



**Town of Hilton Head Island
Board of Zoning Appeals
Regular Meeting
Monday, September 24, 2018 – 2:30 p.m.
Benjamin M. Racusin Council Chambers
AGENDA**

1. **Call to Order**
2. **Pledge of Allegiance**
3. **Roll Call**
4. **Freedom of Information Act Compliance**
Public notification of this 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. **Swearing in Ceremony for Reappointed Member Patsy Brison – *Performed by Brian Hulbert***
6. **Welcome and Introduction to Board Procedures**
7. **Approval of Agenda**
8. **Approval of the Minutes – Meeting of August 27, 2018**
9. **Unfinished Business**
10. **New Business**
 - a. **Public Hearing**
VAR-001924-2018: David McNair of McNair Building Construction, Inc, on behalf of Greg Poe, is requesting a variance from LMO Section 16-6-102.D, Wetland Buffer Standards, to build a residential pool in the wetland buffer and setback. The property is located at 58 Broad Pointe Drive and is identified as Parcel # 257 on Tax Map # 11. *Presented by Taylor Ladd*
11. **Board Business**
 - a. Review proposed amendment to the Rules of Procedure to allow property owners to speak at appeal hearings
12. **Staff Report**
 - a. Waiver Report
13. **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 August 27, 2018 Meeting – 1:00 p.m.
Benjamin M. Racusin Council Chambers

Board Members Present: Chairman David Fingerhut, Vice Chairman Jerry Cutrer, Charles Walczak, Robert Johnson, John White, Lisa Laudermitch

Board Members Absent: Patsy Brison (excused)

Council Members Present: David Ames, Bill Harkins

Town Staff Present: Shawn Colin, Deputy Director of Community Development Department; Nicole Dixon, Development Review Administrator; Brian Hulbert, Staff Attorney; Teri Lewis, LMO Official; Taylor Ladd, Senior Planner; Teresa Haley, Senior Administrative Assistant

Others Present: Gregg Alford, Barry Johnson, Chester Williams, Tom Taylor

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. **Swearing in Ceremony for Reappointed Board Members Jerry Cutrer and John White**
Brian Hulbert, Staff Attorney, performed the swearing in ceremony for reappointed Board Members Jerry Cutrer and John White.
6. **Welcome and Introduction to Board Procedures**
Chairman Fingerhut welcomed the public and introduced the Board's procedures for conducting the business meeting.
7. **Approval of Agenda**
Chairman Fingerhut asked for a motion to approve the agenda. Vice Chairman Cutrer moved to approve. Mr. White seconded. The motion passed with a vote of 6-0-0.
8. **Approval of the Minutes – Meeting of June 25, 2018**
Chairman Fingerhut asked for a motion to approve the minutes of the June 25, 2018 meeting. Vice Chairman Cutrer moved to approve. Mr. Johnson seconded. The motion passed with a vote of 6-0-0.
9. **Unfinished Business – None**
10. **New Business**

- a. **APL-001673-2016** – This is a re-hearing of a 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.

For a full description of the above-referenced appeal hearing, see the certified transcript attached hereto as **Exhibit A** and made a part of the record hereof.

11. Board Business

The Board inquired about board training sessions. Staff provided an update and will re-issue the board training survey for topics and meeting times.

12. Staff Report

- a. **Waiver Report** – Ms. Ladd provided the Waiver Report and asked the Board for any questions. Ms. Ladd indicated Staff received one variance application for the regular September meeting.

13. Adjournment

The meeting was adjourned at 6:22 p.m.

Submitted by: Teresa Haley, Secretary

Approved:

David Fingerhut, Chairman

EXHIBIT A

**BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT**

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STATE OF SOUTH CAROLINA
BEAUFORT COUNTY

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

TO THE APPEAL APPLICATION OF:
BEACHWALK HOTEL & CONDIMINIUMS ASSOCIATION,
INC., and BEACHWALK HILTON HEAD, LLC

-----/

The BOARD OF ZONING APPEALS of
BEACHWALK, a witness in the above-entitled
cause, taken pursuant to Notice and agreement,
before Kyle J. Saniga, Certified Court Reporter
and Notary Public, at the Offices of The Town of
Hilton Head Island, One Town Center Court,
Hilton Head, South Carolina, on the 27th day of
August 2018, commencing at or about the hour of
12:56 p.m.



BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

1 APPEARANCES OF COUNSEL:

2 FOR FOR BEACHWALK HOTEL CONDOMINIUMS
ASSOCIATION AND BEACHWALK HILTON HEAD, LLC: :

3
4 THOMAS TAYLOR, ESQUIRE
5 Law Office of Thomas C. Taylor, L.L.C.
6 22 Bow Circle
7 Suite A
8 Hilton Head, South Carolina 29928

9 AND

10 CHESTER C. WILLIAMS, ESQUIRE
11 Law Office of Chester Williams, L.L.C.
12 Post Office Box 6028
13 Hilton Head Island, SC 29938-6028

14 FOR SDC PROPERTIES INCORPORATED:

15 BARRY L. JOHNSON, ESQUIRE
16 Johnson & Davis
17 The Victoria Building
18 Suite 300
19 10 Pinckney Colony Road
20 Bluffton, South Carolina 29909
21 barry@jd-pa.com
22 843.815.7121

23 FOR THE TOWN OF HILTON HEAD ISLAND:

24 GREG ALFORD, ESQUIRE
25 Alford & Thoreson, L.L.C.
18 Executive Park Road,
Suite 1
Post Office Box 8008
Hilton Head, South Carolina 29928

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BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

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BOARD OF ZONING APPEALS BEACHWALK
- BZA BEACHWALK TRANSCRIPT

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1 (Whereupon, Exhibit
2 Numbers 1 through 3 were marked for
3 identification.)

4 MR. FINGERHUT: Teresa, please
5 call the roll.

6 MS. HALEY: Mr. Walczak?

7 MR. WALCZAK: Present.

8 MS. HALEY: Mr. Johnson?

9 MR. JOHNSON: Present.

10 MS. HALEY: Mr. Fingerhut?

11 MR. FINGERHUT: Present.

12 MS. HALEY: Mr. Cutrer?

13 MR. CUTRER: Present.

14 MS. HALEY: Mr. White?

15 MR. WHITE: Present.

16 MS. HALEY: Ms. Laudermilch?

17 MS. LAUDERMILCH: Present.

18 (INAUDIBLE)

19 UNIDENTIFIED SPEAKER: Yes, sir,
20 we are.

21 MR. FINGERHUT: Thank you. Before
22 we begin we're going to have a swearing
23 in of our two of our members, Jerry
24 Cutrer and Brian White. Brian
25 Hulbert's going to do it.

1 (Whereupon, the above members were
2 duly sworn in.)

3 MR. FINGERHUT: Congratulations
4 gentleman. Thank you, both.

5 Welcome to the Board of Zoning and
6 Appeals.

7 A special bulletin today for
8 Councilman Ames for and on behalf of
9 members of the town council present.

10 Today we have one matter on our
11 agenda. It's the hearing of Appeal
12 Number 16732016 from the Beachwalk
13 Hotel and Condominiums regarding a
14 determination of the Town that was made
15 August 23rd 2016.

16 This appeal was first heard by the
17 BZA on November 28th 2016. The Town's
18 determination was upheld and the
19 decision was appealed to the Circuit
20 Court.

21 After consideration of the appeal
22 the Circuit Court remanded the case
23 back to the BZA for a rehearing.

24 The court ordered that the BZA
25 focus on answering the following

1 questions for the court's further
2 consideration in addition to the
3 hearing;

4 Number 1, Is Parcel E -- the PD-2
5 Overlay District established by the
6 LMO?

7 Number 2, If Parcel E is in the
8 PD-2 Overlay District, is Parcel E
9 subject to the LMO's PD-2 Overlay
10 District regulations?

11 Number 3, If Parcel E is subject
12 to the LMO's PD-2's Overlay District
13 regulations, what affect does that have
14 on the development of Parcel E?

15 And must the existing development
16 of the other parcels within that PD-2
17 Overlay District be taken into account
18 in connection with the proposed
19 development of the Parcel E?

20 Regardless of what else we do here
21 today, the Court has specifically
22 directed us to answer those three
23 questions.

24 Now on July 26th 2018 a meeting
25 was held among council for all the

1 parties, town staff and meeting and the
2 following was agreed to in that
3 meeting.

4 Number 1, SDC Properties Inc.,
5 represented by Johnson and Davis is a
6 necessary party to the appeal and will
7 be entitled to be heard as such before
8 the BZA.

9 Number 2, the appeal will be given
10 a full rehearing in addition to
11 answering the court's questions.

12 And Number 3, the appellant will
13 present its case first followed by SDC
14 Properties Inc., and finally the Town.
15 All parties shall have 45 minutes --
16 or, excuse me, up to 45 minutes,
17 however, I've been encouraged to
18 explained that it's not mandatory that
19 the parties take all 45 minutes.

20 MR. WILLIAMS: Understood.

21 UNIDENTIFIED SPEAKER: Frowned
22 upon.

23 MR. FINGERHUT: The appellant will
24 be permitted rebuttal and any other
25 rebuttal will be at the discretion of

1 -- there will be no -- amongst you.

2 (Phonetic)

3 Have a motion to approve to the
4 agenda?

5 MR. CUTRER: Move to approve the
6 agenda.

7 MR. FINGERHUT: Is there a second?

8 UNIDENTIFIED SPEAKER: Second that
9 motion.

10 MR. FINGERHUT: All in favor?

11 THE BODY: I.

12 MR. FINGERHUT: Motion to approve
13 the minutes of the June 25th 2018
14 meeting.

15 MR. JOHNSON: Move for approval of
16 the minutes as written.

17 MR. FINGERHUT: Any discussion on
18 the minutes? All in favor say I.

19 THE BODY: I.

20 MR. FINGERHUT: Now, there's no
21 unfinished business on the agenda so
22 our new business is Appeal Number
23 16732016. Council.

