



**Town of Hilton Head Island
Board of Zoning Appeals
Regular Meeting
Monday, January 23, 2017 – 2:30 p.m.
Benjamin M. Racusin Council Chambers
AGENDA**

1. **Call to Order**
2. **Pledge of Allegiance to the Flag**
3. **Roll Call**
4. **Freedom of Information Act Compliance**
Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.
5. **Welcome and Introduction to Board Procedures**
6. **Approval of Agenda**
7. **Approval of the Minutes** – Regular Meeting November 28, 2016
8. **New Business**
Public Hearing
SER-2150-2016: Request for a special exception to operate a liquor store in the Sea Pines Center (SPC) Zoning District as required by Land Management Ordinance Section 16-4-102.A.6, Principal Use Table. The subject parcel is tax map 15, parcel 312, located at 9 Palmetto Bay Road.
Presented by: Anne Cyran

Hearing
Motion to Reconsider APL-1673-2016: Chet Williams, on behalf of Beachwalk Hotel & Condominiums Association Inc. and Beachwalk Hilton Head LLC, is requesting that the Board of Zoning Appeals reconsider their decision to uphold the decision of the Official related to APL-1673-2016.
9. **Board Business**
10. **Staff Reports**
Waiver Report
11. **Adjournment**

Please note that a quorum of Town Council may result if four or more Town Council members attend this meeting.

TOWN OF HILTON HEAD ISLAND
Board of Zoning Appeals
Minutes of the November 28, 2016 2:30p.m. Meeting
Hilton Head Island Library, Large Meeting Room

Board Members Present: Chairman Glenn Stanford, Vice Chairman Jerry Cutrer, David Fingerhut, Steve Wilson, Lisa Laudermitch, Robert Johnson

Board Members Absent: John White (excused)

Council Members Present: Mayor David Bennett

Town Staff Present: Nicole Dixon, Development Review Administrator; Brian Hulbert, Staff Attorney; Teri Lewis, LMO Official; Teresa Haley, Secretary

1. Call to Order

2. Pledge of Allegiance to the Flag

3. Roll Call – see as noted above.

4. Freedom of Information Act Compliance

Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.

5. Welcome and Introduction to Board Procedures

Chairman Stanford welcomed the public and introduced the Board's procedures for conducting the business meeting.

6. Approval of Agenda

Vice Chairman Cutrer made a motion to **approve** the agenda as submitted. Mr. Fingerhut **seconded** the motion. The motion **passed** with a vote of 6-0-0.

7. Approval of the Minutes – September 19, 2016 and September 26, 2016 meetings

Ms. Laudermitch made a motion to **approve** the minutes of the September 19, 2016 special meeting. Vice Chairman Cutrer **seconded** the motion. The motion **passed** with a vote of 4-0-2. Mr. Wilson and Mr. Johnson abstained from voting as they were not present at the meeting.

Mr. Fingerhut made a motion to **approve** the minutes of the September 26, 2016 meeting. Ms. Laudermitch **seconded** the motion. The motion **passed** with a vote of 5-0-1. Mr. Wilson abstained from voting as he was not present at the meeting.

8. New Business

Public Hearing

VAR-1756-2016: Don Baker, on behalf of Amir Bitton, is requesting a variance from Land Management Ordinance Section 16-5-103, Buffer Standards, to allow a new stairway and landing to encroach into an adjacent use buffer. The subject parcel is located at 7 Cobblestone Court. It is Parcel 85 on Beaufort County Tax Map 11.

Ms. Dixon presented an in-depth review of the project as set forth in the staff report. Ms. Dixon clarified concerns and answered questions by the Board. Staff recommends the Board of Zoning Appeals **approve** the application based on the Findings of Fact and Conclusions of Law contained in the staff report with the following conditions: 1) remove the portion of the existing, non-confirming brick patio that extends beyond the outer edge of the staircase from the buffer to reduce the total area of buffer encroachments; and 2) the site plan submitted by the applicant shows the proposed landing extending 30 inches beyond the western edge of the house. To reduce the total area of buffer encroachments, the landing should only extend to the western edge of the house.

Chairman Stanford asked the applicant to make a presentation. The applicant indicated the owner is asking for the egress itself, to extend the landing beyond the home line, and that the brick patio remain as existing. The applicant answered questions by the Board.

Chairman Stanford asked for comments from the public and none were received. Chairman Stanford then requested comments from the Board. The Board asked whether the extension of the landing makes the staircase any less functional. The applicant replied no. The Board discussed and inquired as to the following: the property line location; the berm behind the subject property; the retaining wall location; the length of the brick paver patio and staircase extension, their impact on the buffer, and remedial options. Staff pointed out that reducing the nonconforming encroaching patio will bring the buffer more into compliance. The staircase is also encroaching into the buffer by extending beyond the home's footprint. The Board discussed with the applicant the code requirement to have at least 5 ft. separation from a residential property line; whether other homes on the street have brick paver patios that extend into the berm; the landing area reduction recommended by staff does not change the specifications for the staircase; and replacement of brick pavers with sod or mulch may negatively affect the retaining wall. The Board asked if there were any objections by neighbors regarding this application. Staff stated no complaints were received for the record.

Vice Chairman Cutrer made a motion to **approve** the application based on the Findings of Fact and Conclusions of Law contained in the staff report with the following condition: the site plan submitted by the applicant shows the proposed landing extending 30 inches beyond the western edge of the house. To reduce the total area of buffer encroachments, the landing should only extend to the western edge of the house. Ms. Laudermilch **seconded** the motion. The motion **passed** with a vote of 6-0-0.

Public Hearing

VAR-1810-2016: Eric Walsnovich of Wood and Partners Inc, on behalf of the Palmetto Hall Plantation Property Owners Association, is requesting a variance from LMO Sections 16-5-113, Fence and Wall Standards, 16-5-102, Allowable Setback Encroachments and 16-5-103.D, Adjacent Street Buffers, to install a fence in the adjacent street setback that is taller than the allowed 4 foot maximum height and within the adjacent street buffer. The properties are located along Beach City Road and Fish Haul Road in proximity to the airport, and are identified as Parcel# 278 on Beaufort County Tax Map# 5 and Parcels# 304, 300 and 328 on Beaufort County Tax Map# 4.

Ms. Dixon presented an in-depth review of the project as set forth in the staff report. Ms. Dixon answered questions by the Board. Staff recommends the Board of Zoning Appeals **approve** the application with the condition that the applicant obtains Minor Corridor Review approval, based on the Findings of Fact and Conclusions of Law contained in the staff report.

Chairman Stanford asked the applicant to make a presentation. The applicant thanked Ms. Dixon for her presentation and then explained the intent and purpose of this application. The applicant agreed with staff condition to obtain a Minor Corridor Review approval.

Chairman Stanford asked for comments from the public and none were received. Chairman Stanford asked if there were any comments by neighbors. Staff indicated none were received. Chairman Stanford then requested comments from the Board. The Board complimented the application. The Board inquired as to the locations of the landscape improvements; and the distance between the fence and the leisure trail along Beach City Road.

Mr. Fingerhut made a motion to **approve** the application based on the Findings of Fact and Conclusions of Law contained in the staff report, subject to staff condition to obtain a Minor Corridor Review approval. Mr. Johnson **seconded** the motion. The motion **passed** with a vote of 6-0-0.

Hearing

APL-001673-2016: Request for Appeal from Chester C. Williams on behalf of Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC. The appellant is appealing staff's determination, dated August 23, 2016, that the proposed development of the Spinnaker Welcome Center at 30 Waterside Drive is permitted as proposed with Development Plan Review Application DPR-001056-2016.

See the certified transcript of the above-referenced APL-001673-2016 attached hereto as Exhibit A and made a part of the record hereof.

Hearing

Motion to Reconsider APL 1006-2016: ArborNature LLC and Adam Congrove are requesting that the Board of Zoning Appeals reconsider their decision to uphold the decision of the Official related to APL 1006-2016.

See the certified transcript of the above-referenced Motion to Reconsider APL 1006-2016 attached hereto as Exhibit B and made a part of the record hereof.

9. Board Business – None

10. Staff Reports – Waiver Report

The Waiver Report was included in the Board's packet.

11. Adjournment

The meeting was adjourned at 5:45p.m.

Submitted by:

Approved by:

Teresa Haley, Secretary

Glenn Stanford, Chairman

EXHIBIT A

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

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

APPLICATION FOR APPEAL NUMBER
APL-001673-2016

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

1 APPEARANCES of COUNSEL:

2 FOR THE APPELLANTS:

3 THOMAS C. TAYLOR, ESQUIRE
 Law Office of Thomas C. Taylor, L.L.C.
 4 22 Bow Circle
 Suite A
 5 Hilton Head Island, South Carolina 29928
 843.785.5050
 6 tom@thomastaylorlaw.com

7 -AND-

8 CHESTER C. WILLIAMS, ESQUIRE
 Chester C. Williams, L.L.C.
 9 17 Executive Park Road
 Suite 2
 10 Hilton Head Island, South Carolina 29938
 843.842.5411
 11 firm@ccwlaw.net

12 ALSO PRESENT:

13 Board Members
 14 Barry Johnson, Esquire

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

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

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

23 Mr. Williams.

24 MR. WILLIAMS: Mr. Chairman.

25 MR. STANFORD: We normally have a

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

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

19 MR. STANFORD: That's fine.

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

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

16 MS. DIXON: This is '84.

17 MR. WILLIAMS: November 5, '84.

18 This is the master plan that was --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. STANFORD: Thank you.

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

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

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

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

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

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

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

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

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

1 MR. WILLIAMS: Correct.

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

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

7 MR. CUTRER: Thank you.

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

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

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

25 Curtis, would you come up, please.

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

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

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

12 THE WITNESS: Curtis Coltrane.

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

16 THE WITNESS: Yes.

17 MR. STANFORD: Thank you.

18 EXAMINATION

19 BY MR. TAYLOR:

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

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

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

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

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

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

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

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

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

9 MR. TAYLOR: It is Exhibit D.

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

1 trying to accomplish in 1993.

2 BY MR. TAYLOR:

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

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

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

17 A Yes.

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

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

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

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

7 A I believe that it does, yes.

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

11 A Yes.

12 Q All right.

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

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

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

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

21 MS. DIXON: I have none.

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

24 EXAMINATION

25 BY MR. CUTRER:

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

3 A I don't know.

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

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

21 MR. CUTRER: Right.

22 MR. STANFORD: Other questions?

23 Thank you, Mr. Coltrane.

24 Another question?

25 MR. TAYLOR: None for me, Mr.

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

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

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

11 MR. STANFORD: Please.

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

14 THE WITNESS: Todd Theodore.

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

18 THE WITNESS: Yes.

19 MR. STANFORD: Thank you.

20 EXAMINATION

21 BY MR. WILLIAMS:

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

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

1 Q Do you sit on any town boards?

2 A I sit on the planning commission.

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

6 A Yes.

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

10 A Yes.

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

16 A No, I did not.

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

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

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

24 A That is what I read, yes.

25 Q When you submitted the development

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

4 A No, I did not know that.

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

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

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

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

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

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

20 A Yes, correct.

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

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

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

5 Q Tell me what you don't understand.

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

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

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

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

24 A Correct.

25 Q Was that an accurate description of

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

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

3 Q I want to make sure you are clear.

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

12 Q Did you look at the density?

13 A We did.

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

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

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

1 A You said it was 16 units per acre.

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

4 A Repeat your numbers back to me.

5 Q You want a pad and paper?

6 A I can write it down right here.

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

12 A Okay.

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

20 A 5,000?

21 Q 5,262.

22 A And where was that used?

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

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

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

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

8 MR. STANFORD: Okay.

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

13 THE WITNESS: If I may speak?

14 BY MR. WILLIAMS:

15 Q Yes.

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

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

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

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

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

8 A Okay.

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

13 A Right.

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

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

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

23 A Got it.

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

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

3 A No.

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

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

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

19 A Yes.

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

1 MR. STANFORD: Is that the
2 question?

3 BY MR. WILLIAMS:

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

6 A Is that correct?

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

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

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

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

20 A So that was a change.

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

24 A Okay.

25 Q So the way I come to these figures that

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

9 A Okay.

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

14 A Yes.

15 Q Okay.

16 A As far as I know.

17 Q Okay.

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

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

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

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

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

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

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

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

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

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

5 Is that an accurate statement?

6 A Yes.

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

9 A Right.

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

20 A No.

21 Q Okay.

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

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

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

14 A I could do it.

15 Q Well --

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

18 Q My question --

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

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

25 A Yes.

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

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

21 A I don't see it that way.

22 Q Tell me how you see it.

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

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

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

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

7 A Right.

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

11 A Correct.

12 Q It expired on March 3rd, 2000?

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

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

18 A I know.

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

1 exemption.

2 A Right.

3 Q So --

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

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

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

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

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

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

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

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

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

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

1 this smaller tract within that?

2 THE WITNESS: Yes.

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

7 THE WITNESS: I don't know.

8 MR. STANFORD: Thank you.

9 BY MR. WILLIAMS:

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

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

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

1 A Yes, I believe so.

2 MR. STANFORD: The answer was yes?

3 THE WITNESS: Yes.

4 BY MR. WILLIAMS:

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

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

13 A Yes.

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

18 A Yes.

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

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

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

1 MR. WILLIAMS: Yes.

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

4 MR. WILLIAMS: No.

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

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

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

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

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

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

1 yes.

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

5 MR. WILLIAMS: Yes.

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

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

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

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

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

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

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

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

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

1 Any other questions for Mr.

2 Theodore?

3 MR. CUTRER: I have one.

4 MR. STANFORD: Yes.

5 EXAMINATION

6 BY MR. CUTRER:

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

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

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

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

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

25 A Yeah.

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

5 A Right.

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

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

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

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

20 Does that make sense?

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

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

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

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

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

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

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

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

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

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

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

5 MR. JOHNSON: Somewhat.

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

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

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

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

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

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

3 EXAMINATION

4 BY MR. FINGERHUT:

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

9 A That is correct.

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

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

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

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

24 Q You're right.

25 MR. STANFORD: Did you have

1 another brief question?

2 MR. CUTRER: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. TAYLOR: I call Charlie

1 Halterman, Your Honor, for a brief --

2 Mr. Chairman, for a brief question.

3 MR. STANFORD: Okay.

4 State your name, please, sir.

5 THE WITNESS: Charlie Halterman.

6 CHARLIE HALTERMAN,

7 a witness herein, having been duly sworn,

8 testified upon his oath as follows:

9 THE WITNESS: I do.

10 EXAMINATION

11 BY MR. TAYLOR:

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

13 A Hilton Head Island, Sea Pines Golf

14 Course.

15 Q What do you do for a living?

16 A I'm the construction manager for

17 Spinnaker and owner representative.

18 Q How long have you been employed with

19 Spinnaker Resorts?

20 A Fourteen years, June of 2004.

21 Q Mr. Halterman, what specific level of

22 administrative capacity do you hold? Are you

23 like a vice president of Spinnaker or anything

24 like that?

25 A No. Just construction manager and

1 handle all his application permits.

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

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

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

9 A Yes, sir.

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

12 A Yes, sir.

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

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

23 Q Okay.

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

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

5 A Yes, sir.

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

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

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

14 A No, I haven't.

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

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

21 Q Have you reviewed it?

22 A Yes, sir.

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

1 in time?

2 A Yes, sir, I did.

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

6 BY MR. TAYLOR:

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

15 A This would not be the 15 --

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

18 A Yes, sir.

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

23 A Yes, sir.

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

1 A Yes, sir.

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

6 A Yes, sir.

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

12 A Yes, sir.

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

18 A I was not employed by the company.

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

24 A Not that I know of.

25 Q That's all I have.

EXAMINATION

1

2 BY MR. STANFORD:

3

4

5

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

6

A No, sir.

7

8

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

9

10

A It was purchased after he purchased the other piece.

11

MR. STANFORD: Any questions from the town?

12

Any questions from the board?

13

Thank you. You're excused.

14

15

MR. WILLIAMS: We call Nicole Dixon.

16

MR. CUTRER: I had a question.

17

EXAMINATION

18

19 BY MR. CUTRER:

20

21

22

23

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

24

A It supports basically recreation and our big outdoor pool.

25

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

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

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

10 A Yes, sir.

11 Q Okay. Thank you.

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

15 Could you state your name.

16 THE WITNESS: Nicole Dixon.

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

20 THE WITNESS: Yes, sir.

21 MR. STANFORD: Thank you.

22 EXAMINATION

23 BY MR. WILLIAMS:

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

1 your occupation, please.

2 A Nicole Dixon, development review
3 administrator.

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

8 A Yes.

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

13 A Yes.

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

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

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

25 A Not until you brought it to my

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

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

6 A After you brought it to my attention.

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

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

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

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

1 against the RD and it does meet that.

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

4 A Correct.

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

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

14 Q Okay.

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

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

19 A 1984 and then reviewed 1987.

20 Q The one that we can't find?

21 A We have May 6th of 1987.

22 Q Isn't it dated February?

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

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

4 A Two days prior.

5 Q Correct. So --

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

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

12 A I did not.

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

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

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

21 A I did.

22 Q Are they accurate?

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

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

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

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

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

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

1 Q You're talking about --

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

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

8 A Okay.

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

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

17 Q I'm not being very clear.

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

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

24 A But we're not talking about that.

25 Q This is a theoretical. You're a

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

9 A Under the current code requirements,
10 yes.

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

13 BY MR. WILLIAMS:

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

17 A (Nods head.)

18 Q Okay.

19 MR. STANFORD: Answer is yes?

20 THE WITNESS: Yes, sir.

21 BY MR. WILLIAMS:

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

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

4 A Correct.

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

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

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

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

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

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

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

5 A Are you talking about this PD-2?

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

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

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

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

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

19 A The old master plan.

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

1 with current code requirements?

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

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

16 A No, I have not.

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

18 A I was not.

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

22 A I do.

23 Q -- and reason it was implemented?

24 A Mm-hmm.

25 Q Do you have any reason to doubt that

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

4 A No.

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

9 BY MR. WILLIAMS:

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

16 A I do not interpret the LMO that way.

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

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

21 BY MR. WILLIAMS:

22 Q The answer is no?

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

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

2 EXAMINATION

3 BY MR. STANFORD:

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

10 A I understand.

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

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

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

13 Q I understand.

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

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

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

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

16 EXAMINATION

17 BY MR. FINGERHUT:

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

21 A When I was reviewing the DPR?

22 Q Yes.

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

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

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

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

12 Q Table in which master plan?

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

16 Q So not this one?

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

1 did not see a reason to deny the application.

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

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

9 Q Yes.

10 A Adding what was out there and --

11 Q Sure.

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

16 MR. STANFORD: Other questions?

17 EXAMINATION

18 BY MR. CUTRER:

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

22 A Yes.

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

25 A Yes, it does.

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

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

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

9 A Okay.

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

15 A Yes, sir.

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

19 A Correct.

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

23 A Correct.

24 Q Thank you.

25

EXAMINATION

1 BY MR. STANFORD:

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

6 A Whatever I found is in your packet, so
7 everything that I found is in there and this
8 document is in there and it lists the town PUD,
9 what was approved and what was proposed with
10 that revision and it lists the acreage of the
11 different uses, the square footage and it does
12 for the same proposed and the reduction of the
13 commercial office, a reduction of the commercial
14 retail, the increase of the hotel rooms, the
15 addition of the common open space requirement
16 and the reduction of the residential.

17 And there's a note below that says that
18 the total area for the proposed 94 hotel rooms
19 has the special exception within the P -- or RD
20 zoning district is 3.9 acres and the hotel was
21 not to be developed on the 3.9 acre site like it
22 was on the table. The acreage not utilized in
23 the hotel would be set off as common open space
24 not to be used for any other developments. And
25 there was documentation that I found there was a

1 letter from, I believe, it was Tom Brechko or
2 somewhere in that documentation that said that
3 open space could be spread out throughout the
4 PD-2.

5 And I asked Todd to come up with some
6 calculation of how much open space exists out
7 there. There was well over nine acres which is
8 well over the 1.3 acres minimum required. And
9 again, I didn't find any documentation or
10 anything that could lead me to deny the
11 application, which is why I came up with my
12 determination and that's why we're here.

13 MR. STANFORD: Other questions?

14 BY MR. STANFORD:

15 Q The table you are referring to is not a
16 concept master plan, is it?

17 A No, it is a table -- I don't know
18 because I don't have a copy of the concept plan
19 if it was actually on there, but that table was
20 on the original 1984 plan. They have that
21 paperwork on there and this revised those
22 numbers, but I don't know if it was actually on
23 there, but it makes reference to this table.

24 EXAMINATION

25 BY MR. CUTRER:

1 Q And the minutes of the '87 meeting do
2 also?

3 A Yes, this is where I found this and it
4 is in your packet. What page, I have no idea.

5 MR. JOHNSON: 1732.

6 THE WITNESS: 1732.

7 Is that where the page is in that
8 documentation is?

9 MR. STANFORD: Other questions?

10 EXAMINATION

11 BY MS. LAUDERMILCH:

12 Q I have a question and it's kind of this
13 whole process again. But if we had that master
14 plan document, however the categorical exemption
15 has expired, now as you look at a new
16 application, most of -- well, I guess all, but
17 the existing improvements on the various parcels
18 within the PUD were built under different LMO
19 requirements. So now that there is an
20 application submitted for a specific undeveloped
21 parcel, do you need to take into account the
22 entire PUD under the current LMO or do you just
23 look at that parcel?

