate and should be replaced

22 Then on page 78 of the Plan it speaks
23 for itself more specifically to Marion Square in the
24 Library site

25 Q Where on the page does it talk

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1 specifically about Marion Square and specifically
2 about the Library site?

3 A Well, it mentions it on the center of the
4 page Talking about Marion Square premiere public
5 space Restoration currently under way Also says
6 old library site is a significant development
7 opportunity but that anything that should go there
8 should be paid particular attention to, the promise
9 of the church steeple, the Old Citadel Building and
10 the Calhoun column on the skyline so the
11 preservation plan was interested in having
12 development that would be subordinate to those
13 structures

14 Q You said Preservation Plan You mean the
15 Downtown Plan?

16 A Yes

17 Q We were looking earlier at those
18 photographs we marked as an exhibit After looking
19 at those and drawing on your own experience, can you
20 tell us what is your estimate of the height of the
21 Old Citadel Building?

22 A I think it's closer to 60 feet

23 Q Is it four stories?

24 A Yes I think it's more of a 60 foot
25 building

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1 Q We mentioned the Aimar Building, we
2 mentioned the Citadel Building Are there other
3 historic buildings in the immediate vicinity of 404
4 King Street?

5 A Yes

6 Q What would those be?

7 A Other historic in the vicinity -- well,
8 you can look at -- up and down the streetscape of
9 King Street, historic buildings that are close

10 Q Would St Matthew's be one?

11 A Yes, absolutely Bordering Marion Square
12 would be St Matthew's Lutheran Church with that
13 wonderful steeple You have the Francis Marion
14 You have the Citadel Baptist Church You have
15 Second Presbyterian

16 Q Earlier you said the Aimar Building at 409
17 King was a Category 2 under the City's Preservation
18 Plan from 1974 Was the Old Citadel classified in
19 any category in that plan?

20 A Yes, it's also a Category 2 so it's
21 flanked by Category 2 Yes, absolutely

22 Q Since we've mentioned the Preservation
23 Plan, now might be a good time to introduce that
24 Plaintiff's Exhibit 8 is a copy of the Historic
25 Preservation Plan from 1974 Any objection to our

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1 admitting it into evidence?

2 THE COURT No objection?

3 (Whereupon Plaintiff's Exhibit 8 marked in evidence)

4 MR WALKER Do you have Plaintiff's 8 in front of
5 you?

6 THE COURT I do not

7 Q While they're looking for that,
8 Mr Gurley, why don't you give us a little bit of
9 background? You started to talk about this 1974
10 Historic Preservation Plan How did that come
11 about?

12 A The City recognized that there needed to
13 be some long range thinking, some long range
14 proposals as a way to protect the historic
15 architecture and the ambience of downtown
16 Logically in the process, first, in order for us to
17 protect these properties we need to identify these
18 properties So a major piece of this 1974
19 Preservation Plan was a survey of historic
20 structures in downtown, particularly below the
21 Crosstown They also created, in surveying those
22 buildings, created a system of category, from a
23 Category 1 to a Category 4 minus, so they can kind
24 of rate the buildings That's, I think, very useful
25 in terms of urban planning, in terms of decisions

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1 you make about the City, that you identified your
2 resources

3 So this is the first plan that really
4 thought about the City as a historic district as a
5 whole, really begin to do some forward thinking
6 about what's appropriate and begin to identify the
7 resources

8 Q When was that plan updated or has it been
9 updated?

10 A Yes

11 Q When was it updated?

12 A 2008

13 Q So for all pertinent times here, was that
14 the Preservation Plan of the City to the best of
15 your knowledge?

16 A Yes

17 Q Having attended these board and commission
18 meetings and reviewed staff reports and
19 recommendations and the like, did City staff
20 consider the Preservation Plan, that's Plaintiff's
21 Exhibit 8, to be authoritative?

22 A Yes, they did

23 Q Did they use it as a reference?

24 A I've heard them use it as a reference,
25 yes

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1 Q What I would like you now to do is to look
2 in the Preservation Plan with respect to the
3 specific area we're talking about Would you do
4 that, please?

5 A Certainly

6 Q Does the Preservation Plan include an
7 overview of the City, a map of the City?

8 A Yes

9 Q Where is that? Page 30 what? When I say
10 a map of the City, a map of height districts or
11 proposed height districts

12 A Yes It's toward the back Must be 36
13 Yes, page 36

14 Q Does page 36 show Marion Square?

15 A Yes, it does

16 Q Does page 36 suggest -- or first, does it
17 show this property, although it doesn't have TMS
18 boundaries, does it show this property as being
19 split zoned with respect to height?

20 A Yes

21 Q What are the split zones that are proposed
22 with respect to height under this Preservation Plan?

23 A 50/30 and 90

24 Q Is 50/30 where? Where is the 50/30 and
25 where is the 90?

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1 A The 50/30 is at the edge of King Street

2 I believe this is 50 feet

3 Q There The 90 stops at Hutson Street?

4 A Yes, correct

5 Q So the south side of Hutson Street where
6 this was proposed to be, what height limit?

7 A 50 feet

8 Q Did this plan talk about the height
9 district 50/30 on page 35?

10 A Yes, it did

11 Q Did it specifically talk about King Street
12 in this area? I'll draw your attention to the upper
13 right column

14 A Yes, it did It says that this district
15 includes from the Crosstown to Broad Street, from
16 Broad Street to King Street to East Bay

17 Q Clearly so Bernadette can get it

18 A From the Crosstown Expressway to Broad
19 Street, from Broad Street, from King Street to East
20 Bay Street From East Bay Street from Broad to
21 within a hundred feet of Market Street and Market
22 Street from King Street to Meeting Street

23 Q Does that include this significant segment
24 of King Street?

25 A Yes, it does

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1 Q What is the substantive part of this
2 height district?

3 A The next sentence says, along these
4 streets existing buildings form a virtually
5 continuous wall of uniform height This wall effect
6 is a significant feature in the development of Old
7 Charleston and should be preserved To achieve
8 these purpose it's recommended the maximum building
9 height and height district 50/30 be established at
10 50 feet and minimum of 30 feet, no setback should be
11 permitted

12 Q Is there anything else at this time within
13 the historic plan of 1994 that you would like to
14 draw the Court's attention to, Mr Gurley?

15 A Yes It also mentions on page 12 that the
16 diversity of structures -- it mentions the street --
17 the steeples, church steeples, and it says that a
18 vital part of the total City scene, and not to be
19 rudely tampered with, is the skyline, which is
20 punctuated with beautiful steeples of historic
21 churches They contribute immeasurably to the
22 general harmony of building heights (inaudible)
23 Major element in the quality of old Charleston

24 Q Anything further?

25 A This proposal is rudely tampering with

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1 that

2 Q Let's go now to the height districts as
3 they existed before the rezoning and before the
4 variance

5 We've marked as Plaintiff's Exhibit
6 3, looks like a map of the City from July 18th,
7 2005 Does this show the City zoning in the
8 immediate area before the rezoning of the variance?

9 A Yes

10 Q Now, what is the district along King
11 Street for the block between Broad - excuse me
12 Calhoun and Hutson Street?

13 A Split zoned Its 3X Here's the Library
14 site It's 3X here and then a hundred feet back
15 becomes 55/30

16 Q So the yellow is 3X?

17 A Correct

18 Q As we go below King Street and above King
19 Street, with respect to the streetscape, what did
20 the City have the height limits as?

21 A 55/30

22 Q That's max 55, no less than 30?

23 A Correct

24 Q Did the existing zoning allow higher
25 buildings in the middle of some of the blocks on

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1 King Street?

2 A Yes

3 Q Would you point out that zoning?

4 A Your Honor, this, the purple, is 80/30 max
5 height, 80 feet, minimum height 30 feet Then there
6 is a little section 100 feet, 30 feet I think it's
7 extremely significant to point out that this 80 feet
8 stopped north of Hutson Street deliberately and went
9 down to 55/30, because it was understood the
10 importance of protecting the view of Marion Square
11 and protecting this area in the Citadel Building

12 Q Would the existing buildings there, the
13 existing Citadel Building, provide a visual buffer
14 to the higher 80/30 if 80 were ever built in the
15 block between King Street and Meeting? Looking
16 north would the existing Citadel Building provide a
17 vision buffer between where the person standing in
18 Marion Square and the higher building, if they were
19 ever built in the middle of the block?

20 A Yes

21 Q There has been alot of talk, so much in
22 this case, split zoning Is split zoning at all
23 unusual on Meeting or King Street?

24 A Split zoning is the norm All of these
25 properties are split zoning The whole idea of the

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1 setback, the whole idea of that is to have two zones
2 so near King Street, lower zone, and height is in
3 the middle

4 Q We talked about the 3X District in the
5 1999 Downtown Plan, recommending it's elimination
6 Did the City actually proceed with efforts to
7 eliminate the 3X District?