24 MR. TAYLOR: Mr. Chairman, very
25 briefly, I am Tom Taylor. I believe

1 I've had the privilege of meeting most
2 of you but those of you who I've not,
3 welcome to the BZA and thank you for
4 your service on this board and for
5 being here today.

6 Mr. Chairman, just a couple of
7 very brief quick housekeeping matters
8 if you'd please, first.

9 The record that was forwarded to
10 the BZA for consideration, the large
11 package unbelievably did not contain
12 two things. I know y'all would find
13 that hard to believe but I want to make
14 sure the record is clear on appeal
15 first and foremost the December 2nd
16 2016 petition for rehearing was not
17 included in what was sent to you and
18 the January minutes of the January 23rd
19 2017 meeting when the rehearing on the
20 initial appeal was held and denied are
21 also not in the record --

22 MR. WILLIAMS: Reconsideration.

23 MR. TAYLOR: Reconsideration,
24 pardon me. I'm too used to being in
25 Circuit Court -- for reconsideration

1 and I would like to move or to hand up
2 to the clerk copies of both of those
3 documents so that they can be included
4 in the final version of this particular
5 hearing and the transcript that will
6 emanate from that.

7 MR. FINGERHUT: I have a question
8 but go ahead.

9 MR. TAYLOR: Yes, sir. And the
10 last thing, sir, I have handed to each
11 of you and have handed to opposing
12 counsel and the clerk a short
13 memorandum on subpoena and Town
14 response which I will probably address
15 in a little bit when I have the
16 opportunity but it -- basically it
17 outlines a subpoena that was issued on
18 August 1st at our request and the
19 Town's response to that and then as
20 part of our argument I will add in a
21 little bit of argumentation about that.
22 Those are just the three housekeeping
23 matters I wanted to put forth. Mr.
24 Chairman?

25 MR. FINGERHUT: Counsel, the only

1 thing that I would ask is that when we
2 met we discussed the visions and it was
3 pretty clear given the size of this
4 record that one of the things within
5 our rules which is no more than
6 four days before the hearing.

7 MR. TAYLOR: Yes, sir.

8 MR. FINGERHUT: Is -- do you
9 consider these matters crucial or
10 things that you can't supplement during
11 the hearing, itself?

12 MR. TAYLOR: No, sir.

13 MR. FINGERHUT: Since we would
14 enforce them against all the parties
15 here I would ask that you do it that
16 way instead and not give us more
17 reading.

18 MR. TAYLOR: Very good.

19 MR. FINGERHUT: Thank you.

20 MR. TAYLOR: Thank you. Mr.
21 Chairman, for the record --

22 MR. FINGERHUT: Yes.

23 MR. TAYLOR: -- Ms. Dixon did
24 refer to both of those in her memo.

25 They just simply were not made a part

1 of the record. Apparently I'm sure by
2 inadvertence and that's the only reason
3 why we wanted to put them in the record
4 today.

5 MR. FINGERHUT: Thank you,
6 counsel. Counsel?

7 MR. ALFORD: We have no objection
8 to the documents other than you'd have
9 to read them we don't object to them.

10 MR. JOHNSON: Same.

11 MR. FINGERHUT: Hearing no
12 objection from any of the parties and
13 given the brevity of the documents they
14 can come in as part of the record.

15 MR. TAYLOR: Thank you. I'll hand
16 them to the clerk, sir.

17 MR. FINGERHUT: Thank you.

18 MR. WILLIAMS: Good afternoon, Mr.
19 Chairman.

20 MR. FINGERHUT: Good afternoon.

21 MR. WILLIAMS: I'm Chester
22 Williams. Mr. Taylor's co-counsel here
23 and I appreciate y'all taking the time
24 to go back through this again. I know,
25 Mr. White, you weren't here at the

1 meeting in November 2016, Mr. Walczak,
2 you weren't on the board at the time.
3 The other four of y'all heard this
4 appeal then.

5 So, for the record, Mr. Walczak,
6 Mr. White we're here on an appeal of
7 the determination letter that Nicole
8 Dixon sent to me as counsel for the
9 appellants dated August 23rd 2016.

10 In that letter Nicole said that
11 the proposed developments of the
12 Spinnaker Welcome Center -- on the
13 tract of land that's commonly referred
14 to here as Parcel E is permitted, as
15 long as it does not exceed -- and
16 allowed in the master plan and the
17 master plan for the waterside PUD --
18 permitted by the current LMO.

19 The four of y'all who were here at
20 the meeting last time may recall that
21 near the end of the meeting Ms. Dixon
22 did concede that no property owner
23 can't development the property as
24 provided for in the master plan because
25 of the expiration of a categorical

1 exemption they no longer have a right
2 to the property and Mr. Taylor will
3 address some of the issues -- Mr.
4 Coltrane in a little while.

5 MR. CUTRER: Mr. Chairman, if I
6 might, could I have direct a question
7 to Mr. Williams.

8 MR. FINGERHUT: Yes.

9 MR. CUTRER: Mr. Williams, this
10 question was asked and not answered in
11 the November 16th or November of 2016
12 hearing.

13 You represent Beachwalk Hotel and
14 Condominiums Association and the
15 Beachwalk Hilton Head, LLC. Both of
16 whom are owners of units in the
17 Beachwalk Hotel.

18 MR. WILLIAMS: Well, the owners
19 association doesn't own any of the
20 units. The association -- it's an
21 association of all the owners.

22 MR. CUTRER: But the claims do,
23 they apparently own either if not all,
24 many or most of these units and the
25 whole purpose of the hours that we

1 spent in 2016, the whole purpose of the
2 filing with the District Court and
3 remanding back to this BZA is to
4 prevent the development of this welcome
5 center on this property on Parcel E.

6 Here's my question, and this is
7 important to me, may or may not be
8 important to my fellow board members,
9 you are the -- or your clients are the
10 aggrieved party in this case. How are
11 they aggrieved? How will these parties
12 be injured if this property is
13 developed as proposed?

14 MR. WILLIAMS: Our clients are
15 owners of property that's located in
16 the waterside PUD and are such are
17 bound by all the terms of the waterside
18 PUD and all the LMO regulations that
19 govern PUD's, including the average
20 density regulations, including the open
21 space regulations, including the
22 impervious, pervious regulations.

23 In trying to figure out what our
24 clients can do with their property,
25 because sooner or later I think

1 everybody knows something's going to be
2 done with the Beachwalk Hotel. It's --
3 I can't tell you when but I suspect
4 sooner something will happen and at
5 that point it's important to understand
6 what the rules are.

7 Nicole's been through the rules
8 here with the proposed development, the
9 welcome center, and we think she got it
10 wrong, so we need to make sure that we
11 understand and protect our client's
12 interest with respect to what happens
13 in the future on the Beachwalk Hotel
14 property because it is all part and
15 parcel of the same PUD overlay.

16 MR. CUTRER: But the Beachwalk
17 Hotel property is not Parcel E.

18 MR. WILLIAMS: Correct.

19 MR. CUTRER: There are -- I assume
20 you and Mr. Taylor aren't working on a
21 pro bono basis so there've been
22 thousands of dollars of legal expenses
23 expended. The District Court has had
24 the case for a year. This body has
25 spent a number of hours plus we had the

1 opportunity to read 1,098 pages
2 recently and surely there's more
3 involved here than just a citizen's
4 concern that every eye --

5 MR. WILLIAMS: I just explained,
6 we need to know what the rules are for
7 future actions with respect to other
8 properties that are in the same PUD
9 overlay, that is the Beachwalk Hotel,
10 and the only way to make sure that we
11 understand what the rules are is to
12 make sure that the Town staff has
13 applied the rules. We don't think
14 they've applied them correctly and let
15 me correct -- you said the goal of this
16 appeal was to prevent the development,
17 that's not correct.

18 The goal of this appeal is to make
19 sure that any development of Parcel E
20 is done in conformance with existing
21 LMO requirements.

22 MR. CUTRER: But your position is
23 what you've allocated if that, in fact,
24 is the case then there's no density
25 available with this Parcel E,

1 therefore, it cannot be developed.

2 MR. WILLIAMS: We think that
3 follows from the application of the
4 reference of the LMO, yes.

5 MR. CUTRER: So I'm going to ask
6 you one more time and you can choose to
7 indicate or talk around it if you like
8 but how would your client be injured if
9 Parcel E is developed as proposed?

10 MR. WILLIAMS: If Parcel E is
11 developed as proposed the entire PD-2
12 Overlay District becomes nonconforming.
13 That has an adverse -- material adverse
14 affect on our clients. We're here to
15 make sure that the rules are properly
16 followed. You have oversight
17 jurisdiction on the actions of the Town
18 staff and that's why we're here.

19 MR. CUTRER: Okay.

20 MR. FINGERHUT: Mr. Williams,
21 please.

22 MR. WILLIAMS: Thank you.

23 Again, this is a -- I'd like to
24 think that, Mr. White, you and Mr.
25 Walczak read through all that thousand

1 or 1,100 pages of stuff so maybe you're
2 familiar with some of the stuff I'll go
3 over and I'll -- I have to agree, a lot
4 of that stuff really is not necessary
5 to the determination here. The Town
6 staff that was required to provide you
7 with all the documents on which the
8 decision appeal was rendered and I'm
9 not sure it was really necessary to
10 include all the permitting documents
11 but be that as it may it's all in there
12 but the waterside PUD was established
13 -- was originally permitted by the
14 Beaufort County Joint Planning
15 Commission in 1984 before the Town had
16 deregulation issues on those sorts of
17 matters. It was amended by the Town
18 most recently on -- in May of 1987 and
19 that amendment resulted in what
20 everybody commonly accepts what the
21 approved master plan is even though the
22 Town has been unable to locate a copy
23 of the master plan with that stamped
24 approval on it.
25 There are 15.1 acres in the

1 waterside PUD.