24 A Staff believes that you look at that
25 parcel. The original concept plan was based

1 under a different LMO, and so to go back now
2 this PD-2 doesn't meet the LMO, well, obviously
3 it doesn't. It is a PD-2. The LMO says any
4 further development has to meet the current LMO
5 standards and that is what the applicant did.
6 It meets all current LMO standards. I could not
7 find a reason to deny the application.

8 MR. STANFORD: Thank you very
9 much.

10 MR. WILLIAMS: If I could, I like
11 to clarify one thing, Mr. Stanford.

12 EXAMINATION

13 BY MR. WILLIAMS:

14 Q Nicole, the document that is the
15 concept master plan that is up there, it doesn't
16 have density or use charts like the 1984 plan,
17 does it?

18 A No, it does not.

19 Q So it is not sufficient for determining
20 what the permitted or even what the purposed
21 density use is for the 15.1 acres at the time it
22 was done as it was presented. Is that an
23 accurate statement?

24 A Correct, and this plan, I believe, I
25 actually found in the DPR documents. It wasn't

1 even in the PD-2 documents.

2 Q One other question. Are the
3 LMO Section 16-3-106, Sub G, which is the
4 provisions for the plan development overlay PD-2
5 district, is that part of the current LMO
6 requirements?

7 A Yes.

8 Q Thank you.

9 MR. STANFORD: Thank you. Are you
10 finished?

11 MR. WILLIAMS: That's all.

12 MR. STANFORD: Nicole, you're
13 excused.

14 Is there any further presentation
15 from the town?

16 MS. DIXON: I think I addressed
17 everything I was going to say. No, I
18 can't think of anything I would like to
19 add.

20 MR. STANFORD: I know that we have
21 Mr. Johnson, who is the attorney for
22 the owner of this property. Mr.
23 Williams, Mr. Taylor represent the
24 condominium association that is
25 affiliated with the property.

1 Mr. Johnson, do you have anything
2 to present in conjunction with this?

3 MR. JOHNSON: Just a little bit
4 briefly, sir.

5 MR. STANFORD: Thank you.

6 MR. JOHNSON: For the record, I'm
7 Barry Johnson, local attorney. I
8 didn't come prepared to make a
9 presentation today because of the rules
10 of the board, which I respect.

11 MR. STANFORD: Thank you, sir.

12 MR. JOHNSON: But I thank you for
13 the opportunity to say just a couple
14 things. The planning commission
15 minutes that were alluded to a few
16 minutes ago and because these do not
17 have Bates stamps, I don't know how to
18 identify them to you, but in your
19 materials we have the Town of Hilton
20 Head Island Planning Commission May 6,
21 1987, meeting that's either one or two
22 days after the date of the drawing that
23 is on the screen and in these minutes
24 there is approval of the plan that was
25 discussed with modifications and those

1 modifications appear in some tables
2 that are attached to those minutes in
3 these plans, and I believe that they
4 significantly re-enforce what Ms. Dixon
5 has said.

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

21 Now, if you -- I think we all
22 understand what the appellant is trying
23 to argue. I would submit to you a
24 couple things in that regard. One is
25 that the people that fought to get

1 their vested rights validated or
2 verified, I think was the word that
3 Curtis used, intended to fully develop
4 their property under their
5 constitutional rights. That's why they
6 went to significant expense and trouble
7 to get those rights validated. They
8 disagreed with the time limits on a
9 very narrow point, the court said five
10 years is good enough for the
11 continuation of those rights.

12 But if you just look not only at
13 that cluster of dozen or so of them and
14 I represented at least half of those
15 people that got those exemptions at
16 that time, none of them will ever
17 comply with the current LMO, so the
18 theory that my friend Chet and my
19 friend, Tom are arguing to you is that
20 none of these undeveloped properties
21 anywhere on the island in PD-2 overlays
22 are ever going to get developed. That
23 is the practical effect.

24 And the zoning law requires that
25 if you give people the opportunity to

1 have a reasonable use of their property
2 and a reasonable use of this property
3 is certainly to comply with the
4 applicable site standards for RD for
5 those 1.086 or 68, whatever it is acres
6 and it does comply. Otherwise, what
7 you have effectively done is condemn
8 the property as a town action and that
9 becomes a different conversation. But
10 it may have effect on any other
11 properties out there that are so far
12 undeveloped residuals from PUDs that
13 met the categorical exemption standards
14 that expired all of them in or about
15 March of 2000 because they issued the
16 letter about the same date if not the
17 same date and are now sitting here
18 saying "is the property worth zero
19 because you can't do anything with it
20 or does it have a reasonable and fair
21 zoning which the municipality has
22 obligation to provide to it. Staff has
23 been a determination of how to
24 interpret the LMO that is reasonable
25 and fair and it consistent with the

1 obligations of the municipality
2 regarding zoning and resulting uses and
3 densities.

4 I would also like to say one more
5 thing and then I'll sit down. Some of
6 you and I don't know -- I understand
7 Mr. Stanford has legal background. I
8 apologize -- Mr. Fingerhut does too. I
9 don't know unfortunately all you people
10 and I apologize for that. The law in
11 South Carolina where there is ambiguity
12 regarding restrictions and I think it's
13 generally the law in the country. It
14 is derivative of constitutional rights
15 for property ownership. Where there is
16 ambiguity, the law favors the
17 unrestricted use of the property rather
18 than the restricted use of the
19 property.

20 If you heard earlier, Mr. Coltrane
21 his association and law partnership
22 with Jim Herring back in the mid-80s.
23 Mr. Herring had a case that went to the
24 South Carolina Supreme Court called
25 Hamilton versus CCM. It is Hilton Head

1 based case. It has to do with the
2 plats around Harbour Town and the
3 documents related to the cemetery and
4 some other land over there and the
5 question was whether or not the absence
6 of designation of use on the plats made
7 it open space. And the court very
8 convincingly ruled that it doesn't say
9 therefore it is not expressly
10 restricted to open space and you can't
11 have that by implication because the
12 law favors the free and unrestricted
13 use of the property where this is
14 ambiguity.

15 So if you find some ambiguity
16 about the 1987 July master plan, which
17 merely implemented like Nicole said,
18 the May 1987 plan and the adjustments
19 to that made by the planning commission
20 at their meeting on May 6th, then I
21 would suggest to you that is an
22 ambiguity that supports the conclusion
23 the staff has come to and I would
24 encourage you to that decision.

25 I will answer any questions I can.

1 MR. STANFORD: I continue to have
2 trouble moving forward from the 1987
3 concept master plan, which is the core
4 zoning document for this parcel as well
5 as the balance of the 15 acres. That
6 would have been the core zoning
7 document there and then we're moving
8 forward based on that, but we don't
9 have that document.

10 MR. JOHNSON: Right.

11 MR. STANFORD: And we have to make
12 an assumption on that. I'm very
13 uncomfortable making an assumption.

14 MR. JOHNSON: I'm suggesting that
15 you don't have to make that assumption.
16 You can say the absence of that
17 document creates an ambiguity, and
18 there is enough documentation -- I
19 realize Mr. Cutrer?

20 MR. CUTRER: Cutrer. Close
21 enough.

22 MR. JOHNSON: Cutrer. Sorry.
23 That it was opine or said a while ago,
24 you got thousands of pages of
25 documents, and I appreciate you-all

1 haven't had time to study all that, but
2 if you did you would find in the
3 minutes of May 6, 1987, all the comfort
4 you need and you would see that the
5 July, three month later document, is
6 the implication of what was commanded
7 by the town planning commission.

8 MR. STANFORD: Thank you for that
9 able presentation, prepared or not.

10 Any other questions?

11 MR. CUTRER: If I might.

12 MR. JOHNSON: Yes, sir.

13 MR. CUTRER: I think I heard
14 Nicole say that under the current LMO
15 this property could be developed. All
16 of this discussion of the 1987 master
17 plan was part of the conditional
18 exemption.

19 MR. JOHNSON: Categorical
20 exemption.

21 MR. CUTRER: Categorical
22 exemption.

23 MR. JOHNSON: Yes, sir.

24 MR. CUTRER: Which expired in
25 2000.

1 MR. JOHNSON: Yes, sir.

2 MR. CUTRER: Am I correct or am I
3 wrong that all that 1987 stuff is kind
4 of irrelevant at this point?

5 MR. JOHNSON: I believe it became
6 irrelevant on March 3rd, 2000.

7 MR. CUTRER: So if all this
8 discussion of 1987 action by the town
9 is irrelevant because that exemption
10 expired, then today we're bound or
11 governed by the current LMO?

12 MR. JOHNSON: Correct.

13 MR. CUTRER: And I believe I heard
14 Ms. Dixon say that her interpretation
15 was that under the current LMO this
16 property could be developed as being
17 proposed?

18 MR. JOHNSON: That's correct.

19 MR. STANFORD: But the application
20 was not made based upon the current LMO
21 rather it was based on the 1987 master
22 concept plan as I understand it.

23 MS. DIXON: No, it was not.

24 MR. JOHNSON: I don't have all the
25 details about think, but I think that

1 is entirely accurate. I think that was
2 just a component of the history.

3 MR. STANFORD: Nicole, can you
4 straighten me out?

5 MS. DIXON: When the application
6 was submitted it was initially reviewed
7 under the current LMO. It wasn't until
8 Chet brought to my attention the PD-2
9 that applied to this property, that I
10 started doing all that determination to
11 Chet. But all along I was reviewing
12 the application under the current LMO
13 and after reviewing the PD-2 documents
14 still did not find a reason to deny the
15 application, and the application met
16 current LMO requirements and approved
17 it, so that's what the application
18 approval is based on is the current
19 LMO.

20 MR. STANFORD: I like to hear from
21 the appellant on that narrow point, how
22 is the application made and how should
23 have the application been considered?

24 MR. WILLIAMS: The application
25 form, itself, does not refer to a PD-2

1 overlay. If you look at the e-mails,
2 clearly, they were not currently aware,
3 Todd Theodore and Nicole Dixon, during
4 the application process until the issue
5 was raised by us that there was a PD-2
6 overlay. I think you're exactly right.
7 The March 3, 2000, the legal ability to
8 rely on the categorical exemption
9 expired. I think Mr. Johnson just
10 suggested that. Mr. Johnson also said
11 the court upheld that five-year
12 limitation as a valid limitation. So
13 the first part of our argument --

14 MR. STANFORD: Tom, excuse me.

15 MR. WILLIAMS: The first part of
16 our argument is that the 1987 master
17 plan isn't irrelevant because it still
18 is the plan that defines the boundaries
19 of the PD-2 overlay district. I think
20 we're all fairly comfortable that the
21 15.1 acres, there is boundaries of the
22 PD-2 overlay district, but after the
23 expiration of the categorical
24 exemption, any property owners can no
25 longer rely on the uses and densities

1 that are provided for in the 1987
2 master plan. And with the categorical
3 exemption letter says that after that
4 point, you have to comply with all
5 current code requirements.

6 MR. CUTRER: Current at that
7 moment or current today?

8 MR. WILLIAMS: Current at the
9 development permit application was
10 filed.

11 MR. CUTRER: 2016?

12 MR. WILLIAMS: Correct.

13 Nicole has at admitted that the
14 PD-2 overlays are part of the LMO
15 requirements and she's also testified
16 that she did not review the application
17 from the standpoint of the PD-2
18 requirements for average density over
19 the PD-2. She looked at it as a
20 standalone parcel without taking into
21 account the requirement of the PD-2
22 overlay. You can't have it both ways.
23 If you're in a PD-2 zone, you are
24 required to comply with the PD-2
25 requirements. Because there is certain

1 benefits that accompanied from being in
2 there, but there is certain burdens
3 that go along with it. The benefits
4 were increased density of the certain
5 areas. The burden is where is that
6 offsetting open space. We don't know
7 standing here if the 1987 master plan
8 says open space on Parcel E neither
9 does Nicole neither does Mr. Theodore,
10 yet they proceeded to approve the plan
11 on the assumption that it did not.

12 MR. STANFORD: We need to move on.

13 MR. WILLIAMS: So it is a two-step
14 inquiry. Is there is right to rely on
15 the 1987 master plan? Our position is
16 no, there is not. So that kicks you
17 into the current code requirements.
18 And with Mr. Johnson said earlier about
19 if you follow our arguments than no
20 further development is allowed PD-2
21 district. That is not correct. No
22 further development is allowed in the
23 PD-2 where it would exceed the average
24 density of the underlying zoning
25 district. If there was only a 50 50

1 room hotel instead of 91, there might
2 be some more density.

3 Somebody got the benefit of that
4 PD-2 approval, the master plan approval
5 way back then. The current properties,
6 the SDC Properties bought it during the
7 time where they had the right.

8 MR. STANFORD: Okay. You made
9 that point. Let's move on again,
10 please.

11 And this is a case that is brought
12 to us on appeal. There is no provision
13 for public comment in this particular
14 type of case, so I think you have made
15 your argument abundantly and I would
16 ask you to please show us the courtesy
17 of letting us move forward and unless
18 you feel there is something that we
19 have totally missed.

20 MR. WILLIAMS: It is difficult for
21 me to know whether or not there is
22 something you totally missed. If you
23 have any questions, please ask. But on
24 the assumption that you don't think you
25 missed anything, then we would ask that

1 you hold that the development of the
2 Waterside PD-2 -- any development in
3 the Waterside PD-2 district including
4 without limitation the proposed
5 Spinnaker Welcome Center, Parcel E,
6 must comply with the current LMO
7 requirements, that the average density
8 of provisions of LMO Section
9 16-3-106.G.4.A, which is the PD-2
10 requirements, is the applicable PUD
11 that the average density of the RD has
12 already been exceeded by the existing
13 development with the PD-2 overlay and
14 you reverse Ms. Dixon's determination.

15 MR. STANFORD: Thank you.

16 MR. TAYLOR: Mr. Chairman, I'm
17 sorry. Before Mr. Johnson sat down, I
18 wanted to ask him less than 30 seconds
19 of questions for the record. May I ask
20 Mr. Johnson a couple questions?

21 MR. STANFORD: Very, very quick.

22 MR. TAYLOR: He is an officer of
23 the court. He does not need to be
24 sworn in.

25 MR. STANFORD: He does not need to

1 be sworn in.

2 MR. JOHNSON: I do not understand
3 that I am appearing as a witness, but
4 as counsel for my client and I am not
5 subject to questions by opposing
6 counsel.

7 MR. STANFORD: And I so rule.
8 Thank you.

9 Now it is time for us to discuss
10 this and make a decision or it occurs
11 to me, we may want to consider in this
12 case a remand back to the town to make
13 the determination, to make its
14 determination on this application in
15 light of the factors that we have here,
16 which are the missing master concept
17 plan and then how that relates to the
18 applications of law for this particular
19 application. That is a month down the
20 road. I acknowledge that. And I'm
21 interest of the comments of the board
22 on that.

23 MR. WILLIAMS: If it may help you
24 out, we would be willing to stipulate
25 the 1987 master plan shows the

1 boundaries of the PD-2 district as 15.1
2 acres.

3 MR. FINGERHUT: I think that is
4 excellent idea maybe for a slightly
5 different reason. Looking at what the
6 appellant is asking for holding the
7 development of the Waterside district
8 including the limitation of the
9 purposed Spinnaker Welcome Center must
10 comply with the current LMO. I would
11 certainly move we still hold that.
12 Number 2, that the average density
13 provision in the LMO section -- I'm not
14 going to read the whole thing now --
15 would apply. I would move that and I
16 would actually move to reverse and
17 remand.

18 MR. STANFORD: Reverse or remand?

19 MR. FINGERHUT: Reverse and remand
20 for analysis of the average density
21 because I don't believe that was done.
22 I think that's what I'm hearing here.
23 I don't know that we heard enough here
24 to rule whether on the average
25 densities that counsel is making, but I

1 think we did hear enough that it was
2 not done by applicant or by the town
3 and I didn't view --

4 MR. STANFORD: We don't have the
5 motion on the table at the moment.

6 This is just a discussion.

7 MR. FINGERHUT: Yeah.

8 MR. STANFORD: And I'm interested
9 in the points of view of the other
10 members of the board.

11 MS. LAUDERMILCH: I heard two
12 different interpretations now of this
13 latest parcel how the density issue is
14 analyzed. Is it based on the parcel
15 solely or is it based on the entire
16 PUD?

17 MR. STANFORD: Yes.

18 MS. LAUDERMILCH: And I've heard
19 two different opinions which creates
20 confusion and I don't feel prepared to
21 make a decision.

22 MR. WILSON: Mr. Chairman, I have
23 another thought. I like to know
24 whether or not these discussions about
25 this part of your suggesting that

1 should be remanded back to the staff
2 for further consideration has already
3 been discussed at length and between
4 Mr. Williams and between Ms. Dixon. In
5 that case, I would really moving
6 forward with this process to remand it
7 back to their continued conversation.

8 MR. STANFORD: Understood. And
9 that is a good point. I'm not trying
10 to just push it down the road, but we
11 have two competing interpretations of
12 the applications of the rules here and
13 I'm just trying to see if there is
14 some way we can get more clarity on
15 that.

16 MS. DIXON: I was going to say,
17 obviously, Chet and I disagree on how
18 it is interpreted, but to remand it
19 back to us, the staff feels that the
20 density should be based on that
21 particular piece of property. If
22 you're saying that you-all need to make
23 a decision whether density should be
24 based on the average of the entire
25 PD-2, if that's the case, Chet's done

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

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

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

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

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

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

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

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

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

25 MR. FINGERHUT: So you're

1 concurring that his math is correct?

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

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

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

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

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

23 MR. STANFORD: Sure.

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

1 PD-2 overlay no longer applies or it
2 does apply?

3 MS. DIXON: I think the pd-2
4 overlay is always going to be. It was
5 approved in that PD-2 boundary exists.
6 That property is part of that PD-2.

7 MR. CUTRER: To create a total
8 picture?

9 MS. DIXON: Correct.

10 MR. CUTRER: Okay.

11 MS. DIXON: I do not think we have
12 to go back and make sure all the
13 densities in that development complies
14 to the current LMO. I don't think that
15 was the intent of the language in the
16 LMO and I don't think that should be an
17 unbuildable lot.

18 MR. CUTRER: So we take the parcel
19 today, how does this applicant comply
20 with the current LMO and how does it
21 comply with the PD-2 overlay?

22 MS. DIXON: The PD-2 is always
23 going to be there. Now, as far as them
24 being tied to the density that was
25 shown on the original conceptual plan,

1 they don't have to be tied to that.
2 They have to be tied to the current LMO
3 density standards.

4 MR. CUTRER: So how does that
5 proposed development comply with the
6 current LMO?

7 MS. DIXON: How does it?

8 MR. CUTRER: How does it?

9 MS. DIXON: They demonstrated that
10 their density meets the current density
11 standards and current open space.

12 MR. CUTRER: That's what I needed
13 to hear.

14 MR. JOHNSON: Can I ask a quick
15 question? This master plan if it were
16 to appear, does it have any bearing on
17 what we're talking about?

18 MS. DIXON: It does not.

19 MR. STANFORD: We talked 45
20 minutes about that.

21 MS. DIXON: It is just a diagram
22 what was approved by the planning
23 commission and I just looked back when
24 you were talking earlier and that table
25 is listed in Attachment H in the

1 documents I gave you and that is
2 planning commission minutes from the
3 May 6th meeting.

4 MR. STANFORD: Thank you.

5 Mr. Williams, please.

6 MR. WILLIAMS: I'll be very quick.

7 To buy into the town staff's
8 interpretation, you necessarily need to
9 find Parcel E is the only piece of
10 property in the Town of Hilton Head
11 Island that is PD-2 zoning district
12 that doesn't have to comply with PD-2
13 requirements. To comply with the
14 current code requirements is exactly
15 that. Do not pick and choose which
16 one. She said she reviewed it only
17 under the RD requirement and not the
18 PD-2 requirements. And she admitted
19 that if you reviewed it under the RD
20 requirements and the PD-2 requirements,
21 there is not sufficient density there.

22 MR. STANFORD: Thank you.

23 Does anyone care to make a motion
24 this?

25 MR. FINGERHUT: Yeah. I'll make a

1 motion. I would move that we grant the
2 appeal and as requested hold that any
3 development to the PD-2 overlay
4 district including without limitation
5 the purposed Spinnaker Welcome Center
6 on Parcel E must comply with current
7 LMO. I'm reading the submission to be
8 clear for the record. The average
9 density provision in the LMO Section
10 16-3-106.G.4 is applicable to the
11 Waterside PD-2 overlay district.

12 Number 3, the average density to the RD
13 district has already been exceeded by
14 the existing development on the parcels
15 within the Waterside PD-2 overlay
16 district, which we just stipulated to
17 and by granting the appeal, we reverse
18 Ms. Dixon's determination.

19 MR. STANFORD: Is there a second?

20 MS. LAUDERMILCH: I would second.

21 MR. STANFORD: All right. So the
22 effect of this would be that the
23 property can not be developed in
24 accordance with the current
25 application.