8 A Yes

9 Q Were there Council meetings where the 3X
10 District was discussed?

11 A Yes

12 Q Do you recall it being discussed in a
13 Council meeting back in 2005?

14 A Yes

15 Q Did you attend that meeting?

16 A Yes, I did

17 (Whereupon Plaintiffs Exhibit 9 is marked in evidence)

18 Q Before we get to the minutes themselves,
19 would you tell us what was before Council back in
20 September 2005 with respect to the 3X District?

21 A There was a request to eliminate the 3X in
22 alot of sections of Charleston

23 Q To save us all time I'm going to ask, does
24 that discussion, memorialized in the minutes, begin
25 on page 40 of the minutes which is the page Bate

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1 Stamped 071 at the bottom?

2 A Yes

3 Q Okay Now, we have the minutes but give
4 us the short version, evening headline news, of what
5 happened at that Council meeting

6 A Well, at the City Council meeting there
7 was a proposal to eliminate the 3X and that was
8 passed We objected Preservation Society objected
9 to the fact that this 3X hotel site was not
10 included

11 Q So in the City's proposal did it include
12 eliminating 3X in this one block?

13 A No, it did not And that was of great
14 concern We were shocked that it wasn't included
15 We couldn't understand why We never got a
16 satisfactory answer and at this meeting I stood up
17 and again objected to it and wanted an answer to
18 that question

19 Q Did any Council members also express
20 concerns as to why this relic 3X would be left on
21 this one block between Calhoun and Hutson?

22 A Yes, Council member George

23 Q Was there discussion about the possibility
24 of eliminating 3X in that block?

25 A Yes, it was some discussion, yes

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1 Q Do the minutes talk specifically about the
2 possible hotel on this site?

3 A Yes

4 Q Was it pointed out that the owners of the
5 site had not been given particular notice of the
6 rezoning of', their property if they were eliminated
7 and, therefore, nothing could be done, basically?
8 To the best of your recollection?

9 A No

10 Q Did you answer?

11 A No

12 Q Did City Council at this time take any
13 action or did they defer action?

14 A They took action

15 Q What did they do?

16 A They approved the elimination of 3X in the
17 areas proposed

18 Q Now, did 3X come up again about a year
19 later?

20 A Yes

21 Q Did Mayor Riley attend this Council
22 meeting?

23 A Yes, he did

24 Q We're going to offer the minutes from
25 September 26, 2006 Any objection?

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1 MS CANTWELL No objection

2 MR DOMIN No

3 (Whereupon Plaintiff's Exhibit 10 is marked in evidence)

4 Q Was Mayor Riley for or against the
5 elimination of the 3X District?

6 A He was for the elimination and he spoke to
7 that issue

8 Q What did he say about the 3X District?

9 A He said the 3X designation was archaic and
10 had no place in the modern community

11 Q Does the discussion begin on page 16 of
12 the Minutes Bate Stamped two 32?

13 A Yes, it does He called the 3X a relic

14 Q Was there further discussion on it?

15 A Yes, there was public comment

16 Q I'm going to draw your attention on page
17 17 of these Minutes, which is page Bate Stamp 233,
18 about the middle of the page is a paragraph starting
19 Mayor Riley Do you see that?

20 A Yes

21 Q Would you read that for the record?

22 A Mayor Riley thanked Mr Batchelder, Ms
23 Mortenberry(phonetic), Mr Morgan and their
24 colleagues for their work on this He stated this
25 is something that could reasonably be argued that we

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1 should have done a long time ago He said the 3X
2 District is a relic and that it was done when they
3 first developed zoning ordinances and had very
4 little experience with it He commented it's
5 prehistoric and should not be part of the City
6 Zoning Ordinance any longer

7 Q Did Council approve the elimination?

8 A Yes

9 Q Did the Preservation Society support
10 Council's action?

11 A Yes

12 Q Did you say anything to staff or the Mayor
13 or Council after that or during that process?

14 A Yes I stated at the meeting that we
15 agreed with the Mayor that 3X has no place in the
16 community and thought it was best it be eliminated

17 Q To your knowledge, based on all your
18 experience in watching zoning changes, aside from
19 this one instance that we're here on today, has the
20 City ever, ever, ever moved City staff to expand the
21 3X District?

22 A No

23 Q Let's go back to 404 King Street What
24 was the first approval that was sought with respect
25 to the Old Library site at 404 King Street?

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1 A It was a special-exception request for a
2 185-room hotel and a general accomodation zone in
3 February of 2004

4 Q Did you attend that meeting?

5 A Yes, I did

6 MR WALKER Do you have any objection to
7 Mr Gurley's position statement?

8 MS CANTWELL No objection

9 MR DOMIN No objection

10 (Whereupon Plaintiffs Exhibit 11 is marked in evidence)

11 Q Did you provide Plaintiff's Exhibit 11 to
12 the BZA?

13 A Yes, I did

14 Q What were the Preservation Society's
15 concerns about the application for the special
16 exception, in a nut shell?

17 A The traffic study was terribly flawed It
18 used -- part of the special-exception test is you
19 are required to have a traffic study The traffic
20 study that the applicant used was based on poor 1998
21 traffic counts The traffic counts were out of
22 date They also characterized this area as a low
23 growth, limited growth area which was, on the face
24 of it, was just really absurd There were sixteen
25 projects in that area being constructed, being

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1 developed, going through the process at this time in
2 2004 There were condominium projects on George
3 Street The Federal Building was being considered
4 There was development on upper King There was a
5 dormitory on St Phillip, a parking garage on
6 St Phillip This was an area of vibrant, explosive
7 growth and for them to characterize it as low,
8 limited growth we thought was just totally
9 unrealistic and just did not meet the
10 special-exception test

11 Q Did the Society have concerns about the
12 size of the hotel when the impact analysis indicated
13 it was going to be 185 rooms?

14 A Yes, we did It was going to create
15 tremendous traffic

16 Q In terms of the size?

17 A No, not at this point

18 Q Did the filing indicate any zoning
19 variances would be requested?

20 A I don't believe it did

21 Q Now, was that special exception approved
22 by the BAR?

23 A Yes, it was

24 Q Did the Preservation Society take any
25 action with respect to appealing it?

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1 A Not at this point

2 Q Why not?

3 A This was before the Vested Rights Act We
4 felt that we had the opportunity to appeal the
5 extension and voice our concerns, that there would
6 be an opportunity for public review We had no way
7 of knowing what the future would bring

8 Q What was the next step to the approval
9 process? /

10 A The Board of Architectural Review

11 Q Would that have been December 2005?

12 A Yes

13 Q What was it before the BAR for?

14 A Conceptual approval

15 Q What are the three phases of approval
16 granted by the BAR?

17 A Conceptual, preliminary, and final

18 Q Was this the first opportunity that the
19 Society had to review, in detail, the plans for the
20 hotel?

21 A Yes

22 Q The conceptual renderings? Did you appear
23 on behalf of the Society to speak?

24 A Yes Cynthia Jenkins, our Executive
25 Director, spoke and I was at the meeting, yes

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1 Q Did the Society submit to the BAR a
2 position statement taken into the record?

3 A Yes

4 MR WALKER Any objection to putting in that
5 position statement, December 14, 2005?

6 (Whereupon Plaintiff's Exhibit 12 is marked in evidence)

7 Q What was the Society's position with
8 respect to the design that was then on the table?

9 A We felt it was much too large We felt it
10 was inappropriate in terms of its height scale and
11 mass and we asked that the application be denied

12 Q Was the application approved?

13 A Yes

14 Q Did the building, as presented to the BZA,
15 violate the zoning with respect to height --

16 A Yes

17 Q - on the portion of the property --

18 A Yes

19 Q - deemed 55/30? Does the BAR, to the
20 best of your knowledge, have the authority to grant
21 a variance from the zoning?

22 A No

23 Q Did the Preservation Society appeal that
24 approval, conceptual approval?

25 A No

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1 Q Why not?

2 A We weren't allowed to You can't appeal a
3 BAR decision until it goes through the process, the
4 three steps, conceptual, preliminary, and final

5 Q It wasn't final yet?

6 A It wasn't final yet, so we had no
7 opportunity to I'm sure we would have if we had
8 the opportunity

9 Q Next was - third step, would have been
10 the one-year extension of the special exception?

11 A Yes

12 Q When did that occur?

13 A February 2006, I believe

14 Q Did the Society appear?

15 A We appeared but were not allowed to speak

16 Q Was that before the BZA?

17 A Yes

18 Q Did the BZA grant the one-year extension
19 based on the Vested Rights Act?

20 A Yes

21 Q Did the Society appeal that?

22 A Yes

23 Q Is that still pending?

24 A Yes

25 Q All right Now, we're at the variance

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1 At some point did the owner seek a height variance
2 in this 55/30 District to allow the construction of
3 a hotel as tall as the one that it went to the BAR
4 for conceptual approval on?

5 A Yes

6 Q When did that happen, Mr Gurley?

7 A That was in January 2007 I believe

8 Q Did the Preservation Society appear at
9 that meeting?

10 A Yes

11 Q Did the Preservation Society support,
12 oppose? What was its position?

13 A We opposed

14 Q Did you submit a letter into the record on
15 that?

16 A Yes

17 MR WALKER We have Mr Gurley's letter of
18 January, 2 --

19 MS CANTWELL ~ No objection

20 MR DOMIN No objection

21 MR WALKER Admitted without objection

22 (Whereupon Plaintiffs Exhibit 13 is marked in evidence)

23 Q What were the grounds for the Society's
24 opposition to the zoning variance, the height
25 variance as set forth in your letter?