2 The original approval -- excuse me
3 one second -- the approvals for the
4 county and then ultimately is revised
5 by the Town provided for 20 -- almost
6 22,000 square feet of office use. Over
7 36,000 square feet of retail use. 94
8 hotel rooms and 200 residential units.

9 When the Town was incorporated the
10 first LMO was adopted. It turns out
11 that those densities were far in excess
12 of what the Town permitted. It --
13 under the current code if someone had
14 come in to develop approvals at that
15 time and again Mr. Coltrane will
16 address some of the issues having to do
17 with categorical exemption and maybe --
18 Mr. Taylor, maybe this is a good time
19 to get Mr. Coltrane to offer his -- it
20 is important, to a large extent, you
21 understand the issues and the effect of
22 categorical exemption, so for -- I'll
23 turn things over to Mr. Taylor, for
24 just a moment.

25 MR. TAYLOR: Petitioners call as a

1 witness Mr. Curtis Coltrane, please,
2 Mr. Chairman.

3 MR. JOHNSON: Unless he's going to
4 testify to something different than
5 what he testified to that was contained
6 at length in the transcripts that are
7 before you I objects to his testimony.

8 MR. FINGERHUT: Counsel?

9 MR. TAYLOR: Your Honor, this is
10 rehearing, Your Honor -- Mr. Chairman,
11 as was decided and -- this is a
12 rehearing in toto.

13 While it's certainly appropriate
14 for this group to look at the former
15 transcript testimony it is actually
16 nothing but hearsay insofar as this
17 goes and it is important that we have I
18 believe a brief discussion which it
19 will be brief and certainly it is not
20 inappropriate in that --

21 MR. FINGERHUT: Thank you. I'll
22 overrule that objection. We'll hear
23 the witness on this.

24 MR. JOHNSON: Objection's noted
25 for the record?

1 MR. FINGERHUT: Yes, indeed.

2 MR. CUTRER: May I ask a question
3 before we proceed?

4 MR. FINGERHUT: Certainly.

5 MR. CUTRER: We had a lengthy
6 discussion in the 2016 about the
7 category exemption -- categorical
8 exemption and how that went away in
9 2000 and my understanding, which may be
10 incorrect was, it no longer is
11 applicable, so could you explain to us,
12 before we get into this testimony, why
13 we need to go through this again if
14 it's no longer applicable?

15 MR. TAYLOR: Yes, sir. Because
16 for the very reason that you said and I
17 think, Mr. Cutrer, that this shows --
18 am I getting that right?

19 MR. CUTRER: Close enough. Call
20 me Jerry.

21 MR. TAYLOR: This shows a little
22 bit about the misunderstanding of --
23 some process because exactly what you
24 said is correct. It is no longer
25 applicable, which means that they may

1 not build, right now, the way they're
2 asking to build because they were
3 allowed a categorical exemption for
4 five years to do so and when they did
5 not move under that our argument is
6 that it is no longer valid and
7 therefore they have no right,
8 whatsoever, to build and argue that
9 they're entitled to build under the old
10 code provisions or to not be considered
11 -- a better way to put it is, to not be
12 considered under the current LMO which
13 is exactly what the Town staff says
14 they have the right to do is to build
15 but not be considered and controlled by
16 the current LMO provisions.

17 An understanding of the
18 categorical exemption and why the Town
19 adopted it and what it meant and what
20 rights they had and abandoned by not
21 moving forward I think is vitally
22 important to this Board, especially to
23 the two members who were not here
24 prior.

25 MR. ALFORD: Mr. Chairman. I'm

1 sorry. I would interpose an objection.

2 It's clearly not relevant. We

3 stipulate that the categorical

4 exemption is expired.

5 With respect to the conclusion

6 that Mr. Taylor draws thereafter which

7 is, well, if it's expired they can't do

8 it. I think that's the battleground

9 which really get to the question which

10 I think better suits -- however, it's

11 his case to put it up any way he wants.

12 If the Court -- I'm sorry, the

13 body would note my objection. It is --

14 it's irrelevant and it is a waste of

15 our resources but if he wants to put it

16 up and you want to let him there's no

17 objection.

18 MR. FINGERHUT: Thank you.

19 MR. TAYLOR: Mr. Chairman, I would

20 like to note for the record that we

21 couldn't even get opposing counsel to

22 agree to the two steps -- Judge Dukes

23 two steps prior to coming in here, so

24 certainly there's no been no consent

25 offered or turned down by the

1 categorical exemption.

2 MR. FINGERHUT: I agree, counsel.

3 Your objection is noted but overruled.

4 This is -- looking at the document
5 filed by the Town it's clear that the
6 affect of the categorical exemption is
7 one of the issues in this case and as
8 you say and I do agree with this, it's
9 their 45 minutes, they can present it
10 any way they want.

11 MR. CUTRER: 41 minutes now.

12 MR. FINGERHUT: Counsel?

13 MR. TAYLOR: Mr. Chairman, I'd
14 like to call Mr. Coltrane. Have him
15 sworn, please.

16 CURTIS COLTRANE,
17 having been produced and first duly sworn as a
18 witness, testified as follows:

19 EXAMINATION

20 BY MR. TAYLOR:

21 Q Curtis, can you state your full name
22 for the record.

23 A For the record my name is Curtis Lee
24 Coltrane.

25 Q And Curtis, can you tell the members of

1 the BZA, please, what your background is insofar
2 as relationship with the Town especially during
3 the timeframe of 1990 through 2000.

4 A In June of 1989 I was appointed to
5 serve as the Town Attorney for Hilton Head
6 Island.

7 I served in that capacity until June of
8 2003 at which point I left to pursue other
9 things but during the period from '89 to the
10 middle of 2003 I served as Town Attorney.

11 Q And Curtis, you are a licensed lawyer
12 and have been for more than 30 years, correct?

13 A That is true.

14 Q Curtis, did you work with the Town
15 Council when they adopted the provisions
16 concerning what is now known as a categorical
17 exemption?

18 A I did.

19 Q Did you help draft that ordinance?

20 A I did.

21 Q Curtis, would you explain to the BZA
22 basically what the categorical exemption
23 ordinance was designed to do and how it
24 applied to developments?

25 MR. ALFORD: Interposing an

1 objection. The law is the law, it
2 speaks for itself with respect to --
3 and I have tremendous respect for Mr.
4 Coltrane -- but with respect to his
5 interpretation or his recollection of
6 the intent of the law is absolutely
7 irrelevant. The law says what it says
8 and that's why it's the law. We all
9 got to argue about what it meant after
10 at came in. (Phonetic)

11 MR. FINGERHUT: Counsel?

12 MR. TAYLOR: Mr. Chairman, all of
13 the provisions concerning the
14 categorical exemption have been taken
15 out of the code now so there is not a
16 categorical exemption provision for you
17 all to look at and interpret.

18 In addition, Mr. Coltrane is being
19 offered as basically an expert witness
20 to some extent because he worked with
21 the Town Council. He knew how this was
22 supposed to work and how it did work.
23 We would find -- we would argue that
24 the testimony would be entirely
25 relevant and as all testimony can be

1 considered by each council member to
2 the extent they choose to consider it.

3 MR. FINGERHUT: Thank you,
4 counsel. I overrule the objection and
5 will let it in.

6 MR. ALFORD: Thank you.

7 THE WITNESS: At the time that the
8 council considered the ordinance and
9 the procedures that became the
10 categorical exemption process there
11 were a number of permits that had been
12 issued on property on Hilton Head
13 Island that had been issued either by
14 Beaufort County or by the Town Council
15 under the first iteration of the
16 development standards organization.

17 The thought that drove the
18 creation of the ordinance was that the
19 council simply wished to get a handle
20 on what would actually be built in the
21 context of what it was trying to do
22 with respect to its decisions on
23 infrastructure for the Town, largely
24 traffic at the time, and so, the intent
25 of the council in looking at this was

1 to create a process that would allow
2 council to have some level of certainty
3 as to which of the older permits that
4 being pre-LMO permits would actually be
5 developed and which of them would not,
6 and so the framework that was developed
7 is that it was set out in the ordinance
8 and the procedures which is that permit
9 holders were given an opportunity to
10 bring their permits to the Town to
11 determine the validity of them and what
12 was allowable under them and the Town
13 would issue -- in every case that it
14 was done a categorical exemption that
15 had a life of five years and beyond
16 that. At the end of the five years the
17 landed owner was able to move forward
18 with the permit or not. If they didn't
19 move forward then as was stated in the
20 ordinance and as is stated in the
21 categorical exemption that was issued
22 with respect to the property at issue
23 here then when and if someone moved
24 forward to develop the property he did
25 so under the LMO that exists at the

1 time that you actually move forward.

2 (Phonetic)

3 BY MR. TAYLOR:

4 Q Mr. Coltrane, referring to the document
5 you just mentioned, the Board of Zoning Appeals
6 has a copy in their packet but for the record
7 there was a letter apparently issued by Thomas
8 Grechco (phonetic) acting as the Chief of
9 Planning for the Town of Hilton Head Island on
10 March 3rd, 1995 to Robert L. Graves. Are you
11 familiar with that letter?

12 A I am.

13 Q All right. Have you reviewed it before
14 we came into this?

15 A Yes.

16 Q All right. And is that, in fact, what
17 would be termed in the vernacular, a categorical
18 exemption letter?

19 A Yes. It was a notification. The
20 applicant in this case had filed an application
21 for one, I suspect, through the offices of Mr.
22 Johnson and this was the Town's response to it.
23 The categorical exemption was granted, given a
24 life of five years beyond the date of it and --
25 as previously discussed.