1 MR. FINGERHUT: Correct. As long
2 as it is part of the PD-2 district, it
3 has to be -- any development
4 application has to be in light of the
5 entire district, not that single
6 property.

7 MR. WILSON: It is vote to
8 overturn the ruling.

9 MR. STANFORD: I was just trying
10 to make it clear so everybody
11 understood what was happening.

12 MR. WILSON: That is what we are
13 voting for.

14 MR. STANFORD: I was just
15 clarifying.

16 Any other discussion on the
17 motion?

18 Call the role, please.

19 MS. HALEY: Mr. Wilson.

20 MR. WILSON: No.

21 MS. HALEY: Mr. Fingerhut.

22 MR. FINGERHUT: For the motion.

23 MS. HALEY: Mr. Stanford.

24 MR. STANFORD: Against the motion.

25 MS. HALEY: Mr. Cutrer.

1 MR. CUTRER: Against the motion.

2 MS. HALEY: Ms. Laudermilch.

3 MS. LAUDERMILCH: For the motion.

4 MS. HALEY: Mr. Johnson.

5 MR. JOHNSON: Against the motion.

6 MR. STANFORD: Motion fails. So

7 we are ready to proceed forward. Thank

8 you, gentlemen.

9 MR. TAYLOR: Mr. Chairman.

10 MR. STANFORD: We need another

11 motion. Somebody who feels otherwise.

12 The motion failed. I'm spinning

13 right now.

14 MR. FINGERHUT: It's late.

15 MR. STANFORD: Does someone care

16 to make a motion? The other two

17 motions available to us are either

18 remand or to deny or overrule the

19 appeal.

20 MR. CUTRER: I move to deny the

21 appeal. I believe I've heard Ms. Dixon

22 say that those requirements that were

23 in that PD-2 density don't apply. The

24 property meets the current LMO

25 standard. The results of the

1 determination letter way back in 1987
2 said all that expired in 2000. It is
3 expired. I heard testimony from the
4 staff that says this property would
5 comply with current LMO, so I move to
6 deny the appeal.

7 MR. STANFORD: Is there a second?

8 MR. WILSON: Second.

9 MR. STANFORD: Discussion on the
10 motion, please?

11 Call the role.

12 MS. HALEY: Mr. Wilson.

13 MR. WILSON: Yes, for the motion.

14 MS. HALEY: Mr. Fingerhut.

15 MR. FINGERHUT: Against the
16 motion.

17 MS. HALEY: Mr. Stanford.

18 MR. STANFORD: For the motion.

19 MS. HALEY: Mr. Cutrer.

20 MR. CUTRER: For the motion.

21 MS. HALEY: Ms. Laudermilch.

22 MS. LAUDERMILCH: Against the
23 motion.

24 MS. HALEY: Mr. Johnson.

25 MR. JOHNSON: For the motion.

1 MR. STANFORD: Motion carries.
2 Thank you. Now in conjunction with the
3 motion for reconsideration --

4 MR. TAYLOR: Mr. Chairman, excuse
5 me. Before you move on -- before you
6 move off of this, you know as a lawyer,
7 I have an obligation to protect my
8 client, I need because of your ruling
9 earlier, I need to make a 30 second
10 proffer on the record of what I
11 intended to ask Mr. Johnson. Would you
12 please allow me to do that?

13 MR. STANFORD: Can't you just
14 submit it into the record? Don't you
15 have them written down there?

16 MR. TAYLOR: No, sir. These are
17 my notes, sir. You couldn't read that.
18 I would be happy to --

19 MR. STANFORD: We need to be out
20 of here in 20 minutes and we haven't
21 heard the ArborNature reconsideration
22 still and I don't think we can postpone
23 it.

24 MR. TAYLOR: I can address that in
25 a moment. I wanted to put my offer --

1 I'm sorry -- proffer on the record. I
2 hear you to say no.

3 MR. STANFORD: Thank you.

4 (Whereupon, the appeal hearing was
5 concluded at approximately
6 5:38 p.m.)

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C E R T I F I C A T E

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STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Amanda Bowen, Court Reporter and Notary Public in and for the above county and state, do hereby certify that the foregoing testimony was taken before me at the time and place herein-before set forth; that the witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, that thereupon the foregoing testimony was later reduced by computer transcription; and I certify that this is a true and correct transcript of my stenographic notes so taken.

I further certify that I am not of counsel to either party, nor interested in the event of this cause.

Amanda Bowen

Court Reporter

Notary Public

Beaufort, South Carolina

AN ORDINANCE OF THE TOWN OF HILTON HEAD ISLAND

ORDINANCE NO. 93-33

PROPOSED ORDINANCE NO. 92-35

AN ORDINANCE TO AMEND CHAPTER 7, "THE LAND MANAGEMENT ORDINANCE (LMO) OF THE TOWN OF HILTON HEAD ISLAND", OF TITLE 16 OF THE MUNICIPAL CODE OF THE TOWN OF HILTON HEAD ISLAND, 1983, BY AMENDING SECTION 16-7-250, DEFINITIONS; BY AMENDING PART B, PRIOR APPROVALS, OF ARTICLE III. NONCONFORMITIES AND PRIOR APPROVALS; BY AMENDING ARTICLE VI, ADMINISTRATION, BY ADDING PART J, VESTED RIGHTS DETERMINATIONS; AND PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, the Town Council of the Town of Hilton Head Island did on January 19, 1987 amend Chapter 7 of Title 16 of the Municipal Code by enacting a Land Management Ordinance (LMO) of the Town of Hilton Head Island; and

WHEREAS, the Town Council accepted, on July 8, 1991, the Town of Hilton Head Island 1991 Comprehensive Plan as adopted by the Planning Commission on June 19, 1991; and

WHEREAS, the Comprehensive Plan for the Town of Hilton Head Island outlines, among other things, the need for establishing growth control measures that are designed to preserve the natural environment, maintain the quality of life and reduce residential and commercial development at buildout, while maintaining a viable economic environment in the community; and

WHEREAS, the Town Council on December 18, 1991, adopted a resolution which: established a joint Town Council-Planning Commission Subcommittee, hereinafter referred to as the Growth Management Task Force; directed the Growth Management Task Force to develop the Growth Management Element of the Comprehensive Plan; and, notified property owners of the pendency of ordinances resulting from the Growth Management Element that would amend the LMO; and

WHEREAS, the Town Council contracted for services with the firm of Freilich, Leitner & Carlisle to review and recommend amendments to the LMO; and

WHEREAS, the firm of Freilich, Leitner & Carlisle completed an analysis of the LMO and recommended amendments to said ordinance which among others included changes to Article III, Nonconformities and Prior Approvals; and



WHEREAS, the Planning Commission, following a positive recommendation from the Growth Management Task Force, and Public Hearings conducted on October 7, 1992, September 8, 1993, voted to recommend to Town Council that the proposed amendments to Articles II, III and VI of the LMO, as shown in Attachment A, be adopted; and

WHEREAS, the Town Council finds that it is in the Town's best interest and welfare to regulate the conditions under which development plans that have prior approvals may be pursued, since development undertaken based upon previously granted approvals may: be inconsistent with the goals and objectives of the Comprehensive Plan; be in conflict with the use provisions of the underlying zoning district; be in conflict with the site regulations, including allowable densities and intensities of use, as established in Article IV of the LMO; not fully adhere to the design and performance standards set forth in Articles VIII and IX of the LMO; create substantial impacts on public facilities and natural resources; and, create a public or private nuisance; and

WHEREAS, the Town Council, in amending Article III of the LMO, recognizes and acknowledges that cases may exist where all or a portion of a development plan which has received prior approval has become vested and declares that these amendments to Article III shall not be interpreted as denying such vested rights, where such rights are found to exist; and

WHEREAS, the Town Council recognizes the need to enact more detailed administrative procedures for the review and determination of the validity of claims of vested rights.

NOW, THEREFORE, BE IT ORDERED AND ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF HILTON HEAD ISLAND, S.C.; AND IT IS ORDAINED BY THE AUTHORITY OF SAID COUNCIL:

Section 1 Amendment. That Chapter 7, Land Management Ordinance (LMO) of the Town of Hilton Head Island, of Title 16 of the Municipal Code of the Town of Hilton Head Island, S.C., be, and hereby is amended, a copy of which is attached hereto and incorporated fully herein as Attachment A entitled "Proposed Amendments to Article II, Definition of Terms; Article III, Nonconformities and Prior Approvals; and Article VI, Administration."

Note: Additions to the Municipal Code are shown as **bold and underlined** text and deletions to the Municipal Code are shown as **strikeouts**.

Section 2 Severability. If any section, phrase, sentence, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

Section 3 Effective Date. This Ordinance shall be effective upon the enactment by the Town Council of the Town of Hilton Head Island.

Passed, approved and adopted by the Council for the Town of Hilton Head Island on this 15th day of November, 1993.



Harvey W. Ewing, Jr., Mayor


Sandi Santaniello, Town Clerk

Public Hearing: 10-7-92 and 9-8-93

First Reading : 11-2-92

Revised First Reading: 8-2-93 and 10-18-93

Second Reading and Adoption: 11-15-93

Revised 11/09/93

Proposed Ordinance 92-35

Attachment A

"Proposed Amendments to Article II, Definition of Terms;
Article III, Nonconformities and Prior Approvals; and
Article VI, Administration."

Add the following definitions to Land Management Ordinance Section 16-7-250.
Definitions:

Legally established: Any land use, development, building, structure or site, including any lot of record, which was established, constructed, used or recorded pursuant to, and in conformance with all relevant requirements of the Ordinances then in effect.

Legally maintained: As used in this chapter, the phrase "legally maintained" shall mean that any and all conditions, obligations and requirements of any permit, approval or certificate of any description issued by Beaufort County, South Carolina or the Town of Hilton Head Island, shall have been met within the time frame, if any, required by such permit, approval or certificate, or that the permit, approval, or certificate has been fully executed according to its terms.

Legal nonconformity: Any land use, development, building structure or site, including any lot of record which was legally established, but which is not presently in full compliance with the provisions of this chapter as amended.

Nonconforming use: Any legally established activity using land, buildings or structures which was legally established, but which is not permitted on the applicable site by right, as a special exception or as a conditional use pursuant to Article IV of this Chapter.

Nonconforming building or structure: Any building or structure which was legally established, but which is not presently in compliance with the design and performance standards as set forth in Articles VIII, IX and X of this Chapter or with the applicable regulations of the zoning district in which it is located as set forth in Article IV of this Chapter.

Nonconforming site or lot of record: Any site or lot of record which was legally established, but which is not presently in compliance with the applicable zoning district regulations set forth in Article IV and/or with the applicable subdivision regulations set forth in Article VIII, Part C of this Chapter.

ARTICLE III, NONCONFORMITIES AND PRIOR APPROVALS

PART B. PRIOR APPROVALS GRANTED PRIOR TO THE ADOPTION OF THIS CHAPTER

Section 16-7-350. Findings of Fact, and Statement of Intent and Purpose.

This Part B of Article III is adopted in accordance with the 1985 Comprehensive Plan for the Town of Hilton Head Island, as amended, to regulate the conditions under which development plans which were granted approval prior to the adoption of this chapter may be pursued. In addition to the findings and recommendations contained therein, Town Council further finds that a compelling situation exists, and will continue to exist, with regard to the Town's ability to accommodate the impact of the ~~rate of~~ development as more specifically detailed in the said Comprehensive Plan, while at the same time exercising its obligation to minimize any potential danger to the public health, safety and general welfare.

Town Council further finds that, pursuant to the terms of any land development regulations or ordinances ~~the ordinance~~ in effect prior to the adoption of this Chapter, that certain development approvals were granted, including, but not necessarily limited to, namely "preliminary approvals" and "final development permits" issued by Beaufort County or the Town of Hilton Head Island. In adopting this Part B of Article III, it is not the intent of Town Council to deny to any individual who has received a prior development permit or approval, including but limited to, a preliminary approval or a final development permit which has been legally maintained a reasonable opportunity to proceed with development plans based on such prior approval or permit. It is the intent of Town Council in enacting these provisions to attempt to strike a balance between ~~such development opportunities~~ the provision of a reasonable opportunity to implement development plans which received prior approvals which have been legally maintained and the obligation incumbent upon the governing authority to adopt land use regulations which are consistent with the said Comprehensive Plan and necessary to protect, promote and improve the public health, safety and welfare.

The purpose of this Part B of Article III is to regulate the conditions under which development plans that have prior approvals may be pursued, consistent with the findings and intent of this section. Development proposed to be undertaken pursuant to prior approvals may be: inconsistent with the goals and objectives of the Comprehensive Plan; in conflict with the use provisions of the underlying zoning district; be in conflict with the site regulations, including allowable densities and intensities of use, as established in Article IV of this chapter; and/or not fully compliant with the design and performance standards set forth in Articles VIII and IX of this chapter. Further, such development may create substantial impacts on public facilities and natural resources or may create a public or private nuisance.

Section 16-7-352. Status Expiration of Previously Issued Prior Final Development Permits.

- (a)** Any final development permit granted approval prior to the effective date of this chapter shall remain valid for the life of such permit or until December 31, 1994, whichever shall occur first, subject to such conditions as may have been required pursuant to the granting of such permit and subject to the requirements of Part B of Article VII of this chapter.

- (b) The following shall not be construed to extend the life of a final development permit beyond December 31, 1994:
- (1) Completion of a phase or a portion of a phase, whether or not designated in the final development permit.
 - (2) Completion of infrastructure for a phase or a portion of a phase, whether or not designated in the final development permit.
 - (3) Obtaining a building permit, certificate of compliance or certificate of occupancy for a phase or a portion of a phase, whether or not designated in the final development permit.
- (c) Any final development permit granted approval prior to the effective date of this chapter for which a vested rights or equitable estoppel determination has been made pursuant to the procedures provided for in Section 16-7-698 shall remain valid for the length of time and under such conditions as provided for in the vested rights determination.

Section 16-7-354. Expiration of Prior Final Development Permit.

~~Any final development permit granted prior to the effective date of this chapter shall become invalid upon its expiration.~~

Section 16-7-356. Status Expiration of Previously Approved Prior Preliminary Approvals.

- (a) Any preliminary approval which was granted prior to the effective date of this chapter shall remain valid for the life of such approval or until December 31, 1994, whichever shall occur first, and shall be consistent with the terms of the ordinance in effect at the time such approval was granted, and subject to such conditions as may have been required pursuant to the granting of such approval.
- (b) Any application filed pursuant to the requirements of this chapter for Planning Commission review and/or development plan

review, based upon such a prior approval, but submitted after the effective date of this chapter, shall be subject to applicable requirements and procedures of Articles VI and VII of this chapter. In the granting of a development plan approval pursuant to such application, the Planning Commission or Administrator shall require conformance to the greatest degree practical with applicable site regulations set forth in Article IV and design and performance standards set forth in Articles VIII and IX. Any or all parcels of a tract granted prior preliminary approval for unspecified commercial use shall conform to the permitted commercial uses in Article IV for the specific zoning district within which it is located.

- (c) The following shall not be construed to extend the life of a development plan which was granted preliminary approval prior to the effective date of this chapter beyond December 31, 1994:
- (1) Obtaining a final development permit or development plan approval for a plan or a phase or a portion of a phase, whether or not designated in the preliminary approval.
 - (2) Completion of a phase or a portion of a phase, whether or not designated in the preliminary approval.
 - (3) Obtaining a building permit, certificate of compliance or certificate of occupancy for a phase or a portion of a phase, whether or not designated in the preliminary approval.
- (d) Where a PUD master plan, which was granted approval prior to the effective date of this chapter, has been incorporated into the official Town zoning map pursuant to Section 16-7-435 of this chapter, the provisions of that section shall govern the implementation of such PUD master plan.
- (e) Any preliminary approval which was granted prior to the effective date of this chapter for which a vested rights or equitable estoppel determination has been made pursuant to the procedures provided for in Section 16-7-698 shall remain valid for the length of time and under such conditions as provided for in the vested rights determination.

(Ord. No. 87-23, 9-16-87)

Section 16-7-358. Expiration of Prior Preliminary Approval.

~~Any preliminary approval granted prior to the effective date of this chapter, or any applicable amendment hereto, shall become invalid upon the expiration of such approval unless a development plan application for such proposed development, or any phase thereof, is filed in completed form prior to such expiration.~~

PART C. APPEALS

Section 16-7-360. Appeal to Board of Adjustment.

~~Any person aggrieved by a determination made pursuant to the provisions of this article shall have the right to appeal to the Board of Adjustment consistent with the procedures and requirements set forth in Article VI of this chapter.~~

Section 16-7-360. Determination of Vested Rights.

Determinations of claims of vested rights pursuant to a prior preliminary approval or prior final development permit shall be made in accordance with the provisions of section 16-7-698 of this chapter.

ARTICLE VI. ADMINISTRATION

PART J. Vested Rights Determinations

Section 16-7-698. Procedures for the Determination of Vested Rights.

In order to provide for the fair and equitable determination of vested rights pursuant to any approval previously granted pursuant to this chapter, or any approval granted prior to the adoption of this chapter, the Town Council shall adopt, by resolution, administrative procedures for the determination of vested rights.

PROCEDURE FOR DETERMINATION OF VESTED RIGHTS

Section 1 Purpose and Intent:

- (A) The purpose and intent of these Vested Rights Determination Procedure provisions are:
- (1) To implement the requirements of the State and Federal Constitutions, Statutes of South Carolina and Common Law of South Carolina that limit the application of comprehensive plans and land use ordinances and regulations with respect to property owners with vested rights;
 - (2) To recognize that development projects for which vested rights have been obtained must be accounted for in the comprehensive plan and land use ordinances and regulations of the Town of Hilton Head Island, South Carolina;
 - (3) To provide a method for determining and quantifying the number of projects, development projects, and land uses, now non-conforming, or which may become non-conforming due to subsequent amendments to the land management ordinances and regulations of the Town of Hilton Head Island, South Carolina, but which are vested, so that such projects, development projects and land uses can be accounted for in the existing and future Comprehensive Plans and land use ordinances and regulations of the Town of Hilton Head Island, South Carolina;
 - (4) To establish uniform and non-burdensome procedures and specific criteria for the determination of Vested Rights and claims of Equitable Estoppel in order to aid in the accomplishment of sound and orderly planning;
 - (5) To protect legitimate investment-backed expectations;
 - (6) To protect the planning and plan implementation processes;
 - (7) To settle potential disputes and to minimize costly and protracted litigation;
 - (8) To facilitate implementation of goals, objectives and policies set forth in the Town of Hilton Head Island Comprehensive Plan of 1991 and the Land Management Ordinance (§ 16-7-100, *et. seq.*, *Code of the Town of Hilton Head Island*, (1983)); and
 - (9) To ensure that all applicable legal standards and criteria are utilized in the determinations to be made hereunder.

Section 2 Definitions:

(A) The words or phrases used herein shall have the meaning prescribed in § 16-7-250, *Code of the Town of Hilton Head Island*, (1983), except as otherwise indicated herein. In the case of any conflict between the definitions set forth in § 16-7-250, *Code of the Town of Hilton Head Island*, (1983), and herein, the definitions set forth herein shall apply to matters arising under these Regulations:

- (1) Administrator means the Director of Community Development for the Town of Hilton Head Island, South Carolina.
- (2) Aggrieved Person means and refers to any person who has an immediate and substantial pecuniary interest in the outcome of any application for a Categorical Exemption or Vested Rights Determination.
- (3) Applicant means and refers to a property owner, or duly designated agent of the property owner, who makes an application for a Categorical Exemption Certification or for a Vested Rights Determination pursuant to these Regulations.
- (4) Board of Adjustment means and refers to the Board of Adjustment for the Town of Hilton Head Island, South Carolina.
- (5) Building Permit means and refers to a Building Permit issued by the Town Of Hilton Head Island, South Carolina, authorizing commencement of any construction or other improvement to real property, in accordance with the Building Code then in effect and the Land Management Ordinance.
- (6) Categorical Exemption or Categorically Exempt means and refers to a parcel, development project or any phase or portion thereof, which has been declared to be exempt from the application of all or any portion of the existing Land Management Ordinance, or any future amendments thereof, pursuant to these Regulations.
- (7) Categorical Exemption Certificate means and refers to the written document issued by the Administrator upon a Final Determination that a given parcel, development project or any portion thereof is Categorically Exempt.
- (8) Deliver and Delivery mean and refer to the deposit of any written notification required by these Regulations into the United States Mail, to the mailing address of the Applicant as shown on the

Application for Categorical Exemption Certificate or Vested Rights Determination, with first class postage affixed thereto; or by personal, hand delivery to the Applicant.