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1 MS CANTWELL I just want to put on the record
2 the same objection to testifying anything about the
3 variance, because we're limited to the record

4 THE COURT Okay

5 Q Go ahead

6 A In order for the applicant to receive a
7 variance he would have to pass a variance test which
8 has different sections to it One of the sections
9 was the applicant had to prove that this property
10 was an extraordinary and unusual piece of property
11 And we felt the applicant failed to make the
12 variance test Being split zoned is the norm
13 Nothing unusual There is nothing exceptional about
14 that In terms of their use of that property, most
15 properties are that way So we felt there was
16 nothing unusual, nothing extraordinary That's a
17 key part of the variance test

18 Also felt they could make reasonable
19 use of the property without this height variance
20 There are hotel buildings being built at 55/30 We
21 also felt the last section of the variance test
22 would be against the public interest We certainly
23 felt the hotel, as proposed, would be against the
24 public interest, so we did not believe they met the
25 variance test and asked the application be denied

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1 Q You mean the height of the hotel proposed?

2 A Yes

3 Q Did the Society oppose hotel use?

4 A No, we supported the hotel use

5 Q Was there any presentation to the Board
6 that the hotel of a lower elevation simply was not
7 economically feasible?

8 A No

9 Q Was there any presentation to the Board
10 that other potential uses for the height limit of 55
11 feet were not economically feasible?

12 A Not that I recall

13 Q Now, did the Society appeal that decision?

14 A Yes

15 Q That's one of the two cases before His
16 Honor right now

17 Let's turn now to the other case
18 before Judge Scarborough That's the case involving
19 the rezoning of this particular parcel and we have a
20 blow up here of what the zoning was like before the
21 zoning change, and that's Plaintiff's Exhibit 4 Do
22 you recognize that?

23 A Yes

24 Q Is that the way the property was zoned?

25 A Yes

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1 Q Could you grab that marker right over the
2 rim there and mark the outline of the boundaries of
3 404 King Street?

4 (Witness indicates)

5 Q Put an X through that

6 (Witness indicates)

7 Q The blue portion of the parcel is in what
8 district?

9 A 3X

10 Q And the greenish is in what district?

11 A 55/30

12 Q When do you recall, if you remember, first
13 hearing about a potential move by the City to rezone
14 the entire parcel 3X?

15 A 2007 I think it's August 2007, I
16 believe

17 Q Was it after the Society and the Historic
18 Charleston Foundation had appealed the variance?

19 A Yes

20 Q Was the first meeting on this rezoning,
21 that you recall, before City Council?

22 A Yes

23 Q At that time, when it was first brought
24 up, do you recall what the justifications were?

25 A Economic revitalization, which we didn't

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1 believe that - this part of King Street had already
2 long been revitalized

3 Q Let's talk about that in January 2007
4 Say in the summer of 2007, when the rezoning effort
5 took hold at the hands of the City, what was the
6 status of King Street going north from Marion
7 Square?

8 A In terms of its revitalization?

9 Q Yes

10 A It was a vibrant -- it was established,
11 had its own identity, alot of local businesses,
12 there had been alot of rehabilitation,
13 Carolopolis - new construction, it was a vibrant
14 upcoming --

15 Q Had the City either finished or was in the
16 process of finishing its new streetscape where it
17 bricked crosswalks, put up new street lights and
18 generally enhanced the area north?

19 A Yes

20 Q Did you believe the economic rezoning of
21 upper King Street was legitimate?

22 A No, it was not legitimate

23 Q Did you attend the Planning Commission
24 meeting after the City Council first discussed it in
25 July of 2007?

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1 A Yes

2 Q Was a presentation done by City staff at
3 that meeting?

4 A Yes

5 Q Who presented for City staff?

6 A Lee Batchelder

7 Q In a nutshell, what was Mr Batchelder's
8 justifications for changing the zoning?

9 A Again, as I remember, it was the economic
10 revitalization argument

11 Q Did Mr Batchelder refer to the rezoning
12 with particular reference to this project?

13 A Yes

14 Q Was there anything discussed other than
15 the rezoning to accomplish this one particular
16 design of a building?

17 A No

18 Q Was there any discussion or mention by
19 City staff of the need to change the policy in
20 general with respect to 3X?

21 A Change the policy in general?

22 Q Or to expand the district?

23 A Yes They wanted to expand the 3X

24 Q But with respect to what?

25 A With respect to that site

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1 Q In your estimation was there any need to
2 change the zoning to accomplish this project since
3 the height variance had been granted?

4 A No Your Honor, we were astounded to find
5 that the City was proposing to extend the 3X
6 boundary because there was no reason to They had
7 already been granted special exception They had
8 already been granted the height variance They
9 could construct that building as existing zoning as
10 that map shows now There was no reason to extend
11 the 3X except to make the Foundation's lawsuit
12 disappear

13 Q Did City staff show slides that related to
14 Charleston Place?

15 A Yes

16 Q What were those slides of, primarily?

17 A Well, it was to show the facade and how
18 the facade worked with the rest of King Street and
19 the view corridor

20 Q Did it show -- did the pictures include a
21 desolate Market Street?

22 A Yes, they did

23 Q Did that have any pertinence to upper King
24 Street?

25 A Absolutely not That was another point

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1 that concerned us The idea of equating the
2 situation in the 1970's around King Street and
3 Beaufain with the situation in terms of the
4 development and the vitality of upper King Street in
5 2007, they had -- it was completely irrelevant, had
6 nothing to do with it because upper King Street at
7 that time was a vibrant, upcoming part of the
8 commercial district Much opposed to what you saw
9 in the 70's at Charleston Place Did not relate at
10 all

11 Q Were figures put on or figures in the
12 Power Point that showed the estimated financial(
13 impact?

14 A Yes

15 Q Did they relate to this particular hotel?

16 A Yes

17 Q What is the significance of a zoning
18 change in contrast to the height variance with
19 respect to the life of this property?

20 A Well, a height variance is specific to one
21 project Extending the 3X, that runs with the
22 property If you extend the 3X, then no matter what
23 happens, if this project goes away and that land is
24 sold the City and this community is stuck with 3X at
25 that property The 3X runs with the property and

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1 it's forever The zoning variance was specific for
2 one particular application

3 Q In your estimation was the zoning change
4 or would the zoning change, the 3X, be detrimental
5 to the easement at 409 King Street, right here?

6 A Would be extremely detrimental

7 Q Would it be detrimental to the interest of
8 the Society and it's purposes?

9 A Yes, it would

10 Q Did the Planning Commission make a
11 recommendation?

12 A Yes They approved

13 Q Was it brought out at that hearing? Was
14 there any discussion of the variance case, the
15 appeal of the variance, at that Planning Commission
16 hearing?

17 A I'm not sure they discussed it at the
18 Planning Commission I don't believe they did I
19 don't remember

20 Q What was the next step in the rezoning
21 process after the Planning Commission in July 08?

22 A City Council

23 Q Did you appear at the City Council
24 meeting?

25 A Yes

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1 Q Who presented for the City staff at the
2 City Council meeting?

3 A I think it was Michael Maher at this
4 point

5 Q Did you notice any significant change in
6 the arguments?

7 A No Well, he presented a Power Point
8 presentation at that point with some more detailed
9 figures of different scenarios

10 Q Mr Gurley, did the Power Point presented
11 by the City, to show the financial impact, include
12 the financial impact from alternative uses or a
13 hotel in a smaller building?

14 A No

15 Q There wasn't any comparative analysis?

16 A That I recall, there was none

17 Q Did City Council receive comments from
18 interested persons?

19 A Yes

20 Q Did the proponents speak?

21 A Yes

22 Q The opponents?

23 A Yes

24 Q Did Mayor Riley at the conclusion ask for
25 either a hand count or a head count of those in

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1 favor and those opposed?

2 A Yes, he did

3 Q What was the tally?

4 A The folks at the meeting opposed far out
5 numbed the votes supporting The exact number --
6 but it was three, four to one in opposition

7 Q There has been some discussion in cross
8 examination today about the Committee To Save The
9 City Are you familiar with that?

10 A Yes, I am

11 Q Are you familiar with the committee's
12 Committee To Save The City's position with respect
13 to this particular site?

14 A Yes

15 Q In Marion Square?

16 A Yes)

17 Q What generally is its position about
18 Marion Square?

19 A They feel that Marion Square should be
20 ringed with a wall of buildings and that tall
21 buildings are appropriate all around
22 (Interruption)

23 Q We were talking about the Committee To
24 Save The City and their vision that Marion Square
25 should be ringed with high buildings Is that

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1 something that was suggested or recommended by the
2 Comprehensive Plan as contained in the Downtown Plan
3 of 1999?