1 Q And, Mr. Coltrane, this was to be
2 applicable to what we now know as Parcel E,
3 correct?

4 MR. ALFORD: Objection, leading.

5 THE WITNESS: No, no. I think it
6 must have been -- it was a little
7 broader than that. It was -- it dealt
8 with several tracts, one of which --

9 BY MR. TAYLOR:

10 Q For several -- that was poorly worded.

11 A One of which was Parcel E.

12 Q That's what I -- excuse me.

13 Did the categorical exemption letter
14 dated March 3rd 1995 apply to Tract E and other
15 tracts that we are currently not talking about?

16 A Yes.

17 Q Okay. And by its own terms, did this
18 letter expire on March 3rd 2000?

19 A Yes and so stated on the final page.

20 Q Very good.

21 MR. TAYLOR: I don't have any
22 other questions for Mr. Coltrane.

23 MR. FINGERHUT: Counsel?

24 MR. JOHNSON: None, Mr. Chairman.

25 MR. ALFORD: No, sir.

1 MR. FINGERHUT: Any questions from
2 the Town of Mr. Coltrane while he's --

3 MR. CUTRER: Sorry to be
4 asking another question but I've got to
5 understand this.

6 We have -- seems to me the real
7 issue is the PD-2 overlay or one of the
8 big -- was the PD-2 overlay created by
9 the categorical exemption or did it
10 exist prior to the categorical
11 exemption?

12 MR. COLTRANE: Standing here right
13 now I can't tell you exactly when the
14 PD-2 overlay was first adopted as a
15 part of the LMO.

16 The categorical exemption, though,
17 allowed the recipient of it to move
18 forward based on whatever prior
19 approval it had.

20 MR. CUTRER: Within a certain
21 period?

22 MR. COLTRANE: Within a certain
23 time period.

24 So irrespective of what the law
25 was on March 3rd 2005 the applicant in

1 this case was entitled to move forward
2 with its previous approval.

3 MR. CUTRER: So, with the
4 expiration March 3rd, a momentous day
5 because it's my birthday -- March 3rd
6 2000 the categorical exemption went
7 away and so the regulations are
8 constraints on this property within --
9 go back to what they were before the
10 categorical exemption with respect to
11 PD-2 and the then current LMO, is that
12 fair?

13 MR. COLTRANE: No. No, the way it
14 would work is that if the permit, the
15 previous permit wasn't executed by
16 March 3rd 2000, then any time after
17 that that the land owner wished to move
18 forward he would then move forward
19 under the terms of the LMO existing on
20 the date that he move forward.

21 MR. CUTRER: So why do I care
22 about -- as a BZA member, why do I care
23 about the categorical exemption and its
24 history?

25 MR. COLTRANE: Well our hearts --

1 MR. WILLIAMS: May I -- I'll be
2 glad to address that.

3 MR. COLTRANE: -- suggest what may
4 or may not be important to you, it's --
5 I was asked to come here because I
6 think mainly for the point that
7 following the expiration of the
8 categorical exemption the property then
9 becomes bound by whatever the LMO is at
10 any point after that, you know, pegged
11 to the time that you move forward and
12 see to improve it or something.

13 MR. CUTRER: Okay.

14 MR. FINGERHUT: Any other
15 questions of Mr. Coltrane? I have one.

16 MR. COLTRANE: Okay.

17 MR. FINGERHUT: Is the -- when the
18 categorical exemption expires is there
19 any carrying over effect as a result of
20 it having been in place on a particular
21 property?

22 MR. COLTRANE: It's expired
23 without any further action having been
24 taken, meaning they haven't moved
25 forward with the development of a plan

1 approval or building permit then
2 whatever existed before that also
3 expired.

4 MR. FINGERHUT: So it's previous
5 existence would then have no effect on
6 what's happening today, is that
7 correct?

8 MR. COLTRANE: That was -- yes,
9 that is -- that was the intent in how
10 it was intended to work.

11 MR. FINGERHUT: Okay. Thank you.

12 MR. COLTRANE: Anything else? May
13 I be excused?

14 MR. TAYLOR: That was going to be
15 my question. Mr. Chairman, may he be
16 exposed?

17 MR. FINGERHUT: Absolutely. No
18 objection.

19 MR. TAYLOR: Thank you.

20 MR. WILLIAMS: One moment while
21 I -- Mr. Chairman, that's just for my
22 reference. Y'all have a copy of that
23 in your package.

24 Mr. Cutrer, your question, if I
25 may address it a little bit about the

1 categorical exemption and the PD-2
2 overlay, the categorical exemption
3 letter for this particular project
4 vested the uses and densities that were
5 provided for in the previously approved
6 master plan.

7 Prior to the application for the
8 categorical exemption the structure
9 that is now Beachwalk Hotel had already
10 been built. It was commenced
11 immediately following the 1987
12 amendment to the master plan by the
13 Town's planning commission.

14 So that left what's referred to as
15 Parcel F, a 10.735-acre tract, Parcel
16 D, which is the right-of-way area
17 .697-acre tract and Parcel E, which is
18 1.068 acre which we're dealing with
19 today. The Beachwalk Hotel is
20 constructed on what's referred to as
21 Parcel A and C 2.6-acre tract, so the
22 categorical exemption -- categorical
23 exemption was designed to allow people
24 to continue to rely on previously
25 issued permits.

1 MR. CUTRER: Up to a certain
2 point.

3 MR. WILLIAMS: Up to a certain
4 point, correct, so what's now the
5 Spinnaker Development, Spinnaker, that
6 was built in the line on the
7 categorical exemption and as allowed
8 under the waterside PUD Master Plan.

9 Nothing ever transpired on Parcel
10 E and the expiration date is important
11 because -- and again, this is a
12 document that's in your package. The
13 current owner of the property, Mr.
14 Johnson's client, acquired the property
15 by way of a deed recorded on July --
16 recorded on July 20th 1999 prior to the
17 expiration of the categorical
18 exemption, so when Mr. Johnson's client
19 SDC Properties acquired the property at
20 that time they could have built all
21 those huge numbers of density that were
22 referred to in the categorical
23 exemption letter. Tom, do you have a
24 copy?

25 MR. TAYLOR: I do.

1 MR. CUTRER: Well, they didn't so
2 that's irrelevant.

3 MR. WILLIAMS: Right. But this is
4 goes to one of Mr. Johnson's points,
5 that if you apply all the requirements
6 of the LMO that there's no density
7 left, then that's a taking, it's simply
8 not because Mr. Johnson's client had
9 the ability to develop that property
10 with a categorical exemption at the
11 time it acquired the property and it
12 chose not to. That is one of the main
13 reasons why it's important to
14 understand what the effect the
15 expiration of the categorical exemption
16 is.

17 MR. CUTRER: It just seems to me,
18 Mr. Williams, that we would all be
19 better served if we focused on what the
20 requirements are in place today.

21 MR. WILLIAMS: I agree and --

22 MR. CUTRER: -- and moved on.

23 MR. WILLIAMS: But for Mr. White
24 and Mr. Walczak not being here for the
25 last meeting I'd be more than happy to

1 do that and if Mr. White and Mr.
2 Walczak tell me, Chet, we understand
3 all that. Let's move onto the
4 questions.

5 MR. WHITE: If that's what you're
6 looking for then let me give it to you.

7 MR. WILLIAMS: Right. So then
8 let's do this. Let's move to the order
9 from Judge Dukes and the responses.

10 Page 27 we have the hearing, first
11 hearing back in November 2016.
12 Petition for reconsideration denied in
13 January 2017 appealed in Circuit Court.
14 April of this year the Circuit Court's
15 order comes down sending -- remanding
16 it back to y'all.

17 Clearly, Judge Dukes didn't
18 understand the rationale for the
19 board's decision and so he wants me to
20 address three questions, so the first
21 question; Is Parcel E in a PD-2 Overlay
22 District established by the LMO?

23 We argued in the first hearing
24 that it was. Mr. Johnson and Nicole
25 Dixon -- both admitted that it was, so

1 I don't think there's any question that
2 the property is in a PUD Overlay
3 District.

4 Number 2; If Parcel E is in a PD-2
5 Overlay District, is Parcel E subject
6 to the LMO's PD-2 Overlay District
7 regulations?

8 We think that's readily evident as
9 was Nicole and Mr. Johnson, so, the
10 facts aren't in dispute here.

11 The only thing that's in dispute
12 is what the law is or more accurately
13 the interpretation of an unambiguous
14 provision of the LMO should be in this
15 application for this particular piece
16 of property.

17 The third question is a little
18 more difficult but we think the answer
19 follows easily for the prior two
20 questions.

21 If Parcel E is subject to the
22 LMO's PD-2 Overlay District, what
23 effect does that have on the
24 development of Parcel E, and must the
25 existing development on the other

1 parcels within the PD-2 Overlay
2 District be taken into account in
3 connection with any proposed
4 development of Parcel E?
5 Our position is the code says if
6 you're in a PD-2 Overlay District, the
7 PD-2 overlay district's off. The
8 regulations always control the base
9 zoning regulation and Nicole, in her
10 memo to you says, yes, it's in a PD-2
11 Overlay District. Yes, the regulations
12 for a PD-2 Overlay District shall apply
13 but not all of them and we're sort of
14 baffled by that position because you
15 see nothing, at all, no evidence, no
16 support for that position in the code.
17 The code doesn't carve out any
18 exceptions for the applicability of the
19 PD-2 Overlay District and that's the
20 crux of this matter here. Do the
21 average density regulations apply in
22 figuring out the development potential
23 of Parcel E or do they not? (Phonetic)
24 And I don't know that there's much
25 else to say on that point. I think I

1 pretty well went over it in my
2 memorandum on the demand for you.

3 If you have any questions about
4 any of those I'll be glad to try and
5 address those.

6 We think there's several different
7 reasons that council is wrong, Town
8 staff is wrong on that particular issue
9 and position.