- (9) Development and/or Development Project shall mean and refer to any form of construction or other improvement, including site improvements, to real property, and shall further mean and refer, without limitation, to subdivisions, Planned Unit Developments, commercial or other non-residential building or structure, or any other form of planned improvements to real property. In these Regulations, this definition is intended to be all-encompassing, and to cover any form of rights to use or improve real property claimed by an Applicant.
- (10) Equitable Estoppel means and refers to a state of facts where it would be inequitable for the Town of Hilton Head Island, South Carolina to enforce all or any portion of the existing Land Management Ordinance, or amendments thereto, with respect to a particular parcel, development project or portion or phase thereof because an Applicant or and Applicant's predecessor in interest has: (1) relied in good faith (2) upon conduct, representations or silence of the Town of Hilton Head Island, South Carolina, amounting to a mis-representation or concealment of facts, (3) where the Applicant was without reasonable means of obtaining knowledge of the truth of the disputed matters, and (4) has made substantial improvements to his property, or has incurred substantial obligations as a result of such reliance. The terms Vested Rights and Equitable Estoppel are sometimes used interchangeably throughout these Regulations and a reference to one shall mean and include a reference to the other.
- (11) Final Decision or Final Determination means and refers to the decision of the Administrator on an application for a Categorical Exemption or on an Application for a Vested Rights Determination.
- (12) Land Management Ordinance means and refers to § 16-7-100, *et seq.*, *Code of the Town of Hilton Head Island*, (1983) and any amendments thereto.
- (13) Notice of Completeness means and refers to a written notice by which an Applicant for Vested Rights Determination or Categorical Exemption is notified that an application is complete.
- (14) Notice of Incompleteness means and refers to a written notice by which an Applicant for Vested Rights Determination or Categorical Exemption is notified that an application is incomplete, and specifying the item or items which are missing.

- (15) Notice of Dismissal means and refers to a written notice which notifies an Applicant that he has failed to respond to the Notice of Incompleteness within the time frame established by these Regulations, and which further notifies the Applicant that his Application is dismissed.
- (16) Town means and refers to the Town of Hilton Head Island, South Carolina.
- (17) Town Council means and refers to the Town Council of the Town of Hilton Head Island, South Carolina.
- (18) Valid or Validly-Issued Final Development Permit means and refers to Final Development Permit or any other authorization, including, without limitation: Development Plan approval [subject to the provisions of § 16-7-666, *Code of the Town of Hilton Head Island*, (1983)]; variances; "comfort letters" issued by the Town of Hilton Head Island, South Carolina; agreements between any agency of the Town of Hilton Head Island, South Carolina, and any third party; settlement agreements entered into to resolve litigation between the Town of Hilton Head Island and any other party, provided that such was legally issued; was issued by an individual or agency of the Town of Hilton Head Island, South Carolina possessing the requisite authority to issue the same; was not issued by mistake; which has not expired, lapsed, or been abandoned, revoked or canceled; or is not subject to expiration, lapse, abandonment or revocation by the passage of time or the conduct of the Applicant or the Applicant's predecessors in interest. All conditions of approval set forth in any such Valid Final Development Permit must have been satisfied by the Applicant or the Applicant's predecessor in interest.
- (19) Verified Copy means and refers to a copy of an original document submitted by an Applicant to the Town, pursuant to these Regulations, which copy bears (or is accompanied by) a sworn statement from the Applicant that the copy is a true and correct copy of the entire original document.
- (20) Vested Rights means and refers to the rights of an Applicant to be exempt from the application of all or any portion of the existing Land Management Ordinance, or any amendment thereto, to a particular parcel, development project or portion or phase thereof because the Applicant or the Applicant's predecessor in interest has: (1) performed substantial work or incurred substantial obligations; (2) in good faith reliance; (3) on any Final Development Permit or Building Permit issued by the Town of Hilton Head Island, South Carolina. The terms Vested Rights and Equitable Estoppel are sometimes used interchangeably throughout these regulations and a reference to one shall mean and include a reference

to the other.

- (21) **Vested Rights Determination** means and refers to the Final Decision of the Administrator, pursuant to which a parcel, development project or any portion or phase thereof is deemed to have Vested Rights or a valid claim of Equitable Estoppel against the Town, thereby exempting the parcel, development project or any portion or phase thereof from all or any portion of the Land Management Ordinance, or any amendment thereto.

Section 3 General Provisions and Applicability:

(A) **Term of these Regulations:** These regulations shall remain in effect unless and until repealed, amended or modified by Resolution of the Town Council in accordance with applicable State Law and local ordinances and procedures.

(B) **Quarterly Report:** The Administrator shall provide a report to Town Council on a quarterly basis, which report shall provide a summary of:

- (1) The number of applications filed for Categorical Exemptions during the quarter, and the status and/or disposition of such applications; and,
- (2) The number of applications filed for Vested Rights Determinations during the quarter, and the status and/or disposition of such applications.

(C) **Annual Review:** At least once every year prior to adoption of the Annual Budget and Capital Improvements Program, the Administrator shall prepare a report to the Town Council on the subject of Vested Rights which shall include:

- (1) Recommendations on amendments, if appropriate, to these Regulations;
- (2) The number of applications filed for Categorical Exemptions during the preceding year, the disposition of such applications and the number of dwelling units by type and square footage of non-residential development represented by such Categorical Exemptions.
- (3) The number of applications filed for Vested Rights Determinations during the preceding year, the disposition of such applications and the number of dwelling units by type and square footage of non-residential development represented by such determinations;
- (4) The location of Categorically Exempt parcels, developments and development projects, including the zoning district in which they are located;
- (5) The location of parcels, developments and development projects where it has been determined that Vested Rights apply, including the zoning district in which they are located;
- (6) The number, identification and location of applications for Categorical Exemptions and Vested Rights Determinations which are denied;
- (7) Other data, analysis or recommendations which the Administrator may deem appropriate, or as may be

requested by the Town Council.

(D) **Effect of Annual Review:** This annual review may, in whole or in part, form the basis for Town Council action to repeal, amend or modify these Regulations; provided, however, that the Town Council may cite and the Town Council may rely upon such other data, information, reports, analyses and documents relevant to any such decision as may be available to the Town Council.

(E) **Amendments:** Changes to these regulations must be made by Resolution of the Town Council. Nothing herein precludes the Town Council or limits the discretion of the Town Council to amend these Regulations at such other times as the Town Council may deem to be necessary or desirable.

(F) **Affected Area:** These regulations shall apply within the boundaries of the Municipal Limits of the Town of Hilton Head Island, South Carolina.

(G) **Applicability:** These Regulations shall apply to all claims for Categorical Exemptions and Vested Rights Determinations, except as otherwise set forth below.

(H) **Inapplicability:** These Regulations shall not apply to nor shall the procedures for obtaining a Categorical Exemption or Vested Rights Determination be available to claims for Vested Rights or Categorical Exemptions based only upon existing zoning of property.

Section 4 Categorical Exemptions:

(A) **Categorical Exemptions:** The following are Categorically Exempt if an application for Categorical Exemption is filed by the Applicant pursuant to this Section 4 and a Categorical Exemption Certificate is issued by the Town:

- (1) Parcels, developments or any portion or phase thereof, which are the subject of a valid Vested Rights Determination issued by the Town pursuant to these Regulations.
- (2) Parcels, developments or any portion or phase thereof, which are the subject of any Final Development Permit issued prior to the adoption of these Regulations, and which Final Development Permit has not expired, lapsed, been abandoned, revoked or otherwise declared invalid;
- (3) Owners of parcels, developments, or any portion or phase thereof, as defined in Subsections one (1) and two (2) above, wherein a valid Building Permit has been obtained by the owner, or the owner's predecessor in interest, shall not be required to obtain a Categorical Exemption Certification unless the construction is abandoned, or the Building Permit pursuant to which construction is taking place lapses, expires or is waived.

(B) **Procedure for obtaining a Categorical Exemption Certificate:**

- (1) **Application:** Any person wishing to obtain a Categorical Exemption Certificate shall file an "Application for a Categorical Exemption Certificate" as set forth herein.
- (2) **Submission of Application:** An Applicant shall file a complete "Application for Categorical Exemption Certificate" with the Administrator no later than December 31, 1994, or within one year of the date of the adoption of any amendment to the Land Management Ordinance from which the Applicant believes he is Categorically Exempt. Failure to submit a complete application within the time frames set forth herein shall be deemed to constitute a waiver and abandonment of the alleged right to obtain a Categorical Exemption.
- (3) **Submission Requirements:** An application for a Categorical Exemption Certificate shall be made on a form established for such purpose by the Town and shall, at a minimum, contain the following information:

- (a) Name and current mailing and street address of the Applicant;
- (b) A description of the development for which the Categorical Exemption is sought, including current survey showing site improvement and copies of relevant deeds;
- (c) Location of development for which the Categorical Exemption is sought, including the Zoning District;
- (d) Total land area of the development for which the Categorical Exemption is sought;
- (e) Total area of impervious surface and open space, of the development for which the Categorical Exemption is sought;
- (f) Number of residential dwelling units, by type, within the development for which the Categorical Exemption is sought;
- (g) Type and amount of non-residential square footage, of the development for which the Categorical Exemption is sought;
- (h) Phases of the development, or portions of the development for which the Categorical Exemption is sought, if applicable;
- (i)
 - (i) a verified copy of any valid Vested Rights Determination issued by the Town pursuant to these Regulations; or
 - (ii) a verified copy of a valid Final Development Permit including any plans, drawings and/or narrative associated with or relating to the Final Development Permit issued by the Town prior to the effective date of these Regulations.
- (j) A sworn narrative statement from the Applicant setting forth the Applicant's basis for his claim of Categorical Exemption.
- (k) A filing fee in the amount of One Hundred and no/100 (\$100.00) Dollars.
- (l) A sworn statement, in a form prescribed by the Town, and signed by the Applicant, attesting that:
 - (i) any Valid Final Development Permits, contracts, appraisals, reports, or any other documents or materials submitted are valid as of the date of the submission and that the Applicant has not assigned, sold or otherwise transferred his interest in and

to the rights described in the said documents;

- (ii) setting forth the names and addresses of any party known to the Applicant to have any pecuniary interest in the outcome of the Categorical Exemption Application;
- (iii) that there are no prior adverse final Administrative determinations of the Town or any federal, state or other local governmental agency affecting the Applicant's Categorical Exemption claim;
- (iv) that there are no prior adverse orders of any state or federal court affecting the Applicant's Categorical Exemption claim;
- (v) that there is no pending administrative action or court proceeding in which the Applicant's Categorical Exemption claim will be affected by the outcome; and,
- (vi) that the Applicant is aware of no other information or document, not submitted with his application, disclosure of which would potentially have a negative impact on his application.

(4) **Review of Application for Completeness:**

- (a) The Administrator shall review the application within ten (10) days of submission and inform the Applicant, in writing, as to whether or not the application is complete. If complete, the Administrator shall proceed to review the application as set forth herein.
- (b) If the Administrator determines that the application is incomplete, a Notice of Incompleteness shall be Delivered to the Applicant.
- (c) The Administrator shall take no further action on an incomplete application until the deficiencies are corrected and the application is resubmitted. If a complete application is not resubmitted within fifteen (15) days from the date of Delivery of the Notice of Incompleteness to the Applicant, the application shall be dismissed; a Notice of Dismissal shall be delivered to the Applicant, and all fees paid shall be retained by the Town. A dismissal pursuant to this subsection shall be without prejudice to the Applicant's right to refile a complete application, subject, however, to the time frames set forth in Section 4 (B)(2) herein.
- (d) A determination of completeness shall only constitute a determination that the application is in

compliance with the submission requirements of these Regulations and shall not imply compliance with the substantive requirements of these Regulations nor shall it indicate that the information submitted is accurate or has been verified.

(5) **Public Hearing on Application:**

- (a) At the same time that the Administrator delivers the Notice of Completeness to the Applicant, the Administrator shall also notify the Applicant of the time and place for a public hearing on the Application. Said public hearing shall be no more than fifteen (15) days following the delivery of the Notice of Completeness.
- (b) At the public hearing, the Applicant shall be given the opportunity to make an oral presentation on the facts and applicable law in support of the Application to the Administrator, and the Administrator shall be given the opportunity to ask questions of the Applicant concerning the materials submitted hereunder and the presentation of the Applicant.
- (c) While the hearing will be open to the public, comments from the public concerning the application shall not be taken at the hearing.

(6) **Issuance or Denial of Categorical Exemption Certification:**

- (a) Following review by the Administrator and the public hearing, the Administrator shall issue his Final Decision, issuing or denying the Application for Categorical Exemption Certification for all, or a portion of, the applicable development.
- (b) If granted, the Categorical Exemption Certification shall be specific as to the development, or portion thereof, which is Categorically Exempt; large-scale, multi-phase development may be determined to be Categorically Exempt in part, but not as a whole.
 - (i) The Categorical Exemption Certification may specify any Land Management Ordinance provisions to which the exemption will or will not apply.
 - (ii) The Categorical Exemption Certification shall also specify that the Categorical Exemption Certification shall be valid for a period of five (5) years from the date of said Categorical Exemption Certification unless another time period is stated therein and the Administrator documents the reasons for the alternate time period; and

that after the expiration of the Categorical Exemption Certification, the affected property shall be subject to all provisions of the then existing Land Management Ordinance.

(c) If the Application for Categorical Exemption is denied, the Administrator shall specify his reasons therefore, in writing.

(7) **Delivery of Final Determination:** The Administrator shall Deliver his Final Determination to the Applicant within sixty (60) days of the public hearing , unless the Administrator and the Applicant agree, in writing, to extend the deadline.

(8) **Denial is without Prejudice to certain other rights:** A denial of an Application for a Categorical Exemption Certificate shall not prejudice the right of the Applicant to seek a Vested Rights Determination based upon the same facts and/or documentation, subject, however, to the time limits set forth in Section 5(B), infra.

Section 5 Procedures for Vested Rights Determinations:

(A) **Necessity for Application:** All development other than that which is determined to be Categorically Exempt pursuant to these Regulations shall be presumed to be subject to the existing Land Management Ordinance, and any amendments thereto, unless the Applicant demonstrates, by a preponderance of the evidence, that Vested Rights have been acquired pursuant to South Carolina law or that the Town is Equitably Estopped from enforcing all or portions of the Land Management Ordinance with respect to all or portions of the development.

(B) **Submission of Application:** An Applicant shall file a complete "Application for Vested Rights Determination" with the Administrator no later than December 31, 1994, or within one year of the date of the adoption of any amendment to the Land Management Ordinance which the Applicant believes affects or involves any Vested Right of the Applicant. Failure to submit a complete application within the time frames set forth herein shall be deemed to constitute a waiver and abandonment by the Applicant of any alleged Vested Rights.

(C) **Submission Requirements:** An application for a Vested Rights Determination shall be made by the Applicant on a form established for such purpose and provided by the Town, and, at a minimum, shall contain the following information:

- (1) All of the information required by Section 4(b)(3) supra;
- (2) Verified Copies of all Final Development Permits, contracts, appraisals, reports, or any other documents or materials upon which the applicant's claim of Vested Rights or Equitable Estoppel is based;
- (3) A sworn narrative statement from the Applicant setting forth the basis for the Applicant's claim of Vested Rights. To the extent applicable, the narrative statement should address the criteria for a determination of Vested Rights or Equitable Estoppel set forth in Section 6 infra.
- (4) A filing fee in the amount of Five Hundred and no/100 (\$500.00) Dollars.
- (5) A sworn statement, in a form prescribed by the Town, and signed by the Applicant, attesting that:
 - (a) any Valid Final Development Permits, contracts, appraisals, reports, or any other documents or materials submitted are valid as of the date of the submission and that the Applicant has not assigned, sold or otherwise transferred his interest in and to the rights described in the said documents;

- (b) setting forth the names and addresses of any party known to the Applicant to have any pecuniary interest in the outcome of the Vested Rights Determination;
- (c) there are no prior adverse final Administrative determinations of the Town or any federal, state or other local governmental agency affecting the Applicant's Vested Rights claim;
- (d) there are no prior adverse orders of any state or federal court affecting the Applicant's Vested Rights claim;
- (e) there is no pending administrative action or court proceeding in which the Applicant's claim of Vested Rights will be affected by the outcome; and
- (f) the Applicant is aware of no other information or document, not submitted with his application, disclosure of which would potentially have a negative impact on his application.

(D) Review of Application for Completeness:

- (1) The Administrator shall review the Application for Vested Rights Determination within fifteen (15) days of submission and inform the Applicant, in writing, as to whether or not the application is complete. If complete, the Administrator shall proceed to review the application as set forth herein.
- (2) If the Administrator determines that the application is incomplete, a Notice of Incompleteness shall be Delivered to the Applicant.
- (3) The Administrator shall take no further action on an incomplete application until the deficiencies are corrected and the application is resubmitted. If a complete application is not resubmitted within twenty (20) days from the date of Delivery of the Notice of Incompleteness to the Applicant, the application shall be dismissed; a Notice of Dismissal shall be delivered to the Applicant, and all fees paid shall be retained by the Town. A dismissal pursuant to this subsection shall be without prejudice to the Applicant's right to refile a complete application, subject, however, to the time frames set forth in Section 5(13) herein.
- (4) A determination of completeness shall only constitute a determination that the application is in compliance with the submission requirements of these Regulations and shall not imply compliance with the substantive requirements of these Regulations nor shall it indicate that the information submitted is accurate or has been verified.

(E) **Public Hearing on Application:**

(1) At the same time that the Administrator delivers the Notice of Completeness to the Applicant, the Administrator shall also notify the Applicant of the time and place for a public hearing on the Application. Said public hearing shall be no more than fifteen (15) days following the delivery of the Notice of Completeness.

(2) At the public hearing, the Applicant shall be given the opportunity to make an oral presentation on the facts and applicable law in support of the Application to the Administrator, and the Administrator shall be given the opportunity to ask questions of the Applicant concerning the materials submitted hereunder and the presentation of the Applicant.

(3) While the hearing will be open to the public, comments from the public concerning the application shall not be taken at the hearing.

(E) **Issuance or Denial of Vested Rights Determination:**

(1) Following review by the Administrator and the public hearing, the Administrator shall issue his Final Decision, issuing or denying the Application for Vested Rights Determination.

(2) The Final Decision shall contain the Administrator's findings of fact and conclusions of law with regard to the Application for Vested Rights Determination, and shall, at a minimum, contain the following:

(a) Whether the Applicant has been found to have acquired Vested Rights or has a valid claim of Equitable Estoppel and the basis for such finding;

(b) If the proposed Determination includes findings and a conclusion that Vested Rights or a valid claim of Equitable Estoppel exists, then the Final Decision shall further state the geographic scope of the determination in relation to the total area of the development site; the specific buildings or uses to which the determination applies; the substantive scope of the Vested Rights determined to have been acquired and the limitations applicable thereto, if any, including, but not limited to, the applicability of impact fees and building permit allocations; any other appropriate conditions, consistent with the rights of the applicant, which are needed to ensure consistency with the Comprehensive Plan and Land Management Ordinance.

(c) The Vested Rights Determination shall also specify that the Vested Rights Determination shall be valid for a period of five (5) years from the date of said Vested Rights Determination unless

another time period is expressly stated therein and the Administrator documents their reasons for the alternate time period; and that after the expiration of the Vested Rights Determination, the affected property shall be subject to all provisions of the then existing Land Management Ordinance.

(F) **Delivery of Final Determination:** The Administrator shall Deliver his Final Determination to the Applicant within sixty (60) days of the public hearing, unless the Administrator and the Applicant agree, in writing, to extend the deadline.

(G) **Withdrawal of Application:** An Applicant may withdraw an application for a Vested Rights Determination at any time by submitting a written request to the Administrator. Withdrawal of an application for a Vested Rights Determination shall result in the forfeiture of all administrative fees paid by the applicant for the processing of the application. Withdrawal of an Application under this subsection shall be without prejudice to the rights of the Applicant to re-file an Application for Vested Rights Determination, subject to the time limitations set forth in Section 5(B) herein.

Section 6 Standards and Criteria for Issuance of Vested Rights Determinations:

(A) General Requirements for Common Law Vested Rights.

- (1) The Applicant has the duty and responsibility to demonstrate by a preponderance of the evidence that a Vested Right to proceed with the proposed development without being subject to specific requirements of the existing Land Management Ordinance, and any amendments thereto, has been legally established and/or to demonstrate that the Town is Equitably Estopped from applying specific provisions of the existing Land Management Ordinance, and any amendments thereto, to the proposed development.
- (2) The applicable legal requisites to establish a claim of Vested Rights to initiate or complete development which does not conform to the existing Land Management Ordinance or amendments thereto are:
 - (a) that the Applicant has made a substantial change of position or has incurred substantial obligations and expenses with respect to the land affected by the permit;
 - (b) acting in good faith and in reasonable reliance on a valid, unexpired approval or act of the Town; or,
 - (c) that the Applicant has, in good faith, applied for an approval or permit to initiate development or construction based upon the existing zoning ordinances prior to any amendment thereto being legally pending; provided, however, that the mere filing of an application will not be sufficient to establish a claim of vested rights, unless said application is Legally Maintained, as defined in § 16-7-250, *Code of the Town of Hilton Head Island*, (1983).
- (3) The applicable legal standards for a determination that the Town is Equitably Estopped from enforcing the provisions of the existing Land Management Ordinance, or amendments thereto are:
 - (a) that the Applicant has, in good faith, relied upon conduct, representations or silence of the Town of Hilton Head Island, South Carolina, amounting to a concealment or mis-representation of facts;
 - (b) in circumstances where the Applicant was without knowledge of the true state of facts, and was without reasonable means of determining the true state of facts;
 - (c) the Applicant has relied, to his detriment upon such affirmative act, representation or omission, and has made substantial improvements or incurred substantial obligations with respect to the

land;

(d) it would be unjust or inequitable to subject the proposed development or construction to the requirements of the Land Management Ordinance, given the totality of the circumstances.