4 A No

5 Q Which way does the Downtown Plan go on
6 that?

7 A Lower height

8 Q In the Downtown Plan is there some
9 indication that, perhaps, there could be some height
10 adjustment in this area?

11 A Some, yes

12 Q What does the Downtown Plan speak in terms
13 of?

14 A Maybe one story minimum

15 Q Is this a slight adjustment of one story,
16 what we're talking about here with this proposed
17 hotel?

18 A No

19 Q 105 feet?

20 A No

21 Q And how do additional buildings,
22 additional very tall buildings around Marion Square,
23 in your estimation, have an effect on Marion Square
24 and the other historic buildings?

25 A Well, they will compete - one, tall new

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1 construction competes with historic buildings As I
2 said before the historic architecture should be
3 dominant The new architecture should be
4 subordinate in terms of its height, scale, and mass
5 A ring of tall buildings would be very detrimental
6 to the Historic District

7 Q Is there a church across from the old
8 library site on King Street?

9 A Yes

10 Q What church is that?

11 A St Matthew's Lutheran

12 Q Does it have a steeple?

13 A Very elegant steeple, yes

14 Q Is it considered one of the finest in the
15 City?

16 A Yes

17 Q Mr Gurley, is or was the rezoning to
18 extend the 3X height district in the public
19 interest?

20 A Absolutely not When you extend the 3X --
21 again, the 3X goes with the land in perpetuity If
22 you have 3X zoning extended, then you forever are
23 faced with a threat of a 105-foot tall building

24 Q Was the extension of 3X zoning to the
25 east, for the remainder of this parcel, in

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1 conformity with the Downtown Plan or not?

2 A No It was opposed to the recommendations
3 of the Downtown Plan

4 Q How so?

5 A The Downtown Plan recommended that heights
6 be lowered, the 3X be eliminated, and this plan
7 expands the 3X District which was -- characterizes
8 over permissive

9 Q I want to go back, just do a little
10 housekeeping There are a couple of exhibits I
11 forgot to put in

12 Are you familiar with the easements
13 on 404 and 409 King Street?

14 A 409 and 417

15 Q 409 and 417 I'm sorry

16 MR DOMIN We'll stipulate all those in evidence
17 (Whereupon Plaintiffs Exhibits 14 and 15 are marked in
18 evidence)

19 MR WALKER Your Honor, Exhibit 14 is the
20 conservation easement facade easements for 409 King
21 Street, and Exhibit 15 is the conservation
22 easement facade easement for 417 King Street?

23 THE COURT Okay Thank you

24 MR WALKER Do you have any objection to putting
25 in the Society's position-statement letter admitted -

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1 presented to City Council 2007?

2 MR DOMIN No objection

3 MS CANTWELL No

4 (Whereupon Plaintiff's Exhibit 16 is marked in evidence)

5 Q Plaintiffs 16, in evidence, is your letter
6 June 19, 2007 to the Mayor Did you present the
7 Society's position to City Council in that letter
8 with respect to the first review of the rezoning of
9 this property?

10 A Yes

11 Q All right Does it contain the objection
12 to the Society - excuse me, that the Society has --
13 Does it contain the objections of the Society as you
14 have elaborated on them here today?

15 A Yes

16 MR WALKER Let me ask opposing counsel, do you
17 have any objection to our putting in the record -- we
18 don't have to do it through this witness -- the BAR
19 Minutes when conceptual approval was granted, Planning
20 Commission Minutes from July, on the zoning change, and
21 then the last City Council meeting in August when the
22 zoning change was approved?

23 MR DOMIN No objection

24 MS CANTWELL No objection The August meeting
25 of Council we were going to put in as well, so I don't

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1 know if you want -- so we don't double up

2 MR WALKER Why don't we get together and make
3 sure those are all in, but we don't have to put those
4 in

5 THE COURT Let's take a few minutes before cross

6 MR WALKER I just have one question and I'm
7 finished

8 Q Mr Gurley, who authorized these two suits
9 that we're here in court on today?

10 A Preservation Society Board of Directors

11 Q Thank you

12 THE COURT Okay Very good Let's take about
13 ten or fifteen minutes

14 (Recess)

15 (Whereupon Plaintiff's Exhibits 16, 17, 18, 19, and 20 are
16 marked in evidence)

17 THE COURT Plaintiff's Exhibit 16, 17, 18, 19, 20
18 in evidence without objection Okay

19 MR WALKER I just wanted to check with the court
20 reporter I heard that maybe Plaintiff's Exhibit 16
21 was not moved into evidence I understand it's without
22 objection If I didn't move it into evidence I meant
23 to do it

24 THE COURT I'll assume they're all in evidence
25 unless they are objected to

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1 MR WALKER Thank you, Your Honor

2 THE COURT Okay Mr Gurley, are you ready to
3 proceed?

4 CROSS EXAMINATION BY MR PRITCHARD

5 Q Mr Gurley, you know Celeste and Charles
6 Patrick, don't you?

7 A Yes

8 Q And didn't they revitalize the buildings
9 on upper King Street?

10 A Yes, they did

11 Q The American Theater and the Fish
12 Restaurant is there and some others, correct?

13 A Yes

14 Q And in 2002 didn't they receive an award
15 from the National Trust for revitalizing those
16 buildings?

17 A Yes, they did, and it was the only such
18 award ever awarded in Charleston It was extremely
19 significant, and really points out that this area
20 had been revitalized before this project

21 Q Thank you No further questions

22 CROSS EXAMINATION BY MS CANTWELL

23 THE COURT What was the award?

24 MR PRITCHARD National Trust of Historic
25 Preservation

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1 THE COURT Got you

2 Q Mr Gurley, I'm Frances Cantwell I'm
3 here for Library Associates Our paths have crossed
4 many, many times at various and sundry public
5 meetings For the record, as part of your job you
6 have to go to all these meetings, right?

7 A Part of the record, yes, I do

8 Q I'm glad you're not doing it solely
9 voluntarily You were testifying earlier about the
10 Preservation Plan, I believe it was, that was
11 adopted in 1974, 35 years ago That plan had
12 recommendations, did it not, for various and sundry
13 elements of land use and development in the
14 Charleston Peninsula, correct?

15 A Yes

16 Q And they were recommendations for City
17 Council to chew on and ponder over, correct?

18 A Yes

19 Q And City Council adopted the plan, did it
20 not?

21 A Yes

22 Q And then the next step when you have a
23 plan, it provides a big picture, if you will, of
24 what you would like your community to look like
25 Would you agree with that?

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1 A I would

2 Q So City Council adopts the concepts that
3 are embraced in the Preservation Plan in 1974 and
4 then the next step would be to actually implement
5 that plan and that's done by way of ordinance, is it
6 not?

7 A That's correct

8 Q And so as it pertains to height, you
9 mentioned earlier that the Plan recommended that 3X
10 be revisited, and that the Plan recommended for this
11 portion of King Street that we're talking about near
12 Marion Square, that the height be limited to 50
13 feet Is that correct?

14 A That's correct

15 Q Now, when City Council implemented the
16 Plan they did so by way of height districts, did
17 they not?

18 A Yes

19 Q And City Council has the ultimate call on
20 that issue, do they not?

21 A That's correct

22 Q And they do that by way of legislative
23 enactment?

24 A They vote, if that's legislative

25 Q They pass an ordinance?

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1 A Yes

2 Q I'm going to show you, if I can find it,
3 Defendant's Exhibit 5, and I would ask you to review
4 that and recommend to you that it is a hand-held
5 version of Plaintiff's Exhibit 3 which is a mounted
6 version of the proposed height districts for upper
7 Meeting Street Do you agree with that?

8 A Yes

9 Q So what you're holding in your hand is
10 essentially a hand held version of Plaintiff's
11 Exhibit Number 3?

12 A Yes

13 Q And this height district, City Council
14 chose to follow some recommendations of the 1974
15 Preservation Plan, and some recommendations it chose
16 not to follow, correct?

17 A Yes

18 Q And specifically where Marion Square is
19 not zoned for 50 feet in height it's zoned -- most
20 of it is zoned for 55 in height as a ceiling and 30
21 feet as a floor, correct?

22 A Correct

23 Q And 404 King Street, which sits really on
24 Tobacco(phonetic) Street but it looks like it
25 borders on Marion Square, because Tobacco Street is

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1 incorporated as part of the park But you're aware
2 that Tobacco Street runs on an east-west access from
3 essentially King Street to Meeting?

4 A Yes

5 Q And City Council, when it was deciding on
6 what heights were appropriate in various parts of
7 the City, made a decision to include the vast
8 majority of what -- 404 King Street and what we know
9 as the 3X District?

10 A Correct

11 Q And right across the street from 404 King
12 Street is a city block bounded by Vanderhorst, King,
13 Calhoun and St Phillip Do you agree with that?

14 A I agree

15 Q And the majority - in fact, all of the
16 frontage of the properties -- excuse me, all the
17 entirety of the properties that front on King Street
18 between the block of Vanderhorst and Calhoun, the
19 entire parcel is zoned 3X, correct?

20 A Correct

21 Q And then there is 3X along parcels that
22 front on St Phillip Street The difference being
23 the rear of those properties are in the 3X District
24 instead of the entire property, is that correct?