10 LMO Section 16-3-1 -- says; land
11 is located in the Overlay District the
12 LMO's regulations regarding development
13 of building district shall apply in
14 addition to the regulations -- in the
15 development -- (Phonetic)

16 The Town would have you believe
17 that, well, that's not always the case
18 and they have -- I mean Nicole had
19 couched it in terms of the staff
20 believes that this provision is
21 inapplicable. It's applicable only to
22 new PD-2 Overlay District. The code
23 doesn't say that anywhere and that's
24 a -- it's a tortured interpretation of
25 the provisions of the code in order to

1 get to the point that the Town staff
2 apparently want to get to.

3 The existing development that's in
4 the PD-2 District is easy to determine,
5 198 residential, five thousand --
6 5,262 square feet of commercial space,
7 91 hotel groups. When you add all that
8 up and you average that over 15 acres,
9 15.1 acres you're at the point where
10 you require more than 15 point acres --
11 15.1 acres to support to justify that
12 development. The developers have their
13 cake and now they want to eat it, too.

14 Like I said, it seems that the
15 staff is interpreting this particular
16 provision but it seems like they are
17 doing it out of the blue.

18 Mr. Taylor, through you, Mr.
19 Fingerhut, had a subpoena issued to
20 Teri Lewis. I'd like you to address
21 those issues right now if you would.

22 MR. TAYLOR: Mr. Chairman, call
23 Teri Lewis, very briefly.

24 TERI LEWIS,
25 having been produced and first duly sworn as a

1 witness, testified as follows:

2 EXAMINATION

3 BY MR. TAYLOR:

4 Q Teri, can you state your full name for
5 the record.

6 A Sure. Teresa Lewis.

7 Q All right. And what do you do, ma'am?

8 A I am the Land Management Ordinance
9 official for the Town of Hilton Head Island.

10 Q And have you held that role during the
11 entirety of the process which we are here about
12 today?

13 A I have.

14 Q All right. Ms. Lewis, I'll show you
15 what has been previously marked and placed in
16 this -- it's previously been mark and handed up
17 as a memorandum.

18 It's called a subpoena to Teri Lewis.

19 Do you see that in front of you?

20 A I do.

21 Q Okay. It was issued or about August
22 the 3rd. Did you receive that at around that
23 timeframe?

24 A I did.

25 Q All right. And Ms. Lewis, did you read

1 it?

2 A I did.

3 Q All right. As part of your job for the
4 Town of Hilton Head, did you attempt to respond
5 to it?

6 A I did.

7 Q Okay. For the record, Mr. Chairman,
8 the subpoena required the product of the
9 following documents;

10 Any and all written interpretations of
11 or determinations under the land management
12 ordinance or other decisions of the LMO official
13 or her designee in which the LMO official or her
14 designee decided that one or more sections or
15 provisions of the LMO applied or apply only
16 prospectively to new proposed development or
17 that one or more sections or provisions of the
18 LMO did not apply or do not apply to a
19 development that was previously approved under
20 prior regulations and partially constructed.

21 Did you endeavor to search and see if
22 there were any documents in the Town's staff's
23 possession, custody or control that matched that
24 request?

25 A I did.

1 Q Were there any?

2 A I did not find any.

3 Q All right. Secondly, it required the
4 production of any and all written
5 interpretations of or determinations under the
6 LMO or other decisions of the LMO official or
7 her designees to which the LMO official or her
8 designee decided that one or more provisions of
9 LMO Section 16-3-106G did not or do not apply to
10 a tract or parcel of land located in a PD-2
11 Overlay District.

12 Did you attempt to find whether there
13 were any documents that would support that
14 position had been taken previously?

15 A I did.

16 Q And did you find any?

17 A Did not.

18 Q All right. And then it provided that
19 you shall produce any and all written
20 interpretations of or determinations under the
21 LMO or other decisions of the LMO official or
22 her designees in which the LMO official or her
23 designee decided that the provisions of an LMO
24 Overlay District did not or do not control over
25 the provisions of the LMO base zoning district.

1 Did you try to determine whether that
2 kind of document had ever been produced before?

3 A I did.

4 Q Okay. And did you find any?

5 A I did not.

6 Q All right. Ms. Lewis, is it a fair
7 summary from that subpoena at issue and the
8 Town's response, which was that there are no
9 documents available, to say that there has, as
10 far as you can tell as the LMO official, never
11 been an interpretation of this type of
12 categorical determination -- terribly worded
13 question -- would it be fair to say that after
14 having worked, you cannot find any former
15 decisions that are similar to the interpretation
16 being made in this case?

17 A For projects other than this one?

18 Q For projects other than this one, yes,
19 ma'am.

20 A Then yes, that's a correct statement.

21 Q Never before as far as the staff can
22 tell had that determination been made?

23 A As far as I can tell.

24 Q Ms. Lewis what happens to a developed
25 parcel when the LMO is amended in a manner and

1 that the parcel no longer complies with it -- in
2 a manner such that the parcel no longer complies
3 with it?

4 A Potentially it becomes a legally -- has
5 legal nonconformity.

6 Q It becomes nonconforming if it's
7 already there or has already been approved,
8 correct?

9 A Yes.

10 Q Okay.

11 MR. TAYLOR: Nothing further for
12 this witness.

13 MR. FINGERHUT: Any questions for
14 Ms. Lewis?

15 MR. ALFORD: No, sir.

16 MR. JOHNSON: No.

17 MR. FINGERHUT: Any questions from
18 the Board for Ms. Lewis? Sorry. No.
19 Okay. Thank you.

20 MR. TAYLOR: Mr. Chairman, I'd
21 like to move that the subpoena be put
22 into evidence. I'm not sure whether
23 your ruling earlier applied to it or
24 not.

25 MR. FINGERHUT: It's part of the

1 record, isn't it?

2 MR. WILLIAMS: Out of an abundance
3 of caution we move that all the
4 information previously applies -- and
5 Nicole's memo also be included in the
6 record here because I don't think
7 anybody has moved --

8 MR. FINGERHUT: Counsel? I think
9 counsel ha agreed to that already.

10 MR. ALFORD: I don't know what
11 that meant but I'll say this, I just
12 want to be clear that the response to
13 the subpoena -- maybe I should recall
14 Ms. Lewis -- the response to the
15 subpoena was we don't have anything
16 that we haven't already put in this
17 already for the -- record.

18 Not -- in other words, everything
19 we got is in the record. It wasn't
20 that it was not responsive. What's
21 responsive is already existing in the
22 record before you.

23 MR. FINGERHUT: That's not the
24 testimony that I heard but it doesn't
25 make sense. Counsel's representation

1 that --

2 MR. ALFORD: No. I think what she
3 said is, I don't have anything else
4 other than about this property, is
5 that --

6 MR. FINGERHUT: That isn't what --

7 MR. CUTRER: That's not what I
8 heard.

9 MR. FINGERHUT: Yeah, that's not
10 what I heard, either. I heard there
11 isn't a -- having to do with anything
12 other than this there isn't anything
13 else so maybe what you're saying --

14 MR. CUTRER: Call her back and
15 have her testify.

16 MR. ALFORD: I'm happy to recall
17 her at this point.

18 MR. FINGERHUT: Sure. That's
19 fine.

20 MR. ALFORD: Ms. Lewis, I'm sorry.

21 EXAMINATION

22 BY MR. ALFORD:

23 Q Ms. Lewis, you got a subpoena.

24 A Okay.

25 Q That asked you questions about similar

1 circumstances?

2 A Yes.

3 Q Okay. You didn't have anything dealing
4 with it?

5 A That's correct.

6 Q Anything that you have dealing with
7 this question is in this record?

8 A That's correct. And that was my
9 response back I was just looking at the e-mails
10 that I sent where it said everything's included
11 in the record. There wasn't anything else other
12 than this and that's why I asked for
13 clarification if we meant other than this
14 project.

15 MR. FINGERHUT: Thank you.

16 MR. ALFORD: I'm sorry if I
17 inartfully expressed that. That's what
18 I wanted to say.

19 MR. TAYLOR: Mr. Chairman, to
20 clean that up, please, sir, I think I
21 -- just one question.

22 EXAMINATION

23 BY MR. TAYLOR:

24 Q Ms. Lewis, you were looking for an
25 e-mail. I have it here. It appears and I think

1 you can look at it with me. Mr. Hulbert wrote
2 you and said, can you tell me if you have
3 located any documents related to Mr. Taylor's
4 subpoena?

5 And you wrote back and said, Brian, I
6 have consulted with Nicole and we have not
7 located any additional documents. The decisions
8 that were reached were as a result of documents
9 that already exist as part of the record.

10 A That's correct.

11 Q That's what you were looking for?

12 A That is right.

13 Q And a summation of that is that you
14 were unable to find a document ever produced by
15 the Town staff in any other matter where a
16 decision of this stature was made, only the ones
17 that relate to this particular case?

18 A That's correct.

19 MR. TAYLOR: Nothing further.

20 MR. FINGERHUT: Thank you.

21 Please, Mr. Cutrer.

22 MR. WILLIAMS: I'd rather answer
23 your questions --

24 MR. CUTRER: It's your time and
25 you use it how you want but here's my

1 question, Attachment G, which is your
2 memorandum on remand --

3 MR. WILLIAMS: Okay.

4 MR. CUTRER: -- page 7 says the
5 following -- and you just said it a
6 little while ago -- the applicable LMO
7 section requires that the average
8 density for the PD-2 Overlay District
9 shall not exceed the maximum density
10 permitted in the base zoning district.
11 For Parcel E the base zoning district
12 is the resort development district.

13 MR. WILLIAMS: Correct.

14 MR. CUTRER: The next paragraph
15 goes on and identifies five -- pardon
16 me, well, five parcels which make up
17 four developments. Parcel D is the
18 Waterside Drive right-of-way.

19 MR. WILLIAMS: Right.

20 MR. CUTRER: Parcel A and C is the
21 Beachwalk Hotel.

22 MR. WILLIAMS: Correct.

23 MR. CUTRER: F is the big
24 Spinnaker development, which includes
25 residential and 5,200 and some odd

1 square feet of commercial I guess it is
2 and then E is the subject parcel.