(4) If the applicant is determined to have acquired Vested Rights, or if the Town is determined to be Equitably Estopped from applying certain specified provisions of the existing Land Management Ordinance, or amendments thereto, to the proposed construction or development, the Applicant shall be granted a Vested Rights Determination.

(B) **Specific Criteria:** The following specific criteria shall guide both the Applicant in submitting evidence and the Administrator in considering the evidence so that all relevant facts are reviewed and so that an adequate record is made for further administrative or judicial review. The specific criteria are not intended to limit either the Administrator or the Applicant in applying the common law of Vested Rights or Equitable Estoppel, and the Administrator may, in any particular case, consider all such applicable law.

(1) **Good Faith.** Acting in good faith may mean, and consideration may be given to, the degree to which the Applicant has made diligent efforts in a timely fashion toward completion of the subject development. Diligent efforts shall require reasonable and timely pursuit of all necessary governmental approvals, certifications and permits, financing, and marketing, together or in a sequence customary to the industry.

(a) The Administrator may find good faith has not been shown:

- (i) where the Applicant has not made diligent efforts to pursue all reasonable means to remedy or avoid the factors preventing him from commencing or continuing with the proposed development; or
- (ii) where all permits, approvals, and certifications which should reasonably be obtained are not obtained and have not been delayed by factors beyond the Applicant's control;
- (iii) where delays are occasioned by the actions of any person holding a legal or equitable interest in the property, its agents, contractors, or employees acting on behalf of the Applicant;
- (iv) where there is a discontinuation of attempts to obtain all necessary governmental

approvals, certifications and permits; financing; and marketing, together, or in a sequence customary to the industry.

(b) Recognizing that land development is a complex process involving a series of governmental approvals which must be obtained over time, the following factors may be considered where relevant:

- (i) The marketing practices associated with the proposed development, e. g., whether the entire development is being marketed for sale as a whole or whether only individual lots or dwelling units are being marketed;
- (ii) The reasonable development time line for a development of the type and size being proposed;
- (iii) The number and type of contractors, engineers, consultants, tradesman, and professionals working on the proposed development, and the nature of their respective activities;
- (iv) Whether the Final Development Permit (if any) was issued in compliance with then current Land Management Ordinance or the Development Standards Ordinance;
- (v) Whether the Applicant was on notice that active or documented efforts were being pursued by the Town to adopt the current Land Management Ordinance at the time that the Valid Final Development Permit was issued; to establish that active and documented efforts had been undertaken, the Administrator must find that there was more than circumstantial notice of a change in the regulations. Comments by Town personnel shall not be deemed sufficient to establish notice of a change in the Land Management Ordinance.
- (vi) Whether the Applicant has inquired and conferred with the appropriate Town officials as to the use to which the property may be put and the conditions and requirements applicable to such use.
- (vii) With regard to claims of Vested Rights arising from an Application for an approval or permit for development which has been made in reliance on existing zoning,

whether or not any amendment to the existing zoning was legally pending prior to the submission of the application.

- (2) **Detrimental Reliance:** In determining whether the Applicant has reasonably and substantially relied on an alleged governmental approval, act or omission, the following factors may be considered:
- (a) The type of approval, act or omission, relied upon;
 - (b) The regulatory system in effect at the time the approval, act or omission occurred;
 - (c) Whether the approval, act or omission was formal or informal;
 - (d) The point in the sequence of required regulatory approvals when the relied upon approval, act or omission occurred. A determination that a development approval claimed by the Applicant as giving rise to Vested Rights or Equitable Estoppel is the final act required (or which was required under the existing land use ordinances) to authorize development shall weigh in favor of making a Vested Rights Determination.
 - (e) The level of detail included in the approval issued by the Town or the act or omission relied upon.
- (3) **Substantial Improvements, Expenses or Obligations:** In determining whether the Applicant has made a substantial change of position or has incurred substantial obligations or expenses, the following factors may be considered:
- (a) The extent to which contributions have been made by the Applicant for public infrastructure for the proposed development, taking into account the relative significance of such contributions as compared to the size, value, and density of the project, and whether performance is complete;
 - (b) The total amount of direct costs of development incurred by the Applicant as compared to the total project cost; provided, however, that costs incurred prior to the Town act or approval upon which the owner relied shall not be considered;
 - (c) The extent to which surveys, design plans, engineering plans, plats, building plans and specifications have been prepared in reliance on a valid Final Development Permit, and the total amount of money reasonably spent thereon relative to the size of the development;
 - (d) The professional fees incurred for the development;

- (e) The nature of any expenditures allegedly made in reliance upon reasonable investment-backed expectations, the company to whom such expenditures were paid, and the business relationship or any familiar or other relationship of the recipient of such expenditures to the Applicant;
- (f) The reasonableness of the total expenditures as compared to customary development practices for a development of similar size and scale on Hilton Head Island, South Carolina;
- (g) The then-present intent of the Applicant to develop a specific project at the time the reliance was deemed to have occurred, as opposed to a tenuous, contingent, speculative, distant or non-existent intent;
- (h) Whether the parcel of land was purchased contingent upon the issuance of the specific Valid Final Development Permit, and whether the Town knew that the Applicant was relying upon the issuance of the Valid Final Development Permit. The existence in a Vested Rights Determination Application of written evidence in the records of the Town of such knowledge shall weigh in favor of the determination.
- (i) The extent to which irrevocable contracts or agreements have been negotiated and executed by the Applicant to pursue the proposed development.

(C) **Equity of Applying Land Management Ordinance to Applicant:** In determining whether it would be inequitable to apply the current Land Management Ordinance to the Applicant, the following factors may be considered:

- (1) The terms of any agreement by and between the Town and the Applicant, or the Applicant's predecessor in interest, executed in conjunction with a development approval;
- (2) The conditions of development approval and the level of, or progress of the Applicant toward, fulfillment of such conditions;
- (3) the number, frequency and timing of Town approvals or acts relied upon by the Applicant;
- (4) Whether and for how long the subject parcel was developable prior to the applicability of the current Comprehensive Plan and Land Management Ordinance, and the type and extent of development that could have occurred when the Applicant acquired the property, incurred substantial obligations or expenditures, or substantially changed his position;
- (5) The reasonableness and good faith of any alleged reliance on governmental approvals, acts or omissions,

given the totality of the circumstances;

- (6) Whether the Applicant had obtained financing or a loan commitment prior to the effective date of these Regulations;
- (7) The use to which the Applicant intended to put the land prior to the effective date of these regulations;
- (8) Whether a capacity reservation, or similar agreement reserving utility or other infrastructure capacity, has been maintained by the Applicant and the requirements for continuing to maintain such capacity; and
- (9) Whether the project is in separate ownerships, and the number of owners and size of parcels in the project under separate ownership (projects shall be considered as a whole).

(D) Standards and Criteria Inapplicable to a Vested Rights Determination:

The following standards may not be relied upon by the applicant and shall not be applicable to a Vested Rights Determination:

- (1) Actions of the Applicant taken after the effective date of the existing Land Management Ordinance, or any amendment thereto; provided, however, that activities of the Applicant which are underway, or which are the next step in a development process, and which are continuing to a reasonable completion of the development project, and which cannot be halted without substantial harm and loss of investment, may be considered;
- (2) Real Property Taxes paid by the Applicant;
- (3) Appraised value of the land as set by the Beaufort County Appraiser;
- (4) Acts or approvals which are not specific to the subject parcel or proposed development;
- (5) Conceptual approvals, informal approvals or encouragement by the Town or any of its staff or officials unless the Town Official has express authority to authorize the specific action;
- (6) Rezoning which are not accomplished in conjunction with a specific plan of development;
- (7) Development that has occurred outside of the boundaries of the proposed development; and,
- (8) A Valid Final Development Permit that is superseded by a subsequent Valid Final Development Permit; or which is abandoned by the Applicant in pursuit of a different development plan.
- (9) Applications to initiate development or construction based upon existing zoning where an amendment to the existing zoning is legally pending prior to the filing of the application.

Section 7 Effect of Categorical Exemptions and Vested Rights Determinations:

(A) **Effect on Land Management Ordinance:** Issuance of a Categorical Exemption or a Vested Rights Determination shall relieve the Applicant from being subject to only those provisions of the existing Land Management Ordinance, and amendments thereto, as are set forth in the Categorical Exemption or Vested Rights Determination. A Categorical Exemption or a Vested Rights Determination shall have no effect on other applicable governmental requirements.

(B) **Amendment of Final Development Permits with accompanying Categorical Exemptions or Vested Rights Determination:**

The granting of a Categorical Exemption or a Vested Rights Determination shall not be construed as a limitation on the Applicant or a successor in interest from seeking an amendment of any Final Development Permit; provided, however that any material change in the proposed development and any increased impact resulting from such amendment shall cause the proposed development to be subject to the then current Land Management Ordinance, any Categorical Exemption or Vested Rights Determination notwithstanding.

(C) **Sale of Lots or Parcels:** Nothing herein shall preclude the sale of a parcel of land or a lot with a Categorical Exemption or a Vested Rights Determination.

(D) **Geographic Scope:** The Categorical Exemption or Vested Rights Determination shall apply only to the particular parcel(s) of land for which application was made for the Categorical Exemption or Vested Rights Determination.

(E) **Reconsideration/Revocation of Vested Rights Determination:** A Categorical Exemption or a Vested Rights Determination may be reconsidered and revoked by the Administrator, notwithstanding any other provision of these Regulations, if the Administrator determines that the Final Determination on a Categorical Exemption or on a Vested Rights Determination was based on materially inaccurate or incomplete information and that correct and complete information was reasonably obtainable by the Applicant.

Section 8 Appeals:

(A) **Appeal from the Final Decision of the Administrator:** An appeal from any Final Decision of the Administrator pursuant to these Regulations, including, but not limited to, issuance or denial of a Categorical Exemption or Vested Rights Determination shall be to the Court of Common Pleas for Beaufort County, South Carolina, pursuant to the provisions of S. C. Code Ann. § 6-7-750 (Supp. 1992).

Section 9 Administration:

(A) **Rules and Regulations:** The Town may adopt by Resolution any other rules, administrative guidelines, forms, work-sheets and processes as are necessary to efficiently and fairly administer and implement these Regulations.

(B) **Administrative Fees:** The Town may establish and modify by Resolution a fee schedule for each of the administrative procedures, determinations, approvals and certifications required by these Regulations.

Section 10 Conflict and Severability:

(A) **Conflict:** In the event of any conflict between other regulations and these Regulations, the more restrictive is deemed to be controlling. These Regulations are not intended to amend or repeal any existing Town Ordinance.

(B) **Severability:** If any section, phrase, sentence or portion of these Regulations is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such section, phrase, sentence or portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining sections, phrases, sentences or portions thereof.

PASSED AND ADOPTED by the Town Council of the Town of Hilton Head Island, South Carolina, at a special meeting of said Town Council held on the 2nd day of December, 1993.



Harvey W. Ewing, Jr., Mayor

ATTEST:



Sandi Santaniello, Clerk

Ex. B

3/10/99

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

BEAUFORT COUNTY, S.C.
RECORDING FEES COLLECTED
TRANSFER FEES \$ 800.00
COUNTY \$ 352.00 STATE \$ 827.60
GENERAL WARRANTY DEED 912

39611

KNOW ALL MEN BY THESE PRESENTS, THAT, POPE AVENUE ASSOCIATES, a South Carolina Partnership, together with its successors and assigns ("Grantor") for and in consideration of the sum of Three Hundred Twenty Thousand and no/100 Dollars (\$320,000.00) to Grantor in hand paid at and before the sealing of these presents by **SCD PROPERTIES, INC.**, a Utah Corporation ("Grantee") of Post Office Box 6899, Hilton Head Island, South Carolina 29938-6899, the receipt of which is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto SDC Properties, Inc., a Utah Corporation, its successors and assigns forever, the property described on Exhibit "A" ("Property") attached hereto.

TOGETHER WITH ALL AND SINGULAR, the rights, members, hereditaments and appurtenances to the said Property belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the Property before mentioned unto SDC Properties, Inc., a Utah Corporation, its successors and assigns forever.

AND GRANTOR DOES hereby bind itself, its successors and assigns, to warrant and forever defend, all and singular, the Property unto SDC Properties, Inc., a Utah Corporation, its successors and assigns, against Grantor, its successors and assigns, and all persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed this 14th day of July, 1999.

Signed, sealed and delivered in the presence of:

POPE AVENUE ASSOCIATES, a South Carolina Partnership

Kevin B. Murphy
[Signature]

By: [Signature]
Richard A. McGinty
Its: General Partner

35
A550-18-202



EXHIBIT "A"**Legal Description**

All that certain piece, parcel or lot of land situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, and shown as "Parcel E" on that certain Plat entitled "A Survey of 15.100 Acres Waterside P.U.D., a Section of Parcel 5B Forest Beach Subdivision" dated December 9, 1987, and prepared by Surveying Consultants, said plat being recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 35, page 79. For a more detailed description, reference is made to said plat of record.

This conveyance is subject to all covenants, conditions, restrictions and easement as described in that certain Declaration of Covenants, Conditions and Restrictions for Waterside P.U.D. as recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 494, page 419 and all amendments thereto as well as all easements, restrictions, covenants and conditions of record the Office of the Register of Deeds for Beaufort County, South Carolina, and further subject to all declarations, covenants, restrictions, easements and plats of record in the Office of the Register of Deeds for Beaufort County, South Carolina.

This being a portion of the property conveyed to Pope Avenue Associates by deed of Robert L. Graves, Richard A. McGinty and Robert S. Crum dated September 16, 1974, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 223, page 1953.

The within Deed was prepared by Mark S. Simpson, Esquire, of Jones, Scheider & Patterson, P.A., Post Office Drawer 7049, Hilton Head Island, South Carolina 29938-7049.

TMS: A PORTION OF DISTRICT 550, MAP 18, PARCEL 202

1 APPEARANCES of COUNSEL:

2 FOR THE DEFENDANTS:

3 THOMAS C. TAYLOR, ESQUIRE
 Law Office of Thomas C. Taylor, LLC
 4 22 Bow Circle
 Suite A
 5 Hilton Head Island, South Carolina 29928
 843.785.5050
 6 tom@thomastaylorlaw.com
 7

8 AND

9 CHESTER C. WILLIAMS, ESQUIRE
 Law Office of Chester C. Williams, LLC
 10 17 Executive Park Road
 Hilton Head Island, South Carolina 29938
 11 843.842.5411
 firm@ccwlaw.net

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13 I N D E X

14 PAGE

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22 OPENING REMARKS AND STIPULATIONS:
 By Mr. Stanford ----- 4

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24

25 CERTIFICATE ----- 12

1 MR. STANFORD: So we have the
2 motion for reconsideration in the case
3 of ArborNature. The reconsideration,
4 you're excused Mr. Johnson. Mr.
5 Wilson, you did not participate in the
6 original, so you cannot participate.
7 You're welcome to sit with us if you
8 like.

9 This is a motion for -- to
10 reconsider an Appeal Number 1006-2016,
11 ArborNature and Adam Congrove
12 requesting that the Board of Zoning
13 Appeals reconsider their decision to
14 uphold the decision of the official
15 related to the application 1006-216 --
16 2016.

17 MR. TAYLOR: Mr. Chairman, I'm Tom
18 Taylor as you know. Sir, if we're
19 going to move forward with this, I ask
20 for at least a two-minute break so that
21 I can reset up. I have a suggestion
22 and I would like to ask and be able to
23 consider this. The timing on this
24 motion to reconsider of being heard is
25 not critical. The motion is going to

1 take me, Mr. Chairman, a little while
2 because what I have for the BZA is the
3 transcript of the hearing that we had
4 and I'm going to hand that out and go
5 through the differences in the
6 testimony and what the questions were
7 and the end what the decisions made
8 for.

9 I like to ask, Mr. Chairman, with
10 all due respect, that I hand out a copy
11 of this official transcript and then
12 allow the board to consider taking a
13 break and hearing me at the next
14 meeting because at that point in time,
15 you would have the chance to read the
16 official transcript. It will make my
17 presentation much quicker and easier
18 and there is no urgency and it is not
19 delaying anything on the circuit court
20 level. Mr. Chairman knows we filed our
21 appeal because we had to do so. The
22 town, they filed its answer. Judge
23 Dukes, I don't believe, is likely to
24 hear it in December and I don't think
25 there is anything and it is 5:40, but

1 I'm at your disposal. But I would
2 rather hand you-all the transcript and
3 be heard at the next meeting.

4 MR. STANFORD: Is Brian still
5 here?

6 Is there a procedural or technical
7 problem with our acting on a motion to
8 postponing this hearing until the next
9 hearing at the Board of Zoning Appeals.

10 MR. HULBERT: There is two --
11 three courses of action. You can deny
12 his request and proceed forward. Two
13 --

14 MR. STANFORD: I don't think that
15 was a formal request. I'm suggesting
16 that.

17 MR. HULBERT: Two, you can grant
18 his request. Or three you can treat it
19 as you're just holding over to the next
20 meeting. If he's starting now, the
21 meeting is held over to the next
22 meeting.

23 MR. STANFORD: Mr. Taylor, you
24 have started your presentation and now
25 given the time and the length of this

1 hearing, I would be interested in a
2 motion to recess and to commence
3 presentation on the ArborNature matter
4 at the next meeting in the Board of
5 Zoning Appeals.

6 MR. FINGER: So moved.

7 MR. STANFORD: Is there a second?

8 MS. LAUDERMILCH: Second.

9 MR. HULBERT: I would just make
10 sure that all the parties are available
11 at the next meeting.

12 MR. WILLIAMS: We certainly are
13 available and in conjunction with that,
14 you may be aware there is another
15 appeal by ArborNature for the same
16 meeting. It would be seem logical to
17 put that all on the following meeting
18 instead of hearing both at the same
19 time. We have no objection to that.

20 MS. LEWIS: Staff does.

21 MR. STANFORD: And that way we
22 have all the parties present for those
23 matters.

24 So we have a motion for a recess.

25 Do we have a second?

1 MS. LAUDERMILCH: Second.

2 MR. STANFORD: Can we quickly call
3 the roll?

4 MR. CUTRER: Is ArborNature
5 continuing to -- ArborNature has a
6 ruling that said this is not in
7 compliance. That ruling has been in
8 effect since September.

9 MR. STANFORD: Yes.

10 MR. CUTRER: Are they continuing
11 their normal operations.

12 MR. TAYLOR: Yes, sir.

13 MR. HULBERT: As long as the
14 appeal is pending on this level or the
15 next level, it doesn't change.

16 MR. CUTRER: I'm sorry.

17 MR. HULBERT: As long as they have
18 an appeal pending either at this level
19 or the circuit court level, the legal
20 action stays until they can continue.

21 MR. STANFORD: The action on that
22 is effect would stay.

23 Will you please call the roll for
24 the motion to recess?

25 MS. DIXON: I just wanted to make

1 sure we have a quorum because I know
2 Teresa said there were a few members
3 that would not be at the December date.

4 MR. STANFORD: December date?

5 MS. DIXON: December 19th.

6 MS. HALEY: Nicole, if I could?

7 Mr. Johnson is excused. Mr.
8 Cutrer indicated he would not be here
9 for the December 19th meeting. Mr.
10 Wilson can not participate so that
11 means we would have four members.

12 MR. STANFORD: What did you say
13 about Mr. White? He would not be
14 available?

15 MS. HALEY: I don't know that.
16 Mr. Wilson, he cannot participate.

17 MR. WILSON: I did not
18 participate.

19 MR. STANFORD: He can't act on the
20 motion for reconsideration. I don't
21 know if he can act on the other motion
22 or not.

23 MR. TAYLOR: Yes, sir.

24 MR. HULBERT: I won't be here
25 December 19th either.

1 MR. STANFORD: Do we want to have
2 a December meeting? I don't want to
3 adversely effect anyone's rights in
4 conjunction with the uses of their
5 property, but it sounds like we are
6 challenged to have a quorum for this.

7 MR. HULBERT: There is also a
8 special meeting on a different date
9 that can go prior to the December 19th.

10 MR. STANFORD: The problem is we
11 don't have everyone's calendar.

12 MR. HULBERT: I won't be here the
13 19th. Just throwing that out there,
14 but I'm not a necessary party.

15 MR. WILSON: What's the soonest we
16 can meet and meet all the requirements?

17 MR. STANFORD: We have four days.

18 MS. HALEY: Forty-eight hours for
19 a special meeting.

20 MR. WILSON: So again, I'm not a
21 part of this. Why can't the board meet
22 next week or the first week of the
23 following?

24 MR. TAYLOR: Mr. Chairman, we also
25 can just have the administrative person

1 and recess and have the administrative
2 person check on the setting of the
3 special date and get back with us.

4 MR. STANFORD: And just publish
5 it?

6 MR. TAYLOR: Yes, sir, and let us
7 know.

8 MR. STANFORD: All right. If we
9 can't get a quorum, we won't have a
10 meeting and it will have to put off to
11 January.

12 MR. TAYLOR: Yes, sir.

13 MR. STANFORD: But we have a
14 motion for the date to be determined
15 dependent on the availability of the
16 sufficient number of members of the
17 board and appear and act on that and so
18 we don't inconvenience the parties.