25 A Split zone, yes

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1 Q You mentioned earlier that there was
2 nothing unusual about split zoning, that there was a
3 number of properties that have split zoning This
4 map, Plaintiff's Exhibit 3 and Defendant's 5 and
5 Defendant's 3 and Defendant's 5, whatever that is,
6 5, shows that there are split zonings, correct?

7 A Correct

8 Q But how those split zonings apply to 404
9 King Street is different than it applies to the
10 other properties in the vicinity, wouldn't you
11 agree?

12 A It's worse It's inappropriate

13 Q City Council made a decision to -- for 404
14 King street to have the 3X height district along the
15 frontage with the lower height to the rear, correct?

16 A Correct

17 Q That is the total opposite of what you
18 would normally see on property that has split height
19 district?

20 A Correct

21 Q Normally you would have the height stepped
22 back off the street?

23 A Right

24 Q That didn't happen at 404 King Street?

25 A Correct

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1 Q Now, across the street from 404 King
2 Street -- I'll call it the church properties,
3 includes Francis Marion Hotel, back up to
4 Vanderhorst Street -- there is no split district, is
5 there?

6 A No

7 Q In fact, all of the entirety of those
8 properties are zoned for 3X, is that not right?

9 A That's correct

10 Q So when City Council moved, if you will,
11 or you call it extended the height district, but
12 they moved the line, the 3X line on 404 King Street,
13 they essentially conformed it, made the entire site
14 subject to the 3X District, correct?

15 A Yes

16 Q And that's consistent with what is
17 happening directly across the street at the Lutheran
18 Church properties, correct?

19 A Yes

20 Q As well as what's happening south of those
21 properties all the way to Calhoun Street?

22 A Correct

23 Q The building - are you familiar with the
24 design that has been proffered to the BAR and to the
25 BZA with respect to the hotel at 404 King Street?

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1 A Yes

2 Q So you're aware that as that property
3 abuts the Citadel and the frontage along King Street
4 that the properties are roughly the same in height,
5 right?

6 A Say that again

7 Q The proposed design of the hotel, the
8 first -- the frontage along King Street and the
9 frontage as it abuts the Citadel is no higher than
10 what the Old Citadel Building is now?

11 A I think it's a little higher at the
12 street Is it 63 feet?

13 Q We were talking about the Citadel being 60
14 feet 60, 63 feet?

15 A Yes

16 Q Maybe three feet higher So it is
17 consistent with the height of the Citadel as it
18 abuts the Citadel?

19 A At that point

20 Q Then it steps back, before you get the
21 higher elevations, up to the 105 foot height?

22 A I don't have the plans before me, so
23 you're asking me to recall from memory

24 Q I am If you don't remember, that's okay

25 A It does step back, but I don't have -- you

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1 haven't provided me with the plans

2 Q My point being or a point being is that
3 the height of this building is stepped back from
4 King Street

5 A Yes, a bit

6 Q And it's stepped back from the Old
7 Citadel, correct?

8 A Insufficiently, but -

9 Q Not asking you if it's sufficient In
10 your opinion it's insufficient?

11 A Correct

12 Q But it is stepped back?

13 A Yes

14 Q And that is consistent with the pattern of
15 development in properties that have split districts
16 The bulk of the height is to the interior of the
17 site as opposed to being on the edge, isn't that
18 right?

19 A That's right, but the extension of the 3X
20 would allow this project to go away and another
21 completely different project to be proposed, so the
22 difference between a height variance and extension
23 of the 3X, you're describing the design of this
24 particular building, could easily go away and we're
25 left with an extended 3X that may create a

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1 completely different type building

2 Q That's an interesting question because in
3 Charleston one board doesn't have the final say,
4 does it?

5 A Depending on what part of the application,
6 the BZA has its role, the BAR has its role

7 Q The BZA has a role, the Planning
8 Commission sometimes has a role, the BAR has a role,
9 and when it comes down to the final envelope of a
10 building as to its height, scale and mass, as to its
11 materials, as to its design, as to its details,
12 that falls within the bailiwick of the Board of
13 Architectural Review, doesn't it?

14 A Yes

15 Q So the fear you have of a building being
16 105 feet high extending across the entirety of the
17 property at 404 King Street would only happen if the
18 BAR were to approve something like that, correct?

19 A That's correct

20 Q And have you ever known the BAR to allow
21 something like that to occur in Charleston?

22 A We've never had the 3X extended in that
23 property I've known the BAR to allow projects that
24 would bump the envelope of the zoning district but
25 this expansion at this site is unprecedented

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1 Q You're not answering my question The
2 design the BAR looked at and the design they
3 conceptually signed off on ultimately, preliminarily
4 approved, did not allow for the extension of the
5 105 foot height cross the entirety of the site

6 A That's correct

7 Q Mr Walker took you through a number of
8 various public processes that this project has been
9 through beginning with the special exception in
10 2004 And at that hearing the inquiry before the
11 Board was whether or not an accomodation use of an
12 intensity that would allow 184 rooms was
13 permissible, should be allowed?

14 A Correct

15 Q The preservation Society opposed it?

16 A Correct

17 Q Other people appeared and supported it?

18 A Yes

19 Q And the Board ultimately disagreed with
20 your position?

21 A Yes

22 Q Then in 2005 the project came before the
23 BAR for conceptual approval And there was a
24 proposed height, scale, mass of size showing eight
25 stories, 105 feet in certain portions of the site

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1 The Preservation Society opposed it, correct?

2 A Correct

3 Q Other members of the public supported it,
4 correct?

5 A And other members of the public opposed
6 it

7 Q Members of the public supported it,
8 correct?

9 A Correct

10 Q The BAR ultimately disagreed with your
11 opinion?

12 A Correct

13 Q Then we came to the variance in January of
14 2007 where Library Associates brought to the Board
15 of Zoning Appeals a project that had been given
16 conceptual approval by the BAR and asked permission
17 to be able to distribute a portion of it's 105 foot
18 height allowance to the middle of the site, correct?

19 A Correct

20 Q It wasn't introducing a height that didn't
21 already exist It was just moving the height to the
22 interior of the site, correct?

23 A Correct

24 Q The Preservation Society opposed it?

25 A Correct

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1 Q Some members of the public supported the
2 request, correct?

3 A Correct And opposed

4 Q And the Board of Zoning Appeals disagreed
5 with your position, correct?

6 A Correct

7 Q Then we get to the rezoning in the summer
8 of 2007 Here is when City Council, before the
9 proposal before the City Council, was to subject the
10 entire site of 404 King Street under one height
11 district, that being the 3X Follow me?

12 A Yes

13 Q And there were people who supported that
14 request?

15 A Correct

16 Q And there were people who opposed it?

17 A Correct

18 Q And your Preservation Society opposed it?

19 A That's correct

20 Q And City Council debated the issue, did
21 they not?

22 A They did

23 Q And City Council, after its debate, made a
24 legislative determination to put the entire site
25 under one height district, correct?

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1 A Correct

2 Q They disagreed with your position,
3 correct?

4 A Yes

5 Q Now, you mentioned that you thought that
6 the part of the presentation that City staff made,
7 with respect to the rezoning, was potentially flawed
8 because it didn't present an analysis of a smaller
9 hotel at the site Now, did the Preservation
10 Society present such an analysis?

11 A No

12 Q Could you have?

13 A Given time we could have, I suppose

14 Q Did any of the opponents present any
15 analysis of the economic impacts this project would
16 have?

17 A Not to my knowledge

18 Q To your knowledge was there anything to
19 prevent that?

20 A Not to my knowledge, no

21 Q It's your position that upper King Street
22 doesn't need any economic help, correct?

23 A My position is that upper King Street is
24 in the process of being revitalized Upper King
25 Street is not the blighted area that was presented

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1 by the applicant, that the economic reasons
2 established by the applicant for this hotel was very
3 much over stated, that upper King Street is doing
4 very well, being revitalized, very prosperous

5 Q You say the economic impacts are over
6 stated but you have no basis of knowing how they
7 were over stated What is your basis for attacking
8 those numbers?

9 A Because the City is offering no basis for
10 presenting those numbers

11 Q I see Okay You were at the meeting?

12 A Yes

13 Q You heard the presentation?

14 A Yes

15 Q Okay I don't know if this is fair to ask
16 you, since you weren't here, but were you aware that
17 the Preservation Society opposed the Charleston
18 Center development?

19 A Oh, yes, I am

20 Q And that Center hasn't destroyed the
21 Downtown Plan, has it?

22 A It destroys some buildings of the Downtown
23 Plan

24 Q You mean where it now sits?

25 A Yes

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1 Q But the -- not going to talk about the
2 economic spin off You would agree with me that has
3 revitalized King Street economically? The
4 Charleston Center Hotel plays a major role in
5 economic rebirth?