3 MR. WILLIAMS: Correct.

4 MR. CUTRER: What I hope you'll
5 get to either now or some point is show
6 this body your interpretation of how
7 this whole development pencils out from
8 the development standpoint and how it
9 either does or does not comply with the
10 resort development district which you
11 say is the governing document.

12 MR. WILLIAMS: On the next page,
13 on the bottom of that page continuing
14 onto the next page, the Town's records
15 show that over the years of development
16 of the Spinnaker project building
17 permits were issued for 198 dwelling
18 units.

19 In addition, one building permit
20 was issued for 5,262 square feet of
21 nonresidential, commercial space.

22 MR. CUTRER: That would be Parcel
23 F.

24 MR. WILLIAMS: Correct. So under
25 the current RD District regulations

1 which allow a maximum of 16 dwelling
2 units per acre the LMO now requires
3 12.375 acres to support the existing
4 198 dwelling units of the Spinnaker
5 project and considering the RD
6 district's 8,000 square feet per net
7 acre cap for nonresidential it requires
8 0.658 acres to support the existing
9 nonresidential development as part of
10 the Spinnaker project, therefore, under
11 the current LMO regulations the
12 Spinnaker project's existing density
13 would take about 13.033-acres of land
14 in the RD District, okay?

15 MR. CUTRER: Okay.

16 MR. WILLIAMS: All right. The
17 Beachwalk Hotel was originally
18 developed with 91 hotels.

19 MR. CUTRER: That's Parcels A and
20 C.

21 MR. WILLIAMS: That's correct.
22 Under the current LMO regulations the
23 RD District allows up to 35 hotel rooms
24 per net acre so the LMO now requires
25 2.6 acres to support the existing 91

1 hotels that are on the Beachwalk Hotel
2 tract, so we're up to 13.033 plus 2.6,
3 which is 15.633, which is more than
4 15.1.

5 MR. CUTRER: How does the Parcel D
6 right-of-way factor into that?

7 MR. WILLIAMS: There's no density
8 assigned to the Parcel D right-of-way
9 but that's included in the 15.1 acres,
10 so the density there is already used
11 up. (Phonetic)

12 MR. CUTRER: Okay.

13 MR. WILLIAMS: The point being
14 that because SDC Properties didn't
15 develop Parcel E as they could have
16 prior to the expiration of the
17 categorical exemption on March 3, 2000
18 they now have to comply with the
19 current code requirements, the average
20 density requirements of PD-2 are
21 applicable to all PD-2 districts and
22 already exceed the density, the average
23 density of the base -- zoning district.

24 MR. CUTRER: Thank you.

25 MR. WILLIAMS: Does that make

1 sense?

2 Getting back to, real quick, the
3 subpoena, what we were looking for was
4 whether or not the Town had taken a
5 similar position in any other
6 circumstance and the answer is, no, we
7 haven't.

8 So I believe this is one-off here
9 and we don't know what's driving this
10 particular intersection.

11 Teri, in response to Tom's last
12 question Teri said, well, when the code
13 changes of a previously development
14 parcel that no longer complies with the
15 current code requirement it's
16 nonconforming. Happens all the time.
17 Well, not all the time but it happens
18 not infrequently. That's exactly what
19 has happened here.

20 In fact, if you read the
21 categorical exemption letter it
22 specifically says, no, if you develop
23 everything out here under -- as you can
24 under the categorical exemption then it
25 may be nonconforming under the LMO.

1 That's exactly what we ended up with, a
2 nonconforming situation and allowing
3 any development -- and keep in mind, I
4 certainly want the Town staff to check
5 my figures and the way you do that is
6 to go back and review this for
7 conformance with the PD-2 requirements
8 but if you have a nonconforming PD-2
9 overlay because it already exceeds the
10 average density for base zoning
11 district and you allow more development
12 there then you're violating the Town
13 code provisions on increasing the scope
14 of nonconforming and I don't think it
15 can be permitted and it's important
16 that we understand what the rules are
17 here and how we go about planning for
18 the future. We -- sooner or later all
19 this area's going to be redeveloped.
20 Some people might argue that Beachwalk
21 Hotel -- development.
22 At some point I would suggest that
23 Spinnaker be redeveloped and it's
24 important to understand what the rules
25 and how they apply because certainly

1 the code will change multiple times in
2 the future and you've got to play by
3 the rules that are in effect at the
4 time you file your application.

5 I think we've covered most
6 everything that we see is the issues
7 here. It's a question of
8 interpretation and -- package, City of
9 Myrtle Beach against -- Corporation.
10 The South Carolina Courts have
11 consistently held that when construing
12 a statute its words must be given their
13 plain and ordinary meaning without --
14 subtle or enforce construction to limit
15 or expand the statute's operations.

16 It seems that us at the Town staff
17 is interpreting the average density
18 provision in a manner that limits it so
19 it doesn't apply to this particular
20 PD-2 development.

21 What other PD-2 developments does
22 it apply to? Are there any others? We
23 don't know the answer to that. Town
24 staff has never addressed that issue,
25 apparently, and there's nothing, at

1 all, in the code that would lead anyone
2 to believe that there's any sort of
3 carve out for previously existing
4 substantially completed PD-2
5 developments that exempts them from
6 compliance with the average
7 density requirements.

8 This is nothing but a -- phase of
9 development of the PD-2 and,
10 unfortunately, it's all been used --
11 and unfortunately SDC Properties
12 allowed their rights to develop the
13 property lapse and they're now in a
14 position where they have to comply with
15 the current code requirements.

16 Questions? (Phonetic)

17 MR. FINGERHUT: Any questions for
18 Mr. Williams? Thank you.

19 MR. WILLIAMS: Thank you.

20 MR. FINGERHUT: Yes, sir.

21 MR. JOHNSON: Good afternoon, Mr.
22 Chairman, members of the Board.

23 My name is Barry Johnson. I'm
24 from the Bluffton firm of Johnson and
25 Davis but as was eluded to by Mr.

1 Coltrane I've had an intensive role in
2 legal matters affected the Town of
3 Hilton Head Island since about the time
4 Town of Hilton Head was created
5 including the prior categorical
6 exemption process that the subject
7 property went through.

8 I'm going to get back to the
9 answer that Mr. Coltrane gave you to
10 your question, Mr. Cutrer, but I'd like
11 to do a couple of other things, first.

12 First thing I want to do is to
13 remind us that we're here for a
14 rehearing as well as to answer three
15 questions from Judge Dukes.

16 In the component of what brings us
17 here today that has to do with the
18 rehearing I just want to confirm with
19 the chair and the board that you have
20 the opportunity to affirm the appeals
21 from determination of the LMO official
22 or to modify it or to reverse it in
23 addition to answering Judge Duke's
24 three questions and when I get through
25 speaking you may find that you can

1 exercise appropriately either the
2 option to affirm the LMO official or
3 the option to modify her decision and
4 be consistent with the facts and the
5 law as I expect to lay them out for
6 you.

7 So, with that understood I'm not
8 going to waste any time on the first
9 two of Judge Duke's questions.

10 I've indicated at the last
11 hearing, in essence, answers to those
12 two questions were yes.

13 So, we're going to focus on the
14 third question and as was evident
15 through discussion about the subpoena
16 we're dealing with a novel situation
17 here. It's an issue for Town staff,
18 for you and I suspect for all the
19 lawyers first impression and as Mr.
20 Williams responded to questions nearing
21 the end of his presentation to question
22 the interpretation here.

23 So, I think that that issue, the
24 question of interpretation can lend
25 support to the idea that the LMO

1 official acted properly within her
2 authority in making a determination
3 that required her to make a
4 interpretation of the LMO and
5 apparently counsel on the other side
6 agrees that it's a question of
7 interpretation even though it is a
8 novel question of the first impression.

9 Now, I don't know that everybody's
10 been out there but I wanted to -- I
11 don't know how to work this thing
12 necessarily there.

13 MR. CUTRER: Just like that.

14 MR. JOHNSON: Just that easy. All
15 right. There's some glare up there on
16 that board but there's a parking lot
17 kind of in the center here. That's the
18 empty parking lot. The long building
19 that runs up and down across here is
20 the Beachwalk property and just for
21 your reference I believe the parking
22 lot over here to my left is a parking
23 lot around Aunt Chiladas restaurant and
24 this wooded area that is right up in
25 here is the subject property, Parcel E,

1 and then there's a similar view of --
2 taken from kind of above the Aunt
3 Chiladas property with subject property
4 over here and the Beachwalk and these
5 green top buildings back here are the
6 Waterside by Spinnaker properties and
7 this is a more straight on view of what
8 it looks like from I think from the
9 edge of the -- my client's property
10 looking over at Beachwalk.

11 That's the circumstance on the
12 ground that it looks like.

13 As I have indicated in my filing
14 in the remand memorandum I take no
15 issue with the staff report of
16 August 1st by Ms. Lewis and agree with
17 it and I think that's an appropriate
18 basis on which you can affirm her
19 decision and I agree with the thrust of
20 Mr. Cutrer's question that the
21 appellants are not aggrieved parties to
22 whom any relief can be granted and I
23 won't go into this in detail but this
24 principal has been long discussed in
25 the legal circles around here going

1 back to cases related to the
2 development of Harbortown that in the
3 absence of clear restrictions and
4 covenants, plats or code statute courts
5 must interpret and I submit you
6 standing in the shoes of a court as an
7 interpretive body must interpret land
8 restrictions, land use restrictions in
9 favor of the freer less restricted use
10 of the property.