19 MR. TAYLOR: I think that is
20 correct. If you have a motion for a
21 recess, it is an open date. As long as
22 you don't have a motion set for a
23 certain date, I think you're fine.

24 MR. STANFORD: So we have a
25 motion.

1 Teresa, call the role, please.

2 MR. WILLIAMS: The recess is
3 called then?

4 MR. TAYLOR: Yes, sir.

5 MS. HALEY: Mr. Fingerhut?

6 MR. FINGERHUT: For the motion.

7 MS. HALEY: Mr. Stanford?

8 MR. STANFORD: For the motion.

9 MS. HALEY: Mr. Cutrer?

10 MR. CUTRER: Against the motion.

11 MS. HALEY: Ms. Laudermilch?

12 MS. LAUDERMILCH: For the motion.

13 MR. STANFORD: Motion carries.

14 Thank you for very much.

15 (Whereupon the hearing concluded at

16 5:45 P.M.)

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C E R T I F I C A T E

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STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Amanda Bowen, Court Reporter and Notary Public in and for the above county and state, do hereby certify that the foregoing testimony was taken before me at the time and place herein-before set forth; that the witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, that thereupon the foregoing testimony was later reduced by computer transcription; and I certify that this is a true and correct transcript of my stenographic notes so taken.

I further certify that I am not of counsel to either party, nor interested in the event of this cause.

Amanda Bowen
Court Reporter
Notary Public
Beaufort, South Carolina



TOWN OF HILTON HEAD ISLAND COMMUNITY DEVELOPMENT DEPARTMENT

One Town Center Court

Hilton Head Island, SC 29928

843-341-4757

FAX 843-842-8908

STAFF REPORT SPECIAL EXCEPTION

Case #	Name of Development	Public Hearing Date
SER-2150-2016	Rollers Wine & Spirits	January 23, 2017

Parcel Data	Property Owner	Applicant
<u>Address:</u> 9 Palmetto Bay Road <u>Tax Map ID:</u> R552 015 000 0312 0000 <u>Zoning District:</u> Sea Pines Circle (SPC) <u>Overlay District:</u> Corridor Overlay District (COR)	Nicholas Costalas Caheti Inc. 57 North Port Royal Dr. Hilton Head Island SC 29928	John Kelsey Rollers Wine & Spirits 6 Lagoon Road Hilton Head Island SC 29928

Application Summary

John Kelsey is requesting a special exception to operate a liquor store in the Sea Pines Circle (SPC) Zoning District, which requires special exception approval per Land Management Ordinance (LMO) Section 16-4-102.A.6, Principal Use Table.

Background

The subject parcel is located at 9 Palmetto Bay Road in the SPC Zoning District. The 1.06 acre parcel is developed with a 5,700 square foot restaurant and 19 parking spaces. The subject parcel has cross access and parking easements with the surrounding parcels in the Island Crossing shopping center. The subject parcel is surrounded by: Island Crossing shopping center to the north and west; Palmetto Bay Road to the east; and the Sun Trust Bank office park to the south. (See Attachment A, Location Map).

The restaurant is currently vacant. It was most recently occupied by Sea Fire Grill. The applicant proposes to renovate the building and site to house two businesses: a liquor store; and a wine and cheese store with outdoor seating.

The applicant met with staff in September to discuss relocating their business, which is currently located at 24 Palmetto Bay Road, to the subject parcel. The proposed location meets the locational restrictions for a liquor store in LMO Section 16-4-102.B.7.g, even if the applicant does not close their current business located at 24 Palmetto Bay Road.

Applicant's Grounds for Special Exception, Summary of Facts and Conclusion of Law:

Grounds for Special Exception:

The applicant is requesting special exception approval to operate a liquor store in the Sea Pines Circle (SPC) Zoning District per the requirement of LMO Section 16-4-102.A.6, Principal Use Table. The applicant states in the narrative that the business will operate in the existing building and that some alterations will be made to the exterior of the building to create an outdoor seating area. Since the property was previously occupied by restaurants, the proposed use will not cause undue traffic congestion or generate the need for additional infrastructure. The proposed use will be compatible with the intensity, scale, and character of the surrounding development because the subject parcel is surrounded by commercial uses. The proposed use will not be a nuisance to neighboring properties because the liquor store will be a commercial use surrounded by commercial uses, and it will only be open to customers during the hours allowed by the South Carolina Alcohol Beverage Licensing regulations.

Summary of Facts:

1. The applicant seeks a special exception as set forth in LMO Section 16-2-103.E.

Conclusion of Law:

1. The applicant may seek a special exception as set forth in LMO Section 16-2-103.E.

Staff Summary of Facts and Conclusions of Law

Summary of Facts:

1. The application was submitted on December 14, 2016 as set forth in LMO Section 16-2-102.C and Appendix D-3.
2. Notice of the Application was published in the Island Packet on January 1, 2017 as set forth in LMO Section 16-2-102.E.2.
3. Notice of the Application was posted on January 6, 2016 as set forth in LMO Section 16-2-102.E.2.
4. Notice of the Application was mailed on December 23, 2016 as set forth in LMO Section 16-2-102.E.2.
5. The Board has authority to render the decision reached here under LMO Section 16-2-102.G.

Conclusions of Law:

1. The application is in compliance with the submittal requirements established in LMO Section 16-2-102.C.
2. The application was submitted 40 days prior to the meeting, therefore meeting the 30 day deadline required in the LMO.
3. Notice of the application was published 22 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
4. Notice of the application was posted 17 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
5. Notice of the application was mailed 30 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
6. The application and notice requirements comply with the legal requirements established in LMO Section 16-2-102.E.2.

As provided in LMO 16-2-103, Special Exception Review Standards, the Board of Zoning Appeals shall approve an application for a Special Exception if the applicant

demonstrates the proposed special exception and associated development will be consistent with the following criteria.

Summary of Facts and Conclusions of Law

Criteria 1: The use will be in accordance with the Comprehensive Plan (LMO Section 16-2-103.E.4.a):

Findings of Fact:

The Comprehensive Plan addresses this application in the following areas:

Goal 8.1 - Existing Land Use

- A. The goal is to have an appropriate mix of land uses to meet the needs of existing and future populations.

Goal 8.5 – Land Use Per Capita

- A. The goal is to have an appropriate mix and availability of land uses to meet the needs of the existing and future populations.

Goal 8.6 – Build-Out

- B. The goal is to consider developing regulations and requirements to maintain the Island Character and meet the needs of the community as it approaches build out.

Goal 8.10 – Zoning Changes

- A. Consider focusing higher intensity land uses in areas with available sewer connections.

Conclusions of Law:

1. Staff concludes that this application meets the criteria as set forth in LMO 16-3-1805.A.
2. This application would allow additional commercial uses within an existing commercial corridor that would bring a mixture of land uses to meet the needs of the population.
3. This application would allow a moderate intensity use to be located where a sewer connection has already been established and where it would meet the needs of the surrounding community.

Summary of Facts and Conclusions of Law

Criteria 2: The use will comply with all regulations and standards that are generally applicable within the zoning district and that are specifically applicable to the particular type of Special Exception (LMO Section 16-2-103.E.4.b):

Findings of Fact:

1. LMO Section 16-4-102.B.7.g.i states liquor stores shall not be located within 500 feet of an existing liquor store.
2. Staff determined the closest property with a liquor store, Park Plaza Liquors & Fine Wines, is located 980 feet from the property on which the proposed liquor store will be located.
3. LMO Section 16-4-102.B.7.g.ii states liquor stores shall not be located within 200 feet of:
 01. A religious institution; or
 02. The boundary of a residential (RSF- or RM-) district; or
 03. A public or private elementary or secondary school.
4. Staff determined the closest property with a religious institution, St. Andrew By-The-Sea Methodist Church, is located 1,894 feet from the property on which the proposed liquor store will be located.
5. Staff determined the closest boundary of a residential district is the RM-8 Zoning District (the Seabrook), located 2,109 feet from the property on which the proposed liquor store will

- be located.
6. Staff determined the closest boundary of a public or private elementary or secondary school, Heritage Academy, is located 3,213 feet from the property on which the proposed liquor store will be located.

Conclusions of Law:

1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-103.E.4.b.
2. The proposed liquor store will be located on a property that is not within 500 feet of a property with an existing liquor store.
3. The proposed liquor store will be located on a property that is not within 200 feet of a religious institution; the boundary of a residential (RSF- or RM-) district; or a public or private elementary or secondary school.

Summary of Facts and Conclusions of Law

Criteria 3: The use will be compatible with the intensity, scale, and character of development existing or planned in the surrounding area (LMO Section 16-2-103.E.4.c):

Findings of Fact:

1. The store will be surrounded by high to moderate intensity commercial uses: a gas station with a convenience store; a bank; an office park; an office supply store; eating establishments; a cycling facility; and a gas and service station.
2. Liquor and wine and cheese stores are a moderately intense commercial use.
3. The store will be located in a freestanding, one story building.
4. The surrounding buildings are both freestanding and multi-tenant. They range from one to two stories in height.
5. Most of the properties in the surrounding area are developed with commercial or office uses.
6. There is a plan to develop a shopping center at the corner of Palmetto Bay and Target Roads with a grocery store, a fast food restaurant with a drive-thru, and a commercial building.

Conclusions of Law:

1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-103.E.4.c.
2. The moderate intensity liquor and wine and cheese store will be compatible with the surrounding moderate to high intensity uses.
3. The scale of the store will be compatible with the surrounding development.
4. The commercial character of the store will be compatible with the commercial character of the existing and planned development in the surrounding area.

Summary of Facts and Conclusions of Law

Criteria 4: The use will not cause undue traffic congestion or create a traffic hazard (LMO Section 16-2-103.E.4.d):

Findings of Fact:

1. The store will be located in a building that was previously occupied by a restaurant.
2. Restaurants are high intensity commercial uses that generate a significant amount of traffic.
3. Liquor and wine and cheese stores are moderate intensity commercial uses that generate a moderate amount of traffic.

Conclusions of Law:

1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-

- 103.E.4.d.
2. The store will not cause undue traffic congestion or create a traffic hazard because the liquor and wine and cheese store will generate less traffic than the previous use of the building.

Summary of Facts and Conclusions of Law

Criteria 5: The use will incorporate preservation and protection of important natural features and not result in significant adverse impacts on the natural environment – including, but not limited to, water, air, noise, storm water management, wildlife, vegetation, wetlands, and the natural functioning of the environment (LMO Section 16-2-103.E.4.e):

Findings of Fact:

1. The liquor store will occupy an existing building on a developed site.
2. The liquor store requires no modification to the site.
3. The applicant plans to build a deck around the northern corner of the building for the wine and cheese shop customers.
4. The deck is permitted. It meets all current site development standards in the LMO.

Conclusions of Law:

1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-103.E.4.e.
2. The liquor store will not result in significant adverse impacts on the natural environment because the liquor store use requires no alterations to the site.

Summary of Facts and Conclusions of Law

Criteria 6: The use will not generate needs for transportation, water supply, sewerage disposal, storm water management, solid waste collection, fire and police protection, and similar public services that cannot be adequately handled by available or provided infrastructure and facilities (LMO Section 16-2-103.E.4.f):

Findings of Fact:

1. The building and site are already developed and have adequate transportation infrastructure, utilities, storm water management, solid waste collection, fire and police protection, and similar public services.
2. The liquor store is a less intense use than the restaurant use that previously occupied the building.

Conclusions of Law:

1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-103.E.4.f.
2. The liquor store will not generate the need for additional public services.

Summary of Facts and Conclusions of Law

Criteria 7: The use will not substantially injure the value of surrounding properties (LMO Section 16-2-103.E.4.g):

Finding of Fact:

1. Staff found no evidence that liquor stores on Hilton Head Island substantially injure the value of surrounding properties.

Conclusions of Law:

- 1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-103.E.4.g.
- 2. There is no evidence that the liquor store will substantially injure the value of surrounding properties.

Summary of Facts and Conclusions of Law

Criteria 8: The use will not materially endanger the public health or safety (LMO Section 16-2-103.E.4.b):

Findings of Fact:

- 1. The liquor store will not have external operations.
- 2. The liquor store will operate during hours specified by the South Carolina Alcoholic Beverage Control Commission.
- 3. Staff found no evidence that liquor stores on Hilton Head Island materially endanger public health or safety.

Conclusions of Law:

- 1. Staff concludes that this application meets the criteria as set forth in LMO Section 16-2-103.E.4.h.
- 2. There is no evidence that the liquor store will materially endanger the public health or safety.

LMO Official Determination

Staff recommends that the Board of Zoning Appeals **approve** the application based on the Findings of Facts and Conclusions of Law.

BZA Determination and Motion

The "powers" of the BZA over special exceptions are defined by the South Carolina Code, Section 6-29-800, and in exercising the power, the BZA may "permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance..." or "may remand a matter to an administrative official, upon motion by a party or the board's own motion, if the board determines the record is insufficient for review."

This State law is implemented by the Hilton Head Island Land Management Ordinance, Chapter 2, Article 103 and the Rules of Procedure for the BZA.

A written Notice of Action is prepared for each decision made by the BZA based on findings of fact and conclusions of law.

The BZA can either Approve the application, Disprove the application, or Approve with Modifications. Findings of Fact and Conclusions of Law must be stated in the determination.

PREPARED BY:

AC
Anne Cyran, AICP
Senior Planner

January 10, 2017

REVIEWED BY:

ND

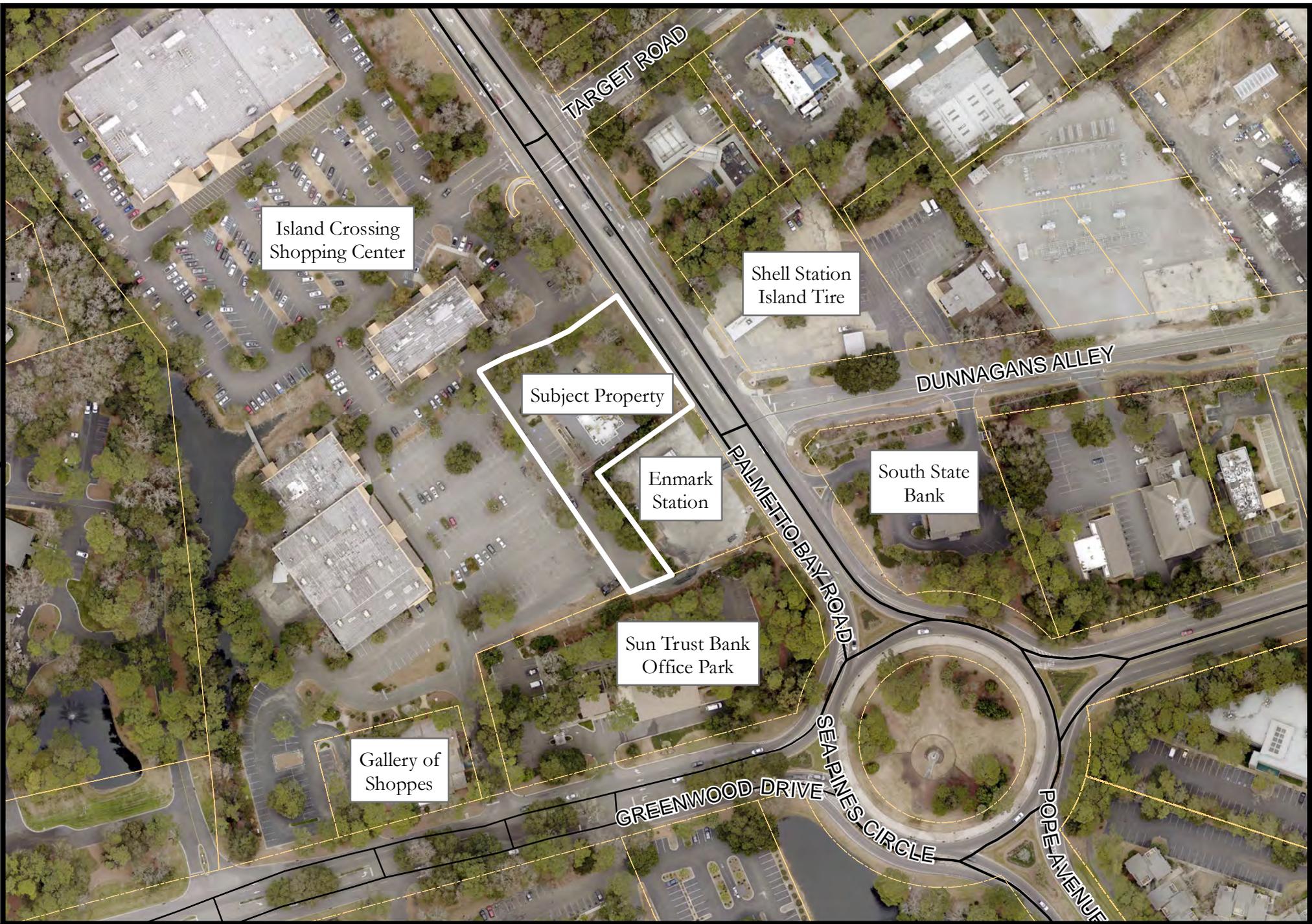
Nicole Dixon, CFM
Development Review Administrator

January 10, 2017

DATE

ATTACHMENTS:

- A) Location Map
- B) Aerial Photo
- C) Applicant's Narrative
- D) Site Plan
- E) Site Photos



Island Crossing Shopping Center

Shell Station
Island Tire

Subject Property

Enmark Station

South State Bank

Sun Trust Bank
Office Park

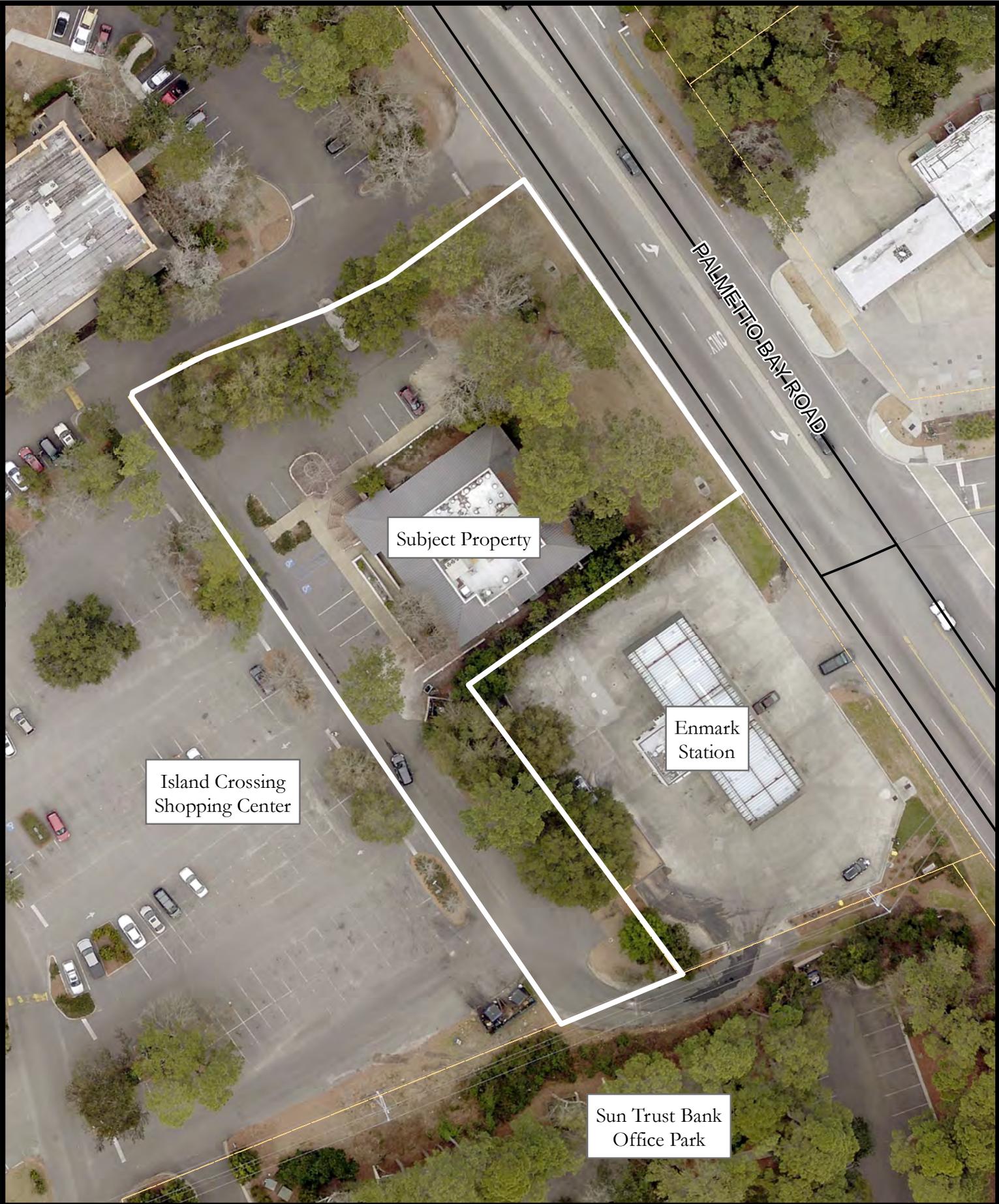
Gallery of Shoppes

Town of Hilton Head Island

SER-2150-2016 Staff Report Attachment A - Location Map



The information on this map has been compiled from a variety of sources and is intended to be used only as a guide. It is provided without any warranty or representation as to the accuracy or completeness of the data shown. The Town of Hilton Head Island assumes no liability for its accuracy or state of completion or for any losses arising from the use of the map.