6 A I think it played a role

7 Q Also did it not -- resulted in a lot of
8 renovation of old historic buildings in the
9 vicinity?

10 A It did It also created destruction of
11 some, but it did create the renovation

12 Q Are you talking about the old Belk's
13 building they took down, Penny's building?

14 A Also talking about the rear of the
15 buildings to accommodate the garage Some of the
16 buildings in that area were demolished

17 Q But the front 40 feet of virtually every
18 one of them was saved?

19 A Yes, but half the buildings were taken
20 out

21 Q They are still in use, are they not?

22 A Yes

23 Q The facades have been beautifully
24 restored?

25 A For the most part

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1 Q They are much prettier than they were
2 before the project was built?

3 A From pictures I've seen, yes

4 Q Now, you were at the meeting of City
5 Council in August of 2007 where there was a public
6 hearing on extending the 3X height district across
7 the entirety of 404 King Street?

8 A Yes

9 Q And I'm going to -- if you want to review
10 them I'm showing what's been marked as Defendant's
11 Exhibit 3 which are minutes of those meetings --
12 excuse me, the minutes of that meeting

13 Now, people spoke in favor of the
14 rezoning, and people spoke against the rezoning Do
15 you recall that?

16 A Yes, I do

17 Q And do you recall -- do you know Benjie
18 Ransford(phonetic), do you remember Ms Ransford
19 speaking?

20 A I remember her being there I don't
21 remember specific comments

22 Q She was president of her neighborhood
23 association?

24 A Yes

25 Q And she spoke in favor of the rezoning?

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1 A I believe she did

2 Q She lives in the neighborhood right by
3 this project?

4 A Yes

5 Q Mr Domin used the term lunatic She's
6 not a fringe person, is she?

7 A I think she falls within the majority of
8 the population, yes No, I wouldn't consider her --

9 Q She's a reasonable person?

10 A I wouldn't argue with your assessment

11 Q Okay What about Patterson Smith? You
12 know Mr Smith?

13 A Slightly, yes

14 Q He is a business man, owns property right
15 around the corner from 404 King Street?

16 A Yes

17 Q He is the Chairman of the Upper King
18 Street Revitalization Committee?

19 A I believe he held that title, yes

20 Q Also I think he's chairman of Carta Were
21 you aware of that?

22 A Seems to me I remember he was

23 Q So he is an active member of the
24 community, participates in what's going on, fair to
25 say?

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1 A Fair to say

2 Q Reasonable man, business man?

3 A Yes

4 Q He supported this project, did he not?

5 A As I recall

6 Q He supported extending the height across

7 the entire site?

8 A As I recall he did, yes I'll take your

9 word for it

10 Q How about Ms Farley Clark?

11 A I know who she is

12 Q She's with the Committee to Save The City?

13 A Yes

14 Q That's a grass roots citizen organization?

15 A It's a group of citizens, yes

16 Q And it is like the Preservation Society in

17 the sense that it is open to the public and it has

18 members and --

19 A I don't know it's organizational

20 structure, but I wouldn't say it's like the

21 Preservation Society

22 Q I wouldn't say it's like it in the sense I

23 don't think it's a 501(c) I don't think it's

24 probably been around as long as the Preservation

25 Society, but it is a community group?

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1 A It is a group of people

2 Q And they have an interest in development
3 of the Downtown Plan, correct?

4 A Correct

5 Q And with respect to Marion Square and with
6 respect to the extension of the height district in
7 the matter before City Council, Ms Clark appeared
8 on behalf of that citizen group and supported the
9 project, correct?

10 A I believe that is correct

11 Q Let's talk about -- so my point is there
12 were people known to you that you would cross paths
13 with from time to time in your business that
14 disagreed with your position on this project and on
15 this issue of rezoning?

16 A Yes

17 Q City Council heard from you?

18 A Yes

19 Q And they heard from Historic Charleston
20 Foundation?

21 A Yes

22 Q They heard from a number of people who
23 were opposed to the rezoning, correct?

24 A Correct

25 Q And debated the issue, correct?

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1 A Correct

2 Q And determined that the rezoning was
3 appropriate?

4 A Yes, they approved the rezoning

5 Q Now, you heard Mayor Riley speak at that
6 counsel meeting, did you not?

7 A Yes, I did

8 Q And it's reflected in the minutes, and you
9 can refer if you want but he set forth reasons why
10 the rezoning should be considered and supported, did
11 he not?

12 A I believe he did I don't remember his
13 specific comments but I believe he did

14 Q Mayor Riley has been at the forefront of
15 running this City for the last 30 plus years,
16 correct?

17 A Correct

18 Q He has been at the forefront of
19 preservation efforts, has he not?

20 A Yes, he has

21 Q He is not on the fringe when it comes to
22 what's best for downtown, what's best for economic
23 development, what's best for historic preservation,
24 is he?

25 A I wouldn't consider him a fringe person,

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1 no

2 Q So he is a pretty reasonable guy, wouldn't
3 you think?

4 A Yes

5 Q He disagreed with your position on this
6 extension of the 3X District across the site?

7 A Yes

8 Q So wouldn't you agree with me, Mr Gurley,
9 that, when all is said and done, what you had was -
10 which happens often in Charleston, is you had an
11 issue that was very important to the community, that
12 an opportunity was provided by the City process to
13 allow you to air your opinions and to allow people
14 who disagreed with you to air their opinions?

15 A Yes

16 Q And that the City Council, to a person,
17 made remarks with respect to this site, 404 King
18 Street, with respect to economic revitalization of
19 upper King Street and with respect to historic
20 preservation, did they not?

21 A Yes

22 Q And I believe it was one of the
23 councilmen, I want to say it was Ms Evans, who
24 talked about striking a balance between the two Do
25 you recall that?

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1 A No, but I'll --

2 Q Don't you think that it is the
3 responsibility in any endeavor, but particularly
4 when you're talking about a downtown, vibrant city,
5 and not a museum, that you have to have a balance
6 of you have to be careful of what you do to make
7 sure you preserve your environment but at the same
8 time do what you can to keep the city active and
9 vibrant, and property taxes as low as they can
10 feasibly be, so this could be a community where
11 people live?

12 A You're getting into a lot of the economic
13 development issues I would agree that reasonable
14 people can disagree I believe this decision made
15 by City Council, even though reasonable people, is
16 wrong

17 Q But you believe reasonable people could
18 disagree about that?

19 A I believe that reasonable people can
20 disagree I believe one group of reasonable people
21 certainly can be wrong on a particular issue I
22 think the reasonable people you mention in this
23 matter were wrong

24 Q But you do think that there is room for
25 disagreement among reasonable people?

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1 A Yes

2 Q I'm not trying to get you to say that you
3 agree with what they said I know you don't I
4 don't ever expect you to agree with what City
5 Council did The point I'm trying to make is they
6 heard discussion from other people that counter
7 balances sort of what your position was?

8 A Yes, there were two sides presented

9 MS CANTWELL I don't think I have anything else
10 Thank you

11 CROSS EXAMINATION BY MR DOMIN

12 Q Very briefly When City Council rolled
13 back the 3X height district in a lot of areas in
14 2006 they did keep the 3X height district on what we
15 would describe as the west side of King Street
16 starting off with the Francis Marion Hotel and
17 extending on from the church, is that correct?

18 A Yes

19 Q And you did not challenge the organization
20 and your membership did not challenge that decision
21 at that time, is that correct?

22 A Yes, we did We asked several times why
23 this wasn't included We didn't understand why this
24 was allowed to stand as it was and why the 3X was
25 allowed to stand We didn't have the opportunity

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1 because it never was on an agenda, but I spoke up
2 several times

3 Q To clarify my question You never
4 instituted any legal challenge to the 3X zoning
5 extending in that area over, quite frankly, over the
6 area that's shown in yellow on Plaintiff's Exhibit
7 Number 3? No lawsuit or challenge was filed in 2006
8 when that was done?

9 A No

10 Q This is not a belated attempt to undue the
11 failure to institute some kind of a lawsuit Your
12 challenge today is only to the extension of this 3X
13 zoning over the remaining 40% of this property, is
14 that correct?

15 A Yes

16 Q Your organization is ready to accept and
17 deal with the fact that 3X site zoning already
18 exists and is not being challenged in the area
19 that's represented on Plaintiff's Exhibit Number 3
20 in yellow, is that correct?

21 A We're not here to challenge it today,
22 but -

23 Q You didn't institute any timely challenge
24 back then either, is that correct?

25 A No, our focus was on the project, the

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1 hotel project, yes

2 Q Are you familiar with the Pavilion Hotel
3 project?

4 A Market Pavilion Hotel, yes

5 Q And you had mentioned design awards, is
6 that correct?

7 A That's correct

8 Q Are you familiar with the fact that that
9 also did receive a Carolopolis?

10 A Carolopolis, yes

11 Q Yes Do you know the history of that site
12 as far as the height zoning?

13 A I think that they were -- they may have
14 needed a bit of a variance I think they were
15 pretty close

16 Q Would it surprise you to learn that, like
17 this site, there was a variance that was granted for
18 the height for that hotel and, thereafter, there was
19 a legal challenge to that variance and then there
20 was a rezoning of that piece of property?