11 We can cite cases with that but
12 it's a well understood principal of
13 law.

14 Now, I'd like to get my focus on
15 Mr. Cutrer's question related to Judge
16 Duke's question, Number 3, and I think
17 you may find this is related to my
18 suggestion that upon this discussion
19 you might be able to make a decision
20 today that either affirms the decision
21 of the LMO official, the determination
22 of the LMO official or modifies it and
23 to that end I want to tell you that Mr.
24 Williams in his remand memorandum and
25 in his discussion today in answer to

1 Mr. Cutrer's question talked about the
2 averaging of the density in the balance
3 of the project and he based that
4 analysis on the calculation of how many
5 other units of residential and how many
6 of hotel and how many of commercial or
7 nonresidential and he gave you the
8 numbers and I don't have any reason to
9 disagree with the numbers. My
10 challenge has to do with his formula to
11 average density that's my challenge,
12 and I started with the proposition that
13 nowhere in the LMO do I find a
14 definition of average density.

15 But I do believe that the LMO
16 provides clear assistance in
17 determining what it is you count in
18 your formula when you average density
19 and this I think is helpful to assist
20 Mr. Williams in getting an answer to
21 his questions of what are the rules and
22 regulations and I submit this rule and
23 regulation is right here in the LMO.
24 It is found in Section 16-10-102. I
25 don't know if I can get both of these

1 up here. I've kind of overlaid them a
2 little bit and I just pulled this page
3 out of the LMO copy and it is 16-10-102
4 Sub Capital B, Density, Sub 1 Density.

5 And it might can be zoomed in on
6 where you can read it. It says -- I'll
7 let her address that -- this says, and
8 I'm quoting, "The measurement of
9 density of the development of a parcel
10 of land calculated by dividing total
11 number of dwelling units by the net
12 acreage of the parcel for residential
13 development."

14 Then it goes onto say "by dividing
15 the total number of guest rooms by the
16 net acreage of the parcel for hotel
17 development and by dividing the total
18 number of square feet of gross floor
19 area by the net acreage of the parcel
20 for other nonresidential development."

21 "In mixed use developments", in
22 this PUD, Waterside PUD is a mixed use
23 development, "acreage allocated to
24 residential use shall not be used to
25 calculate nonresidential density.

1 An acreage allocated for
2 nonresidential uses shall not be used
3 to calculate other nonresidential
4 density.

5 An acreage used for other
6 nonresidential uses shall not be used
7 to calculate hotel density."

8 I put the rest in to finish
9 quoting the section but it's not
10 material to this discussion.

11 It is clear that under this
12 section if you're trying to figure out
13 the average commercial density of the
14 Waterside PUD the most you can take
15 into account is the 5,262 square feet
16 in which -- for which to Town issued a
17 building permit many years ago within
18 the PUD.

19 So where does that take us? I
20 would submit if you apply that LMO
21 section 16-10-102B1, the application of
22 that rule to determine density requires
23 you to average only, at most, and I'm
24 not sure that's even mandated by that
25 statute because it talks about you

1 don't use other nonresidential square
2 footage to calculate another one, the
3 most you could deal with is 5,262 feet
4 as existing density.

5 All right. In the RD District,
6 which is the underlying base distribute
7 here, in LMO Section 16-3-105L, capital
8 L, within the RD District an office use
9 is allowed as a by right use. Other
10 office type uses are allowed. By right
11 uses. (Phonetic)

12 Subject to this limitation the
13 maximum density for a net acre for
14 nonresidential is 8,000 square feet
15 gross floor area.

16 LMO Section 16-10-102B2 right here
17 defines gross floor area as "The area
18 within the inside perimeter of the
19 exterior walls of a building or other
20 structure with no deductions for car --
21 stairs, closets, thickness of walls,
22 columns or other features exclusive of
23 areas upon an unobstructed to the sky.
24 Unless otherwise expressly provided,
25 gross floor area is measured in square

1 feet."

2 In the record before you -- this
3 is more of a background -- and I'm
4 talking about the roughly 1,100 pages
5 there's something called Attachment H
6 and these did not get Bates numbers so
7 -- but they're marked, looks like, like
8 up at the top, I'll put it on the
9 screen. That's the Attachment H. It
10 has a number of pages. This is one of
11 the latter pages of Attachment H and
12 this is what Attachment H is and I put
13 this up to reference the fact that in
14 1987 there was a consideration by the
15 Town of an application for conditional
16 use and special exemption.

17 The background is -- and I was
18 involved in it -- a slice of -- slices
19 of land were exchanged between the
20 Waterside PUD and behind the Aunt
21 Chiladas that had the effect of
22 enlarging the available land on which a
23 hotel could be built. That hotel got
24 built. It is now called Beachwalk and
25 it increased the available density for

1 that hotel from 50 units to 94 units.

2 And the decision that's outlined
3 in the rest of Attachment H to your
4 record required corresponding reduction
5 of -- densities.

6 There's a letter from Mr. Grechco
7 who wrote my client, Mr. Graves, the
8 note of categorical exemption
9 certification related to this
10 Attachment H in which he said, what you
11 got left is what's shown on here and
12 you'll have -- you'll see PUD has
13 approved in this column, has proposed
14 in this column with the little
15 handwritten note approved on a date,
16 looks like May 6th of '87 is the date
17 of that planning commission meeting
18 where that was approved.

19 Now, the numbers there -- if you
20 can zoom in just a little more so you
21 can see those small numbers better but
22 I'm going to tell you what they say --
23 from this table the PUD's commercial
24 office density was reduced from 36,000
25 square feet to 21,913 square feet but

1 look at the next column in each of
2 those categories, the one that just is
3 entitled density. That did not change,
4 15,652 square feet per acre is -- was
5 the standard before and after that
6 decision.

7 The next category,
8 Commercial/Retail previously had been
9 approved for 52,000 square feet and
10 that was reduced to 36,279 square feet,
11 but again, the density per acre did not
12 change for that category. It remained
13 at 12,093 square feet.

14 All right. We understood in the
15 language of today's LMO for RD District
16 purposes that Commercial/Office and
17 Commercial/Retail would together make
18 up what is now called nonresidential.

19 I submit to you with density of
20 7,500 square feet, which is what has
21 been approved by the LMO official and
22 the Town building -- the Town staff, my
23 client's building on his one point -- a
24 little over one acre .068 acres,
25 something like that is, A, less than

1 the 8,000 square feet allowed under the
2 RD District, and B, it is considerably
3 less than the densities allowed under
4 the original plan which you could say
5 might have been either 21,913 or 36,279
6 together, 27,355 square feet.

7 We believe, very strongly, that
8 you cannot -- under the code, under
9 Section 16-10-102B1 consider anything
10 more than the other density elsewhere
11 in the PUD and if you do that, we're in
12 compliance with the code regardless of
13 the interpretation of whether --
14 whatever's left, if anything, of the
15 PD-2 Overlay District applies
16 regardless of where solely RD District
17 we comply by right with both of them
18 even as adjusted because of 16-10-102
19 we -- and the related controls for
20 gross floor area in the RD District
21 section as cited here.

22 I think that's a way that you can
23 deal with this and be operating within
24 the code and that can be a way you
25 could do it as a modification of the

1 official's determination.

2 And I want to address something
3 that Mr. Williams mentioned.

4 He brought up the issue of our
5 prior representation. We've made it to
6 the Court, we made it to you,
7 previously, and we continue to believe
8 it.

9 If you accept his interpretation
10 of the zoning law, the zoning rules and
11 regulations we wind up with an
12 unbuildable piece of property.

13 The question for you, sitting as
14 the interpretive Board for the Town's
15 LMO, what do you think about that?

16 And to help you think about that I
17 want to give you some citations to
18 several South Carolina cases, one's a
19 Supreme Court, two Court of Appeals and
20 one U.S. Supreme Court case. There's
21 lots of others I could give you and it
22 goes like this.

23 The case of Byrd versus the City
24 of North Augusta, 1974, South Carolina
25 Supreme Court considered an appeal from

1 a Circuit Court decision made by the
2 Honorable Julius B. Ness Junior,
3 Circuit Judge, sitting in Aiken County,
4 Judge Ness became the Chief Justice of
5 South Carolina Supreme Court -- for
6 many years and in this case South
7 Carolina Supreme Court said the zoning
8 power must be exercised as reasonably
9 and not arbitrarily. The zoning
10 regulation is legal or valid only when
11 it is reasonable. A quote in the
12 holding of the trial judge which they
13 upheld "It appears to this court that
14 under the facts in this case the
15 rezoning of this property from
16 commercial to residential use is
17 unreasonable and arbitrary and results
18 in a deprivation of plaintiff's
19 property rights and should be declared
20 invalid."

21 And then the Supreme Court says,
22 'It is obvious to this court -- excuse
23 me, Judge Ness, a continued quote from
24 him -- "It's not up to this court to
25 allow the rezoning of this plan in

1 controversy from commercial to
2 residential as attempted under the June
3 15, 1971 ordinance enacted by the City
4 of North Augusta through the arbitrary
5 and unreasonable and deprivation of
6 plaintiff's property."

7 That's foundational principal.
8 The law of regulatory taking and
9 inverse condemnation -- has changed a
10 good bit since 1974 but the principals
11 remain substantially the same.

12 The next case I want you to refer
13 you to is a case of Hampton versus
14 Richmond County, Court of Appeals South
15 Carolina decided in 1987.

16 It held that a zoning ordinance
17 that is confiscatory that renders the
18 property of no value, quote, "of no
19 value" end of quote, is not, quote,
20 "fairly debatable" end of quote, and is
21 therefore, "clearly arbitrary,
22 unreasonable and capricious."

23 I want to go back and read you
24 the -- go on with Hampton.

25 The zoning classification of

1 property should be held -- upheld as
2 constitutional as some elements that
3 the classification is either
4 unnecessary or confiscatory. (Phonetic)

5 Then there's a case of Peterson
6 versus the City of Myrtle Beach.
7 Peterson Outdoor Advertising versus
8 City of Myrtle Beach decided in 1997 by
9 the Supreme Court of South Carolina in
10 which the court held the decision of
11 the zoning board, quote, "must be
12 decided by standards which are specific
13 in order to prevent the ordinance from
14 being invalid and arbitrary."