Subject Property

Island Crossing Shopping Center

Enmark Station

Sun Trust Bank Office Park

PALMETTO BAY ROAD



TOWN OF HILTON HEAD ISLAND
ONE TOWN CENTER COURT
HILTON HEAD ISLAND, S.C. 29928
PHONE (843) 341-4600

Town of Hilton Head Island
SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment B: Aerial Photo



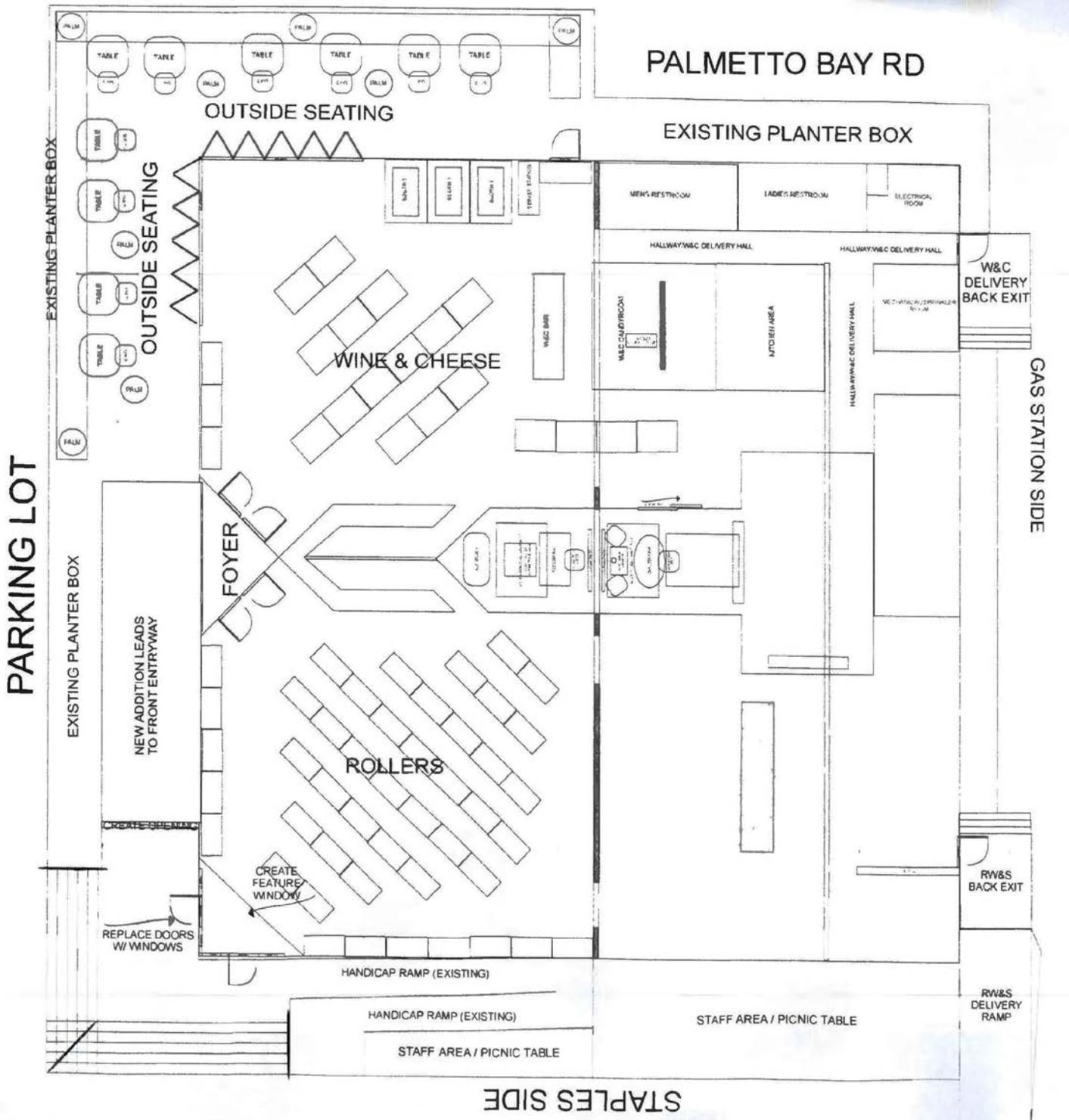
The information on this map has been compiled from a variety of sources and is intended to be used only as a guide. It is provided without any warranty or representation as to the accuracy or completeness of the data shown. The Town of Hilton Head Island assumes no liability for its accuracy or state of completion or for any losses arising from the use of the map.

SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment C: Applicant's Narrative

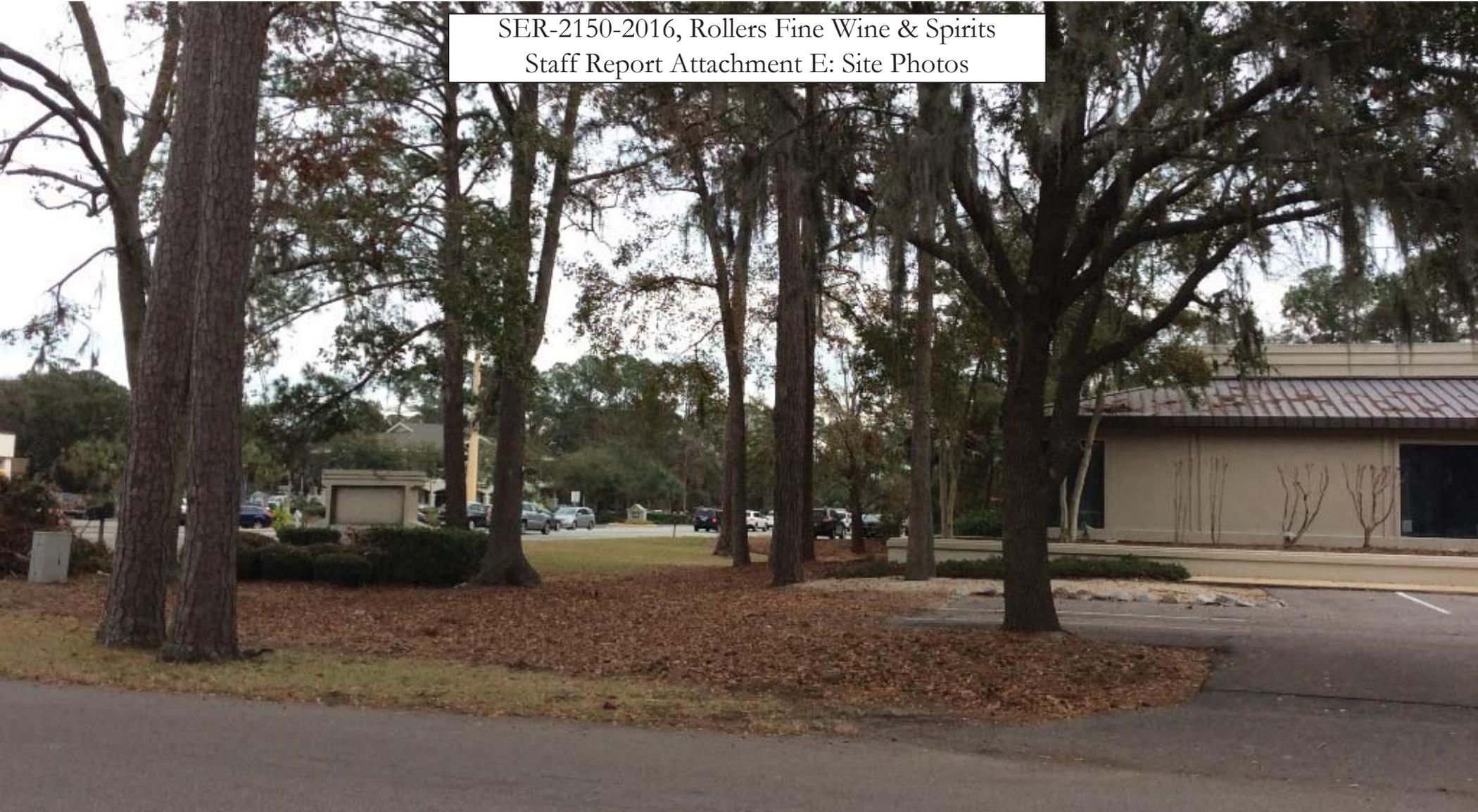
This application meets the LMO Criteria for a Special Exception in the following manner:

- a) **Be in accordance with the Comprehensive Plan;**
Our business will follow and adhere to the Comprehensive Plan for the Town of Hilton Head Island.
- b) **Will comply with all regulations and standards that are generally applicable within the zoning district and that are specifically applicable to the particular type of Special Exception;**
Our business will comply with all regulations and standards. The location has been reviewed by Anne Cyran and it complies with the special exception requirements for a liquor store.
- c) **Will be compatible with the intensity, scale, and character of development existing or planned in the surrounding area;**
Our business will be consistent with the businesses and environment in the surrounding area.
- d) **Will not cause undue traffic congestion or create a traffic hazard.**
Our business will not cause undue traffic congestion or create a traffic hazard.
- e) **Will incorporate preservation and protection of important natural features and not result in significant adverse impacts on the natural environment—including, but not limited to, water, air, noise, storm water management, wildlife, vegetation, wetlands, and the natural functioning of the environment;**
Our business will not have any adverse impacts on the natural environment.
- f) **Will not generate needs for transportation, water supply, sewage disposal, stormwater management, solid waste collection, fire and police protection, and similar public services that cannot be adequately handled by available or provided infrastructure and facilities;**
Our business will not create the needs for additional transportation, water supply, sewage disposal, storm water management, solid waste collection, fire and police protection or similar public services.
- g) **Will not substantially injure the value of surrounding properties; and**
Our business will enhance the value of surrounding businesses.
- h) **Will not materially endanger the public health or safety.**
Our business will not materially endanger the public health or safety.

SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment D: Site Plan



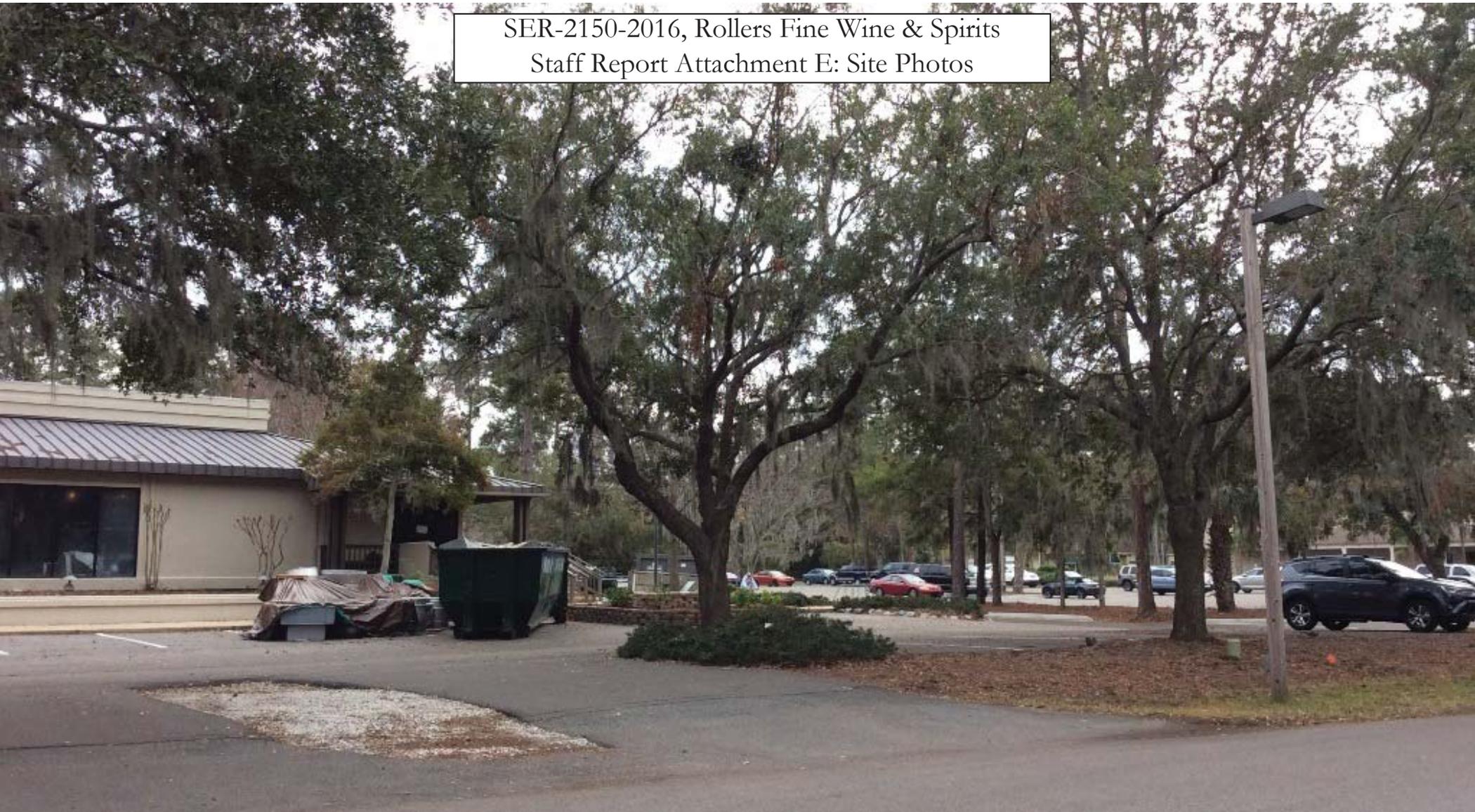
SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment E: Site Photos



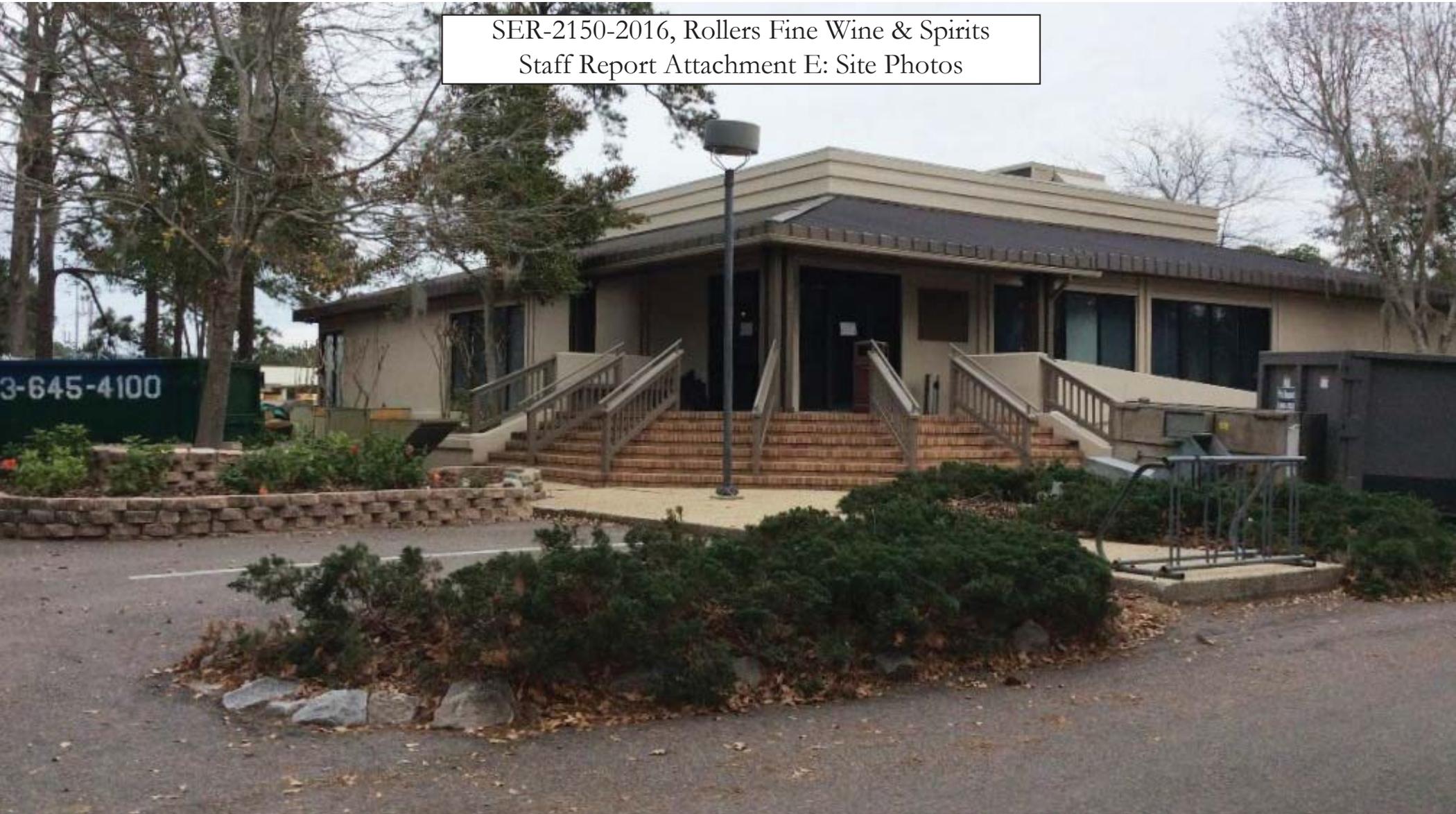
SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment E: Site Photos



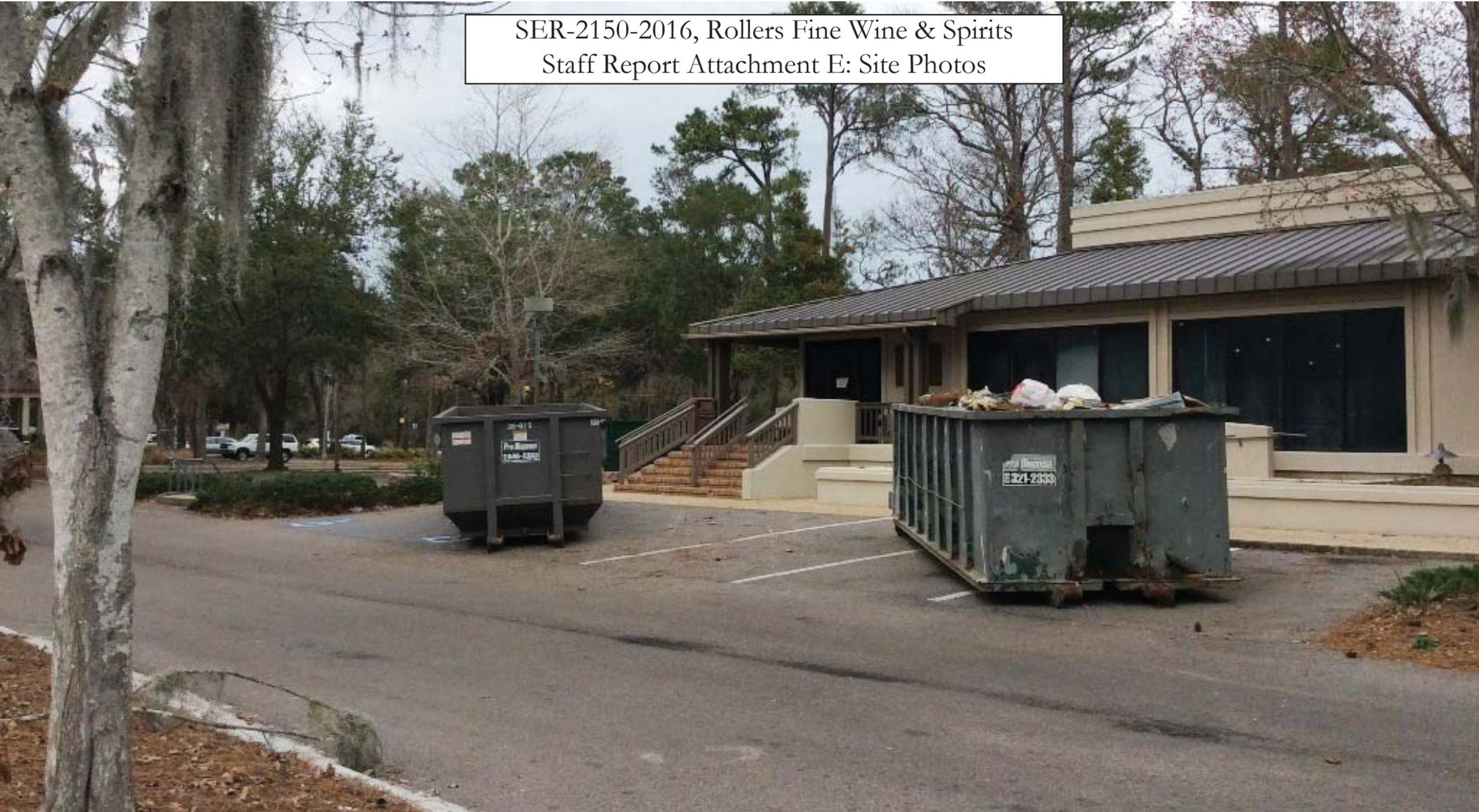
SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment E: Site Photos



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Staff Report Attachment E: Site Photos



SER-2150-2016, Rollers Fine Wine & Spirits
Staff Report Attachment E: Site Photos





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ALSO MEMBER LOUISIANA BAR

Thomas A. Gasparini
ALSO MEMBER CALIFORNIA BAR
(Inactive)
ALSO MEMBER OHIO BAR
(Inactive)

02 December 2016

Teri B. Lewis, AICP
LMO Official
Town of Hilton Head Island
One Town Center Court
Hilton Head Island, SC 29928

**Via Email and
Hand Delivered**

RE: Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk
Hilton Head, LLC Application for Appeal APL-001673-2016 (the "Appeal")
– Our File No. 01787-002

Dear Teri:

On behalf of our clients, Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC, in accordance with Article XI, Section 1 of the Rules of Procedure of the Board of Zoning Appeals (the "BZA"), we enclose herewith for delivery to you, and for filing with the BZA, a Petition for Reconsideration of the Appeal.