21 A Would that surprise me?

22 Q Would that surprise you?

23 A No, it wouldn't particularly surprise me,
24 no

25 MR DOMIN No further questions

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1 REDIRECT EXAMINATION BY MR WALKER

2 MR WALKER Were you aware that there were seven
3 parcels involved in that later rezoning over at the
4 Market Pavilion?

5 A No

6 Q Now, could this project be realized
7 without this 3X zoning change?

8 A Yes

9 Q Do you have the minutes of the Council
10 meeting in front of you from August 21st, 2007 that
11 were marked as Defendant's Exhibit 3?

12 A Yes

13 Q Would you please turn to page 13?

14 A I have it

15 Q After all this discussion pro and con do
16 you see where there is a reference to Councilman
17 Tinkler's comments in the third paragraph down?

18 A Yes

19 Q Would you tell us what his understanding
20 was as stated in the minutes? Read that, starting
21 with Councilman Tinkler?

22 A Councilmember Tinkler stated the reason
23 they are considering the rezoning is to strengthen
24 the legal position of the City, the City having made
25 a judgment that this particular design on this

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1 particular site is the right thing to do

2 Q When he's referring to the legal position,
3 what's he referring to?

4 A He's referring to our lawsuit about the
5 height variance, that this would make it go away

6 Q There was some talk about the setback
7 I've got the plans that were submitted to the BZA
8 both to get, I believe -- one was February '06,
9 2006, and one was June '07, 2007 I think these
10 have been sent up as part of the record, have they
11 not?

12 MR DOMIN They look like they're the same

13 MR WALKER I won't admit them again

14 Q Did the design of the hotel change? I've
15 got, in my left hand right here the February '06
16 drawings Do you see the rendition on the front?

17 A Yes

18 Q And do you see a year later, do you
19 consider that this is the same design a year later?

20 A No, this is very different

21 Q I'm going to put down the '06 and refer to
22 the '07 Was there, within these schematics that
23 were submitted for the height variance, a rendition
24 of the hotel, the different elevations including the
25 elevations with respect to the Old Citadel?

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1 of this First I want you to look at the drawing
2 that shows the side of the building on the east side
3 next to the Citadel Do you see where that comes
4 in, right here?

5 A Yes

6 Q Now, I want you to turn to what's marked
7 in these drawings, I believe, as east elevation
8 And does it show where the 55 foot line is?

9 A Yes

10 Q Right there?

11 A Yes

12 Q Is that the approximate location of where
13 the top of the Old Citadel Building comes in?

14 A Approximately, yes Somewhere right in
15 there

16 MR WALKER Your Honor, I've changed my mind I
17 would like to mark this as a separate exhibit and admit
18 it Any objection?

19 MS CANTWELL No objection

20 MR DOMIN No objection

21 (Whereupon Plaintiff's Exhibit 22 is marked in evidence)

22 MR WALKER That's all we have on redirect

23 THE COURT Okay

24 MS CANTWELL Very briefly

25 BY MS CANTWELL

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1 A Yes

2 Q There was some talk about the setback I
3 would like you to show His Honor the setback and
4 have you comment on whether that is an effective
5 setback or not Hold it up so he can see it
6 (Witness indicates)

7 A Your Honor, referring to the setback here
8 and the setback here

9 Q Stepback, I meant

10 A Both these setbacks are miniscule
11 Particularly when you look at it in terms of -- for
12 two reasons Look in terms of King Street, you
13 never get to the point where you can have any
14 appreciation of the change because your sight
15 line - so it's a solid mass It does no good
16 When you view it from this position, this is such an
17 insignificant little setback that this mass, which
18 I believe is viewable for an eighth of a mile or
19 more, is still extremely overbearing, these
20 setbacks are just -- they're just laughably
21 inadequate

22 Q Does it show the building in comparison to
23 the Old Citadel Building?

24 A Yes, it does

25 Q I'm going to have you look at another page

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1 Q With relation to the most recent exhibit
2 that was introduced, the design that is shown on
3 exhibit - actually this is December of '06 The
4 design of the project as we know it, with it being
5 stepped back from the Citadel in the manner it is,
6 you described the stepbacks as, I think, laughably
7 inadequate, is that correct?

8 A Yes

9 Q But that design and that building envelope
10 was approved by the BAR, was it not?

11 A Yes

12 Q And the BAR consists of design
13 professionals, correct?

14 A Yes

15 Q Preservation professionals?

16 A Yes

17 Q And I believe there is even a lawyer on
18 the Board, is there not?

19 A Probably, yes

20 Q And still Council also was privy to, if
21 not this set of plans, they were privy to the final
22 set of plans that was presented to the Board of
23 Zoning Appeals in January of '07 which showed the
24 project being set back from the Citadel, the higher
25 portion of the project being set back from the

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1 Citadel and from King Street, correct?

2 A I don't know what they were privileged to,
3 but I'm assuming City Council saw it

4 Q Certainly they're public documents, are
5 they not?

6 A Yes

7 Q The concept of that design was affirmed by
8 City Council when it allowed for the zoning on the
9 property so that it could accomodate that design,
10 correct?

11 A The Board of Architectural Review is
12 charged to approve designs I'm not sure that you
13 can say that City Council approved that design I'm
14 not clear on that

15 Q It certainly made a decision to allow for
16 such a design to occur by changing the height to go
17 across the site?

18 A Yes

19 Q So once again we have design professionals
20 on one hand disagreeing with your group's idea of
21 what the appropriate design should be on the other,
22 correct?

23 A Yes We also have design professionals
24 working with us as well

25 Q So you have one set of design

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1 professionals disagreeing with another set of design

2 professionals Neither one of them are

3 unreasonable They just disagree, correct?

4 A One of them is wrong but neither is

5 unreasonable

6 Q Okay Thank you

7 BY MR PRITCHARD

8 MR PRITCHARD Your Honor, a couple of questions

9 Q You've been to every BAR meeting in which
10 this project was considered?

11 A Yes

12 Q And at any BAR meeting was there ever a
13 design exhibit that complied with the zoning, height
14 zoning ordinance?

15 A No

16 Q So every plan the BAR has ever considered
17 was always in violation of the zoning ordinance?

18 A Yes

19 Q So it never had before it an opportunity
20 to consider one that complied?

21 A That's correct

22 MR PRITCHARD No further questions

23 BY MS CANTWELL

24 Q Mr Gurley, would the Preservation Society
25 have supported a building that had 105 feet of mass

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1 along King Street dropping down to a 55 foot
2 elevation on the back part of 404 King?

3 A No, we wouldn't have approved it that way,
4 but that's not what had to be built But, again,
5 it's the armchair thing Mr Waring talked about
6 which is sort of, you know, is not a reasonable
7 approach to that design anyway But -

8 'Q The armchair design is what the former
9 split height districts -- that's the building
10 envelope it produced, was it not?

11 A Yes

12 Q That's an unreasonable building envelope,
13 wasn't it?

14 A Yes

15 Q So even if you had come in -

16 A You could design within that That's not
17 an unreasonable -- if you maximize it, it's
18 unreasonable, but if you design within the 3X
19 portion of the site you don't have to go up as we
20 spoke earlier You could have a 55 foot design with
21 some variations in mass, so that volume could have
22 produced a good design -- could have produced good
23 design if you maximize the volume, but within that
24 volume, yes, you could have created a good --

25 Q You could not have created a building that

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1 would allow you to avail yourself of what zoning
2 gives you with 3X Under the split district you
3 could not have availed yourself of being able to
4 utilize the 3X height district and come up with a
5 building that would have been acceptable to anyone,
6 could you?

7 A I'm not quite sure the point you're
8 making, but you could have used that envelope that
9 was 3X and you could have created a building design
10 You would have gone 50 feet and stepped down to
11 the as you approach King Street, but that volume
12 that's allowed by 3X, the top part of that 50 feet
13 of that volume would not have been appropriate to be
14 used, but you could have done something within that
15 volume

16 Q My point is the 3X District was there
17 And what I'm hearing you saying is that it would
18 never have been appropriate to design a building
19 that would have exceeded the 55 foot height that was
20 allowed on the back portion of the site?

21 A The 55/30 on the back portion of the site,
22 we felt you could do a reasonable building within
23 that 55/30 of the site

24 Q So the 3X that was on the front portion of
25 the site in your mind becomes irrelevant and

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1 untenable because to use it or use any portion of it
2 you come up with a bad design

3 A Not to use any portion of it

4 Q I'm not talking about the first 55 feet

5 A You could have used 3X, you could have
6 used 50 feet of the portion that was allowed in the
7 3X, so not any portion of it

8 Q Anything above the 55 feet?

9 A That's an approximate height

10 Q Anything above 55 feet on that site you
11 say would produce an unacceptable design, correct?

12 A I think we could - we were never
13 presented with an alternative design, but I think we
14 would have been willing to look at something a
15 little taller than that I don't -- I'm not saying
16 a design -- lock in what our opinion would be on a
17 hypothetical design But we think that the volume
18 of 55 feet in that neighborhood is a reasonable
19 approach to this site

20 Q And so, in your opinion, it's unreasonable
21 for the owner of the site or for the City to look at
22 a design which includes height that the zoning
23 permits?