We are filing this Petition today because we feel compelled to do so, notwithstanding the fact that the five day filing in the BZA Rule Article XI, Section 1(2) does not expire until tomorrow. Typically, one would expect that when a filing deadline falls on a weekend or legal holiday, then the filing period is extended to the next regular business day; however, based on the peculiar time calculation method in LMO Section 16-10-101.D.1, the reverse is applicable, and you have taken the position that the filing period for this Petition is shortened to the immediately prior business day, *i.e.*, today.

We have prepared this Petition based on the best information available to us at this time; however, we have not had sufficient time since this past Monday to obtain a transcript from our court reporter of the lengthy testimony at the 28 November 2016 BZA hearing on the Appeal, so we expect that we may want to supplement this Petition once we have completed our review of the transcript of that hearing.

The quotes of some of the testimony at the BZA's 28 November 2016 hearing on the appeal are taken from our initial review of the audio recording of



that hearing. While we have made every reasonable effort to assure that those quotes are correct, there may some differences between the quotes and the actual statements made at the hearing; however, we do not believe any such differences are material in nature.

Please let us know if you or any members of the BZA have any questions or comments regarding this Motion, or if we may otherwise be of assistance.

With best regards, we are

Very Truly Yours,

LAW OFFICE OF CHESTER C. WILLIAMS, LLC

This signature is an electronic reproduction

Chester C. Williams

CCW/

Enclosure

cc: C. Glenn Stanford, Esq.
Thomas C. Taylor, Esq.
Brian E. Hulbert, Esq.
Nicole Dixon, CFM

STATE OF SOUTH CAROLINA)
)
)
)
)
)
COUNTY OF BEAUFORT)

BEFORE THE
BOARD OF ZONING APPEALS
FOR THE
TOWN OF HILTON HEAD ISLAND, SC

APPLICATION FOR APPEAL
APL-001673-2016

PETITION FOR RECONSIDERATION

This Petition for Reconsideration (this “Petition”) is made by Beachwalk Hotel & Condominiums Association, Inc. and Beachwalk Hilton Head, LLC (collectively, the “Appellants”) pursuant to Article XI, Section 1 of the Rules of Procedure for the Board of Zoning Appeals (the “BZA”) of the Town of Hilton Head Island (the “Town”) in connection with Application for Appeal APL-001673-2016 (the “Appeal”), and is submitted by the Appellants to the BZA to seek reconsideration of the decision rendered by the BZA on 28 November 2016 in the Appeal upholding the determinations made by Nicole Dixon, CFM, Senior Planner for the Town of Hilton Head Island, SC (the “Town”) in her letter of 23 August 2016 to Chester C. Williams, Esq., co-counsel for the Appellants (the “Determination Letter”). The motion to uphold the Determination passed by a 4-2 vote of the BZA.

I. INTRODUCTION

In the Determination Letter, Ms. Dixon addresses the requirements for development of Parcel E, stating:

I have determined that the Spinnaker Welcome Center is permitted as proposed as long as it does not exceed what was allowed on that masterplan or what is permitted by the current LMO.

Ms. Dixon also states in the Determination Letter that:

The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements and a Notice of Action was issued on July 28, 2016.



The Appeal seeks to reverse the Determination Letter, but only in part. Specifically, the Appellants disagree that the proposed Spinnaker Welcome Center can be developed on Parcel E “as long as it does not exceed what was allowed on [the Conceptual Master Plan for the Town Center P.U.D. approved by the Town’s Planning Commission on 06 May 1987]”. On the other hand, the Appellants agree that the proposed development of “the Spinnaker Welcome Center is permitted as proposed as long as it does not exceed ... what is permitted by the current LMO.”

The Appeal also seeks to reverse that part of the Determination Letter in which Ms. Dixon asserts that, “The proposed Welcome Center project (DPR-001056-2016) meets all current LMO requirements”.

The BZA held a hearing on the Appeal. Presentations were made on behalf of the Appellants, by Ms. Dixon, and, at the invitation of the Chairman of the BZA, by Barry L. Johnson, Esq., counsel for SDC Properties, Inc., and following questions and discussion, a motion was made and seconded to deny the Appeal. That motion passed by a 4-2 vote.

II. RECONSIDERATION

Article XI of the Board of Zoning Appeals Rules of Procedure adopted 27 July 2015 (the “BZA Rules”) allows for reconsideration of any decision made under Section 16-2-104(T) of the Town’s Land Management Ordinance (the “LMO”).¹ Any Petition for Reconsideration must be filed with the LMO Administrator² within five (5) days of the date of the hearing.³ The Petition for Reconsideration must be in writing, and it must state with particularity the points alleged to have been overlooked or misinterpreted by the BZA.⁴

¹ See BZA Rules, Article XI, Section 1.

² With the adoption of the current version of the LMO on 07 October 2014, the LMO Administrator is now known as the LMO Official.

³ See BZA Rules, Article XI, Section 2.

⁴ See BZA Rules, Article XI, Section 3.



This Petition is timely filed, and sets forth with particularity the points that the Appellants believe were overlooked or misinterpreted by the BZA.

III. BASIS FOR RECONSIDERATION

A. APPLICABLE LMO PROVISIONS

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

1. CONFLICTING LMO PROVISIONS

LMO Section 16-1-106.A.1 says, “When any LMO provision is inconsistent with another LMO provision, ... the more restrictive provision shall govern unless the terms of the more restrictive provision specify otherwise.”

Further, LMO Section 16-1-106.A.2 says, “When there is a conflict between an overlay zoning district and an underlying base zoning district, ***the provisions of the overlay district shall control.***” [Emphasis added]

2. ZONING DISTRICTS

LMO Section 16-3-101.A says, “No land within the Town shall be developed except in accordance with the zoning district regulations of this chapter [*i. e.*, LMO Chapter 16-3: Zoning Districts] and all other regulations of this Ordinance.”

In addition, LMO Section 16-3-101.B says, “Land within the Town is classified by this Ordinance to be within one of several base zoning districts. Land within any base zoning district may also be classified into one or more overlay zoning districts, in which case regulations governing development in the overlay district **shall** apply in addition to the regulations governing development in the underlying base zoning district.” [Emphasis added]



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

Regulations governing development in an overlay zoning district **shall** apply in addition to the regulations governing development in the underlying base zoning district. **The standards governing the overlay zoning district shall control, whether they are more restrictive or less restrictive than a base zoning district.** [Emphasis added]

3. AUTHORITY OF THE TOWN STAFF

The 2004 decision of the South Carolina Court of Appeals in the *McCrowey v. Zoning Board of Adjustment*⁵ confirms what should be a self-evident proposition: The Town staff does not have the authority to alter or waive the provisions of a zoning ordinance.

B. TESTIMONY AT THE BZA HEARING

At the BZA hearing on the Appeal, counsel for the Appellants called Curtis L. Coltrane, Esq., former Town Attorney for the Town, Todd Theodore, a land planner with Wood+Partners, who submitted the Development Plan Review application for the Spinnaker Welcome Center (the “DPR Application”), Charlie Halterman, a representative of SDC Properties, Inc., and Ms. Dixon as witnesses, and they testified under oath administered by the Chairman of the BZA.

In his testimony, Mr. Coltrane explained the process the Town went through that resulted in the 03 March 1995 Categorical Exemption letter from Thomas Brechko to Robert Graves (the “1995 Categorical Exemption”), and the effect of the 1995 Categorical Exemption on the properties included in the Waterside (Town Center) PD-2 Planned Development Overlay District⁶ (the “Waterside PD-2 Overlay District”), including the expiration of the 1995 Categorical Exemption on 03 March

⁵ *McCrowey v. Zoning Board of Adjustment of the City of Rock Hill*, 599 S.E. 2d 617 (SC App. 2004, a copy of which is attached to this Petition as Exhibit A.

⁶ See LMO Section 16-3-106.G.5, and LMO Table 16-3.G.4, the Listed PD-2 Master Plans.



2000, and the corresponding termination of the right of owners of properties in the Waterside PD-2 Overlay District to develop their properties with the uses and densities provided for in the 1987 Conceptual Master Plan for the 15.1 acres in the Waterside PD-2 Overlay District.

Mr. Theodore testified:

1. That when he submitted the DPR Application, he was not aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District, nor was he aware that the properties comprising the Waterside PD-2 Overlay District were the subject of the 1995 Categorical Exemption.

2. That he acknowledged and agreed that Parcel E is part of the property included in the Waterside PD-2 Overlay District.

3. That he did not take the LMO's current PD-2 Overlay District regulations into account when preparing the DPR Application.

4. That in preparing the DPR Application, he did not check to see if the overall density for the 15.1 acres in the Waterside PD-2 Overlay District was in conformance with the maximum density limitation of the base Resort Development District (the "RD District").

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

Ms. Dixon testified:

1. That when she began her review of the DPR Application, she was not aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District, nor was she aware that the properties comprising the Waterside PD-2 Overlay District were the subject of the 1995 Categorical Exemption.

2. That she learned that Parcel E was part of the property included in the Waterside PD-2 Overlay District and that the Waterside PD-2 Overlay District was the subject of the 1995 Categorical Exemption when informed of those facts by counsel for the Appellants.

3. That she approved the DPR Application after she was aware that Parcel E was part of the property included in the Waterside PD-2 Overlay District and that the Waterside PD-2 Overlay District was the subject of the 1995 Categorical Exemption.

4. That she acknowledged and agreed that Parcel E is part of the property included in the Waterside PD-2 Overlay District.⁷

5. That in reviewing the DPR Application, she did not check to see if the overall density for the 15.1 acres in the Waterside PD-2 Overlay District was in conformance with the maximum density limitation of the base RD District, and that she only reviewed the DPR Application for conformance of Parcel E by itself with the density requirement of the RD District.

6. That if the development of Parcel E must conform to the current LMO requirements for a PD-2 Overlay District, then the density calculation for the 15.1 acres in the Waterside PD-2 Overlay District set forth on Pages 13 and 14 of the narrative attached to the Appeal application are correct.

7. That the development of the 15.1 acres in the Waterside PD-2 Overlay District as a new PD-2 Overlay under the current LMO requirements cannot be permitted with the development densities that currently exist on the 15.1 acres in the Waterside PD-2 Overlay District.

8. That the 1995 Categorical Exemption states that after its expiration on 03 March 2000, any future development of the properties

⁷ Ms. Dixon acknowledged in the Determination Letter that Parcel E is within the Waterside PD-2 Overlay District.



in the Waterside PD-2 Overlay District “shall be subject to the provisions of the LMO in effect at that time.”

9. That the PD-2 Overlay District requirements of LMO Section 16-3-106.G are part of the current LMO requirements.

10. That, notwithstanding the fact that Parcel E is in the Waterside PD-2 Overlay District, the Town staff does not agree that development of Parcel E must comply with the average density requirements of the LMO’s PD-2 Overlay District provisions in LMO Section 16-3-106.G.4.a.

11. That if the average density limitations of the PD-2 Overlay District are applied to the entire 15.1 acres in the Waterside PD-2 Overlay District, then the existing development in place exceeds the LMO’s density limitations.

12. That she based her decision to approve the DPR Application on the expiration of the 1995 Categorical Exemption freeing Parcel E from the requirement of compliance with the current LMO PD-2 Overlay District regulations.

13. That the PD-2 Overlay District is still applicable to Parcel E, but, in her opinion, the Town staff does not now have to go back and look at the overall average density of the 15.1 acres in the Waterside Overlay District, as required by LMO Section 16-3-16.G.4.a.

14. That the 1987 Conceptual Master Plan has no bearing on the development of Parcel E.

In his presentation, Mr. Johnson acknowledged that any right to develop any portion of the 15.1 acres in the Waterside PD-2 Overlay District as permitted by the 1987 Conceptual Master Plan terminated when the 1995 Categorical Exemption expired on 03 March 2000, and that a court had upheld the five year life of the 1995 Categorical Exemption. During his presentation, in response to a question from BZA member Jerry Cutrer, Mr. Johnson agreed that the development of Parcel E is now governed by the provisions of the current LMO, and that the



1987 Conceptual Master Plan is now “irrelevant” to the development of Parcel E.

After Mr. Johnson’s presentation, Thomas C. Taylor, Esq., co-counsel for the Appellants, sought to ask Mr. Johnson questions; however, Mr. Johnson claimed to be exempt from questioning, and Chairman Stanford refused to allow Mr. Taylor to question Mr. Johnson. Mr. Taylor later asked to make a proffer of evidence he expected Mr. Johnson to testify to, but Chairman Stanford denied that request, and asked if Mr. Taylor could submit a written proffer. Mr. Taylor’s written Proffer of Evidence was filed with Chairman Stanford on 29 November 2016.

C. THE BZA MEMBERS’ DISCUSSION

During the BZA’s discussion after the testimony of the witnesses and Mr. Johnson’s presentation, BZA member Robert Johnson asked Ms. Dixon, “If this mysterious concept plan, the master plan, were to appear, does it have any bearing on what we are discussing?” Ms. Dixon answered, “It would not.”

Mr. Cutrer moved to deny the appeal, stating, “I believe I’ve heard Ms. Dixon say that those requirements that were in that PD-2 density don’t apply, the property meets the current LMO standard, the results of the determination letter way back in 1987 says all that expired in 2000. It’s expired. I’ve heard testimony from the Town staff that says this property will comply with the current LMO. So I move to deny the appeal.” That motion was seconded by Mr. Wilson, and it was approved by a vote of 4-2.

D. COMPLIANCE WITH CURRENT LMO REQUIREMENTS

It is evident to the Appellants that when Ms. Dixon said she reviewed the DPR Application “under the current LMO”, as to the LMO’s density limitations, she meant only the RD District’s limitations under the current LMO, and not the PD-2 Overlay District’s density limitations of the current LMO. But, Ms. Dixon also agreed that the LMO’s PD-2 Overlay District requirements are part of the current LMO requirements,



and that she did not take into account the LMO's PD-2 Overlay District average density requirements for the 15.1 acres in the Waterside PD-2 Overlay District.

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

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

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

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

LMO Sections 16-1-106.A.2 and 16-3-102.C provide that when there is a conflict between an overlay zoning district and an underlying base zoning district, the provisions of the overlay district **shall** control, whether they are more restrictive or less restrictive than the base zoning district.



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

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

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

The Appellants submit that the BZA should reconsider the Appeal and overturn the portion of the Determination Letter that states that the development of Parcel E as proposed in the DPR Application "meets all current LMO requirements".

E. THE DETERMINATION

The BZA voted 4-2 to simply deny the Appeal. That means that the Determination Letter stands as is.



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

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

IV. CONCLUSION

In his motion to deny the Appeal, Mr. Cutrer said, "I've heard testimony from the Town staff that says this property will comply with the current LMO. So I move to deny the appeal."

Mr. Cutrer's motion did not address the portion of the Determination Letter that allows for the development of Parcel E as provided for in the 1987 Conceptual Master Plan, which everyone finally agreed was no longer applicable for development purposes. Therefore, the BZA should reconsider the Appeal to overturn that portion of the Determination Letter that purports to authorize the development of Parcel E as provided for in the 1987 Conceptual Master Plan.

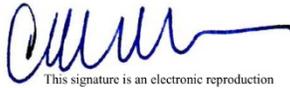
The Appellants agree with that portion of the Determination Letter that states Parcel E can be developed in compliance with current LMO requirements. However, in light of LMO Sections 16-1-106.A.1 and 16-1-106.2, because the density limitations on Parcel E under the PD-2 Overlay District control over the density limitations of the underlying RD District, the Appellants argue that, contrary to the basis for Mr. Cutrer's motion, the development of Parcel E as proposed in the DPR Application **will not** comply with the current LMO.



By her own admission, Ms. Dixon did not take into account the PD-2 Overlay District's average density limitation in reviewing and approving the DPR Application, and that if she does so, then she will have to rescind her Notice of Action on the DPR Application because the overall density limitation for the Waterside PD-2 Overlay District is already exceeded. Therefore, she has not established that the development of Parcel E as proposed in the DPR Application complies with all current LMO requirements. Accordingly, the BZA should reconsider the Appeal to overturn that portion of the Determination Letter that says that the DPR Application meets all current LMO requirements.

This Petition provides the BZA with the opportunity to correct the record and decide the Appeal based upon the provisions of the LMO regarding the priority of PD-2 Overlay District regulations over the base zoning district regulations, the testimony at the hearing, and the record of the Appeal.

Respectfully submitted on behalf of the Appellants on 02 December 2016.



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H

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

v.

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

No. 3845.

Submitted May 13, 2004.

Decided July 12, 2004.

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

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

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ↪1624

414 Zoning and Planning
 414X Judicial Review or Relief
 414X(C) Scope of Review
 414X(C)1 In General
 414k1624 k. Decisions of boards or officers in general. **Most Cited**

Cases

(Formerly 414k605)

Zoning and Planning 414 ↪1631

414 Zoning and Planning
 414X Judicial Review or Relief
 414X(C) Scope of Review
 414X(C)1 In General
 414k1627 Arbitrary, Capricious, or Unreasonable Action
 414k1631 k. Decisions of boards or officers in general. **Most Cited**

Cases

(Formerly 414k610)

Zoning and Planning 414 ↪1649

414 Zoning and Planning
 414X Judicial Review or Relief
 414X(C) Scope of Review
 414X(C)1 In General
 414k1645 Matters of Discretion
 414k1649 k. Decisions of boards or officers in general. **Most Cited**

Cases

(Formerly 414k621)

A decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.

[2] Zoning and Planning 414 ↪1333(1)

414 Zoning and Planning
 414VII Administration in General
 414k1325 Boards and Officers in General
 414k1333 Power and Authority
 414k1333(1) k. In general.

Most Cited Cases

(Formerly 414k353.1)

Zoning and Planning 414 ↪1770

414 Zoning and Planning

414XI Enforcement of Regulations

414k1767 Defenses to Enforcement

414k1770 k. Estoppel or inducement.

Most Cited Cases

(Formerly 414k762)

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

[3] Estoppel 156 ↪52.15

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.15 k. Essential elements.

Most Cited Cases

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

change of position by other party because of his reliance.

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

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

PER CURIAM:

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

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

FACTS

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

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

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

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

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

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

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

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

[S.C.Code Ann. § 6-29-820 \(Supp.2002\)](#).

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

STANDARD OF REVIEW

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

(Ct.App.1984)).

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

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

CONCLUSION

Accordingly, based on the foregoing,

the decision of the trial court is

AFFIRMED.

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

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

END OF DOCUMENT



TOWN OF HILTON HEAD ISLAND

Community Development Department

TO: Board of Zoning Appeals
FROM: Nicole Dixon, CFM, *Development Review Administrator*
DATE: January 10, 2017
SUBJECT: Substitutions of Nonconformities for Redevelopment

The Board of Zoning Appeals (BZA) requested that staff keep them informed of substitutions of nonconformities for redevelopment that are granted by staff. A memo is distributed every month at the regular BZA meetings and is discussed under staff reports on the agenda. Even if there have been no waivers for the month, a memo will be included in the packet to inform the BZA members.

The following language is contained in Section 16-7-101.F, Substitutions of Nonconformities for Redevelopment, which gives the Administrator the power to grant such substitutions for existing nonconforming structures and site features.

LMO Section 16-7-101.F:

“To provide flexibility and encourage redevelopment of sites with nonconforming features or structures, the Official is authorized to approve a Development Plan for such sites if the proposed development:

1. Will not include any new development that increases the amount of encroachment into any required buffer or setback;
2. Will not increase the impervious cover on the site over the maximum allowed for the district or the existing impervious cover, whichever is greater;
3. Will not result in a density in excess of what is allowed under this Ordinance, or the existing density, whichever is greater;
4. Will lessen the extent of existing nonconforming site features to the greatest extent possible;
5. Will not have an adverse impact on the public health, safety or welfare; and
6. Will lessen the extent of nonconformities related to any existing nonconforming structure on the site to the greatest extent possible.”

There have not been any Substitutions of Nonconformities for Redevelopment that have been granted by staff since the December 2016 Board of Zoning Appeals meeting.