24 A I think it's unreasonable to look at a
25 design that creates a building that's 105-foot tall

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Robert Gurley - Examination by Court

1 which is in that district

2 Q No matter how the height is distributed
3 across the site?

4 A Not if it's 105 feet, no

5 Q Thank you

6 THE COURT Mr Gurley, let me ask you a couple of
7 questions

8 EXAMINATION BY THE COURT

9 A Yes, sir

10 Q The split zone District that runs right
11 down the spine of King Street and Meeting, that's
12 designed to encourage setback Is that your
13 understanding?

14 A Your Honor, the split zoning is to make
15 sure that as the buildings approach King Street that
16 first hundred feet, that the height of those
17 buildings is restricted to be respectful and
18 subordinate to the historic streetscape That's why
19 the height is lower at the street Because 18th and
20 19th Century buildings were three, four-story
21 buildings

22 Q That accounts why they're higher in the
23 center than what appears in purple on that diagram
24 When you come down and it turns to a teal green
25 color where the yellow R-3 is Is that fair to say?

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1 It changes, clearly it changes, but the height, the
2 split zoning height is in the middle of the block
3 between King Street and Meeting running north from
4 Marion Square?

5 A Yes, Your Honor If you feel height is
6 appropriate then you would put it in the center of
7 the block where it's set back and not toward the
8 street

9 THE COURT Okay So to summarize your testimony,
10 the objection to the rezoning is the application of the
11 R-3 zoning category to the entire lot upon which the
12 proposed hotel sits, is that right?

13 THE WITNESS Yes

14 THE COURT Then your objection to the variance
15 has to do with the size, the shape, and the scale, the
16 mass of the building, is that fair?

17 THE WITNESS The height variance would allow 105
18 feet, yes We felt that's inappropriate

19 THE COURT Okay

20 Did you have anything further?

21 MR WALKER Nothing further from the Plaintiff,
22 Your Honor

23 THE COURT All right Very good Anything in
24 response?

25 Mr Gurley, thank you You may step down

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1 THE WITNESS Thank you, Your Honor

2 THE COURT Are the Plaintiffs ready to press on?

3 MR PRITCHARD I have one brief witness, then we

4 can decide after that what to do We would call

5 Winslow Hastie

6 (Winslow Warren Hastie, duly sworn, testifies as follows)

7 DIRECT EXAMINATION BY MR PRITCHARD

8 Q Where are you employed?

9 A Historic Charleston Foundation

10 Q And what is your position with the

11 Historic Charleston Foundation?

12 A I'm Director of Preservation

13 Q And as Director of Preservation what do

14 you do?

15 A I oversee our Preservation Department, I
16 have four staff people beneath me I manage We have
17 an easements program, Easement and Covenant Program,
18 a Revolving Fund Program and our general advocacy
19 and special research efforts

20 Q So as the Director of Preservation the
21 Easement Program falls within your department, so to
22 speak?

23 A Yes, it does

24 Q I'll hand you what's marked as Plaintiff's
25 Exhibit Number 21 and ask if you recognize that?

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1 A I do

2 Q What is it?

3 A It's a map from the Historic Charleston
4 Foundation website showing all of the easement
5 properties on the Peninsula of Charleston dating
6 from about 2004

7 Q And how are the easement properties
8 denoted on that map?

9 A The properties themselves are in a dark
10 red color

11 Q Does it also show covenant property?

12 A Yes

13 Q How are those denoted?

14 A They are in a kind of teal blue color

15 Q Has the Foundation acquired additional
16 easement properties since the publication of that
17 map?

18 A Yes, we have

19 Q Do you know approximately how many?

20 A I would guess between 35 and 40 properties
21 since 2004

22 Q Any covenant properties acquired since
23 that map was published?

24 A Yes

25 Q How many?

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1 A Three or four probably

2 MR PRITCHARD I have no further questions of
3 this witness

4 MR DOMIN Nothing

5 THE COURT Is that document in evidence?

6 MS CANTWELL If you would forgive me, I didn't
7 move to put in the two exhibits I was questioning
8 Mr Gurley from I think they were Defendant's
9 Exhibits 3 and 5

10 THE COURT These maps? What's the number on this
11 one?

12 MR PRITCHARD 21

13 (Whereupon Defendant's Exhibits 3 and 5 are marked in
14 evidence)

15 MR WALKER No objection

16 THE COURT Very good Any questions at all?

17 MS CANTWELL No questions

18 THE COURT Mr Hastie, you may step down

19 MR WALKER Your Honor, at this time we were
20 going to publish from the Answers to Interrogatories
21 just a single interrogatory and a single answer This
22 is Interrogatories served on the City Defendants
23 Interrogatory 19 of Plaintiff's Interrogatories
24 Please state, given the height variance granted by the
25 BZA, whether Library Associates, LLC could have legally

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1 proceeded with the plans for the proposed hotel
2 submitted in its rezoning application without the
3 rezoning of the property

4 The answer to 19 It is the position of the City
5 of Charleston that the height variance was legally
6 granted Accordingly Library Associates could have
7 legally proceeded with the plans without a rezoning,
8 but understandably the Plaintiff's intended legal
9 challenge to the height variance created and impediment
10 to progress Individual City Council members could
11 have reasonably taken the position that a rezoning was
12 appropriate under the circumstances and that legal
13 uncertainty over the variance, even if meritless, could
14 be to the disadvantage of the citizens of the City of
15 Charleston

16 Thank you

17 THE COURT Okay

18 MS HANAFI Your Honor, before the Plaintiffs
19 call a next witness I would bring to your attention
20 that the next witness is rather lengthy and wanted to
21 submit to you the Court might like to consider whether
22 he would want to continue today or continue the next
23 day

24 THE COURT Okay We know we're coming back
25 another day Who is your next witness?

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1 MS HANAFI Our expert, Will Cooke

2 THE COURT Okay I know you had the Mayor
3 coming You checked with his calender and it was good
4 for that day?

5 MR DOMIN We have Mr Maher, three witnesses

6 MS CANTWELL It will be a long day

7 THE COURT Why don't we come back another day

8 MS HANAFI Your Honor, I think that's the best
9 idea if you don't want to split it

10 (Discussion off the record)

11 THE COURT We'll close for today Make sure we
12 have everything marked We will convene the 9th of
13 March We can reconvene here at that time at 9
14 o'clock , We'll go back at it at that time I know
15 there was an objection as to Mr Cooke's testimony
16 Let's cross that bridge - if you want to brief that
17 issue beforehand and short circuit that I'll rule on
18 that right off

19 MS HANAFI I can submit a brief to you

20 MS CANTWELL Two questions One, whether he's
21 qualified to testify as an expert in zoning and, two,
22 as whether he can offer a legal opinion as to whether
23 or not the rezoning was valid I think that's strictly
24 the problem to the Court

25 And, number three, he's going to also, he wants to

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1 opine as to the validity of the variance and, again,
2 that's your call based on the record that was made
3 before the Board in January of '07 So I think clearly
4 his testimony on the variance is inadmissible and after
5 you hear his qualifications, I would submit to you, the
6 other testimony might be as well

7 THE COURT Who's witness is he?

8 MS HANAFI It's Historic Charleston Foundation

9 MR PRITCHARD Joint

10 MS HANAFI Right Well, you know, Your Honor I
11 can submit Mr Cooke's resume' to you and --

12 THE COURT I'm familiar with Mr Cooke

13 MS HANAFI He is definitely qualified to testify
14 as to zoning issues of 404 King Street, spot zoning and
15 the issues that emanate from spot zoning The
16 application of the legal test to the spot zoning
17 doesn't necessarily make his opinion a legal opinion
18 He isn't analyzing what the spot zoning issue is to
19 this particular case and, of course, the legal opinion
20 is for the Court to decide I would submit he would
21 not want to offer a legal opinion, per se'

22 THE COURT To the extent he doesn't do that, I'll
23 probably allow that

24 Thank you all for a prompt and clear presentation
25 I'll look to see you again 9th of March

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1 (Court adjourns)

2

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6

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8 STATE OF SOUTH CAROLINA)

9)

10 COUNTY OF CHARLESTON)

C E R T I F I C A T E

11

12 I, Bernadette A Cali, Notary Public, do
 13 hereby certify that the within hearing was taken and
 14 transcribed by me, and that the foregoing pages are
 15 a true and accurate transcript of the within proceedings I
 16 further certify that the persons were present as stated

17 I further certify that I am not of counsel
 18 or kin to any of the parties to this action, nor am I
 19 interested in the result of the said action

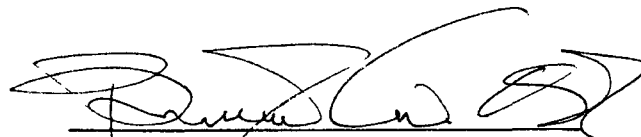
20 IN WITNESS WHEREOF, I have hereunto
 21 subscribed my name, this March 3, 2009

22

23

24

25


 Bernadette A Cali, CSR
 Notary Public
 My Commission Expires
 April 27, 2010

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