15 And last, I want to refer you to a
16 nationally known case originating in
17 South Carolina. The case was Lucas
18 that went to the U.S. Supreme Court and
19 that case ends with a basic
20 proposition, when all economic utility
21 has been zoned or regulated out of a
22 piece of property it has no economic
23 value and that ordinance, an ordinance
24 like that results in an inverse
25 condemnation" --

1 Okay, so, between the LMO
2 official's determination that's boiled
3 down into the staff report of August 1
4 this year and your consideration of the
5 suggestions I have made to you with
6 regard to sections of the LMO that
7 others have not focused on, I
8 respectfully urge you to approve the
9 decision of the LMO official and/or
10 modify it based on the LMO sections
11 that I have provided to you and when
12 you do that, you're going to come back
13 down to Judge Duke's third question and
14 on Judge Duke's third question -- I
15 want to make sure I don't misstate
16 it -- his third question; If Parcel E
17 is subject to the LMO's PD-2 Overlay
18 District regulations -- we've all said
19 so it appears -- sub-question -- what
20 effect does that have on the
21 development of Parcel E?

22 My view of the answer to that
23 question is that the effect of the PD-2
24 Overlay District regulation of Parcel
25 B, meaning at most, depending on how

1 you interpret it, Section 16-10-102B1
2 on what you count, what you don't count
3 when you're comparing densities for
4 different types of uses is the most you
5 can consider is whether you refer for
6 the entire 15.1 one-acre tract to the
7 5,262 square feet of nonresidential
8 permits previously issued. It was not
9 issued on Parcel E, just the overlay.

10 It's not enough to take out even
11 with what we propose on Parcel E of
12 limitations of the LMO as it now stands
13 or the PD-2 Overlay District
14 interpreted under the new LMO as we've
15 discussed.

16 The second sub-question of his
17 question three is, Must the existing
18 development on the other parcels within
19 that PD-2 Overlay District be taken
20 into account in connection with any
21 proposed development of Parcel E? And I
22 believe the answer to that is the same
23 as I gave you for the first
24 sub-question, yes, but no more than the
25 5,262 feet and I can make an argument

1 that it ought to be zero under the
2 precise language of 16-10-102B1, so
3 that's where I come down.

4 I think you should affirm and/or
5 modify but in your modification you
6 ought to wind up allowing us to -- at
7 least as far as your role in this is
8 concerned -- go forward and get our
9 building built we've been trying to get
10 built for three years.

11 I don't want to be redundant. I'm
12 happy to try to answer any questions
13 you may have. If not I'll step-down.

14 MR. FINGERHUT: Any questions for
15 Mr. Johnson?

16 MR. CUTRER: You have suggested at
17 the end of your testimony I guess it's
18 testimony or argument.

19 MR. JOHNSON: Argument.

20 MR. CUTRER: Argument, that the
21 Board of Zoning Appeals might consider
22 -- it has three choices, either
23 affirming -- the two you're proposing,
24 affirming or modifying --

25 MR. JOHNSON: Yes, sir.

1 MR. CUTRER: -- staff's decision.
2 Might I ask how you would propose or
3 suggest that it be modified?

4 MR. JOHNSON: I would suggest that
5 the modification take the form of -- I
6 have to do a preamble if you don't
7 mind.

8 MR. CUTRER: Sure.

9 MR. JOHNSON: Say what you're
10 going to modify, you need to say what
11 it is you're modifying, but I think
12 it's undisputed from the various
13 arguments that what we're dealing with
14 is a question of interpretation and
15 some novel question of first impression
16 here and in that the LMO official has
17 given a determination.

18 The result of that determination
19 is that my client can build its
20 building. What I'm suggesting to you
21 is some clarification of that by way of
22 modification of her decision that in
23 addition to the issues of
24 interpretation that all counsel agree
25 were there and I think you agree were

1 there and perhaps you could argue Judge
2 Dukes -- there because he didn't figure
3 out when it was up in front of him --
4 that there is this basis in the code
5 which is clearly applicable and affords
6 a direct separate rationale to get to
7 the same result the LMO originally got
8 to.

9 MR. CUTRER: This basis in the
10 code being the 16-10B1?

11 MR. JOHNSON: 16-10-102B1, yes,
12 sir.

13 MR. CUTRER: The density.

14 MR. JOHNSON: And that mechanism
15 for how you calculate density when
16 you're comparing densities, which is
17 what you're doing here, trying to
18 compare the density on the -- proposed
19 density on Parcel E to what one part of
20 the code says it's average density but
21 nowhere in the code does it define
22 average density except when you get
23 into 16-10-102B1 and then it tells you
24 what you consider and what you don't.

25 MR. CUTRER: Okay.

1 MR. JOHNSON: And under that
2 formula the LMO official got to the
3 right result and we think you should
4 adopt those --

5 MR. CUTRER: Let me ask you this
6 question. If we apply -- I'm a little
7 -- still a little confused. I want to
8 pursue this more with you --

9 MR. JOHNSON: Yes, sir.

10 MR. CUTRER: -- the density
11 discussion in 16-10-102B1 if you look
12 at hotel development, residential
13 development and nonresidential
14 development and you apply this standard
15 that's set forth here, is it
16 conceivable that you could come up with
17 a calculation that would exceed
18 15.1 acres which is the --

19 MR. JOHNSON: It may be but it
20 won't exceed actual use of 15.1 acres
21 but if you -- your question assumes
22 essentially you're buying counsel's --
23 Mr. Williams' argument about how you
24 average density and I'm suggesting to
25 you that 16-10-102B1 doesn't do that.

1 MR. CUTRER: No my question --
2 that was the first question. Here's
3 the real question.

4 MR. JOHNSON: Yes, sir.

5 MR. CUTRER: I'm a finance guy,
6 not a lawyer.

7 MR. JOHNSON: Yes, sir.

8 MR. CUTRER: And I like to look at
9 the numbers.

10 MR. JOHNSON: Right.

11 MR. CUTRER: So we've had an
12 argument with Mr. Williams that shows a
13 calculation that ends up with more, in
14 his term, average density
15 15.633 acres --

16 MR. JOHNSON: Right.

17 MR. CUTRER: -- that actually
18 exist. What I'd like to ask you is,
19 can you help this Board and step us
20 through how you would recommend using
21 -- how you would recommend calculating
22 the eligible density for the whole
23 property and Parcel E using the
24 constraints set forth in 16-10-102B1.

25 MR. JOHNSON: Yes, sir. I

1 understand your question I think but --

2 MR. CUTRER: One exhibit over here
3 I'd like you to have a comparable
4 exhibit.

5 MR. JOHNSON: Yes, sir. There
6 will not be a comparable exhibit
7 because the definition of difference is
8 contained in Subsection 102B1 because
9 under that subsection we don't have to
10 consider the potential impacts on the
11 whole property. We only have to
12 consider what the code says in
13 Subsection 102B1 is essentially
14 comparing like uses within a mixed use
15 development, which this is. You don't
16 compare the whole thing so you don't
17 come up with a comparable counter table
18 on the other side. You do come up with
19 one slice of it and that slice is what
20 is the LMO today calls a nonresidential
21 component which says, at least under
22 the base of zoning we cannot exceed
23 8,000 square feet per acre and we've
24 got a hair over one acre and we meet
25 that but how we relate to the PD-2

1 overlay?

2 One fair analysis is that when the
3 categorical exemption died in 2003,
4 that the PD-2 overlay while on the
5 books became utterly meaningless and I
6 subscribe to that view but that's a
7 real legal argument.

8 What the code tells us, I think,
9 is that when we compare
10 apples-to-apples, which is what the
11 density section in 102B1 requires us to
12 do, we'd only have to look at the
13 nonresidential and non-hotel use in the
14 rest of the property and that's only
15 5,262 square foot out of an allowable
16 27,355 square feet, so there's 22,000,
17 roughly, 21,000 and change square feet
18 under that formula and five, six
19 hundred square feet roughly left under
20 the RD --

21 MR. CUTRER: Let me see if I'm
22 understanding what you're telling us.

23 MR. JOHNSON: Yes, sir.

24 MR. CUTRER: There are one, two,
25 three, four, five parcels, A through F,

1 B mysteriously vanished. D is the

2 Waterside right-of-way, right?

3 MR. JOHNSON: I think that's

4 right.

5 MR. CUTRER: What we've said

6 doesn't matter. A and C is the hotel.

7 F is the Spinnaker development which

8 includes 5,000 some odd square feet and

9 then E is the subject parcel, so

10 there's really only four.

11 MR. JOHNSON: Yes, sir.

12 MR. CUTRER: But we have three

13 uses within all of this property.

14 We have residential. We have

15 hotel and we have nonresidential, so am

16 I understanding you correctly that if

17 we look at -- let me -- assume for the

18 moment that the Spinnaker Welcome

19 Center is built. If we take the

20 nonresidential -- well, let's start

21 with the hotel.

22 MR. JOHNSON: Yes, sir.

23 MR. CUTRER: If we take the

24 density of the hotel, 9 -- even though

25 94 units were apparently permitted I

1 believe 91 was built.

2 MR. JOHNSON: That's right, yes,
3 sir.

4 MR. CUTRER: So if we divide 91 by
5 the units -- pardon me, the 91 hotel
6 units by the acreage for the hotel and
7 it's within the limits we're okay with
8 the hotel.

9 If we take the residential units,
10 198 I believe and divide that by the
11 number of acres that are applied for
12 nonresidential use and it does not
13 exceed the RD-2 limit of 16 per acre,
14 we're good there, and if we take the
15 5,200 and change existing
16 nonresidential and the 7,500 I believe
17 proposed square footage and we add
18 those two together, divide that by the
19 amount of acres used for nonresidential
20 we're okay there, too? Have I lost
21 you?

22 MR. JOHNSON: You might be okay
23 but the first two-thirds of that
24 summary I don't think are Germain to
25 our discussion --

1 MR. CUTRER: Okay.

2 MR. JOHNSON: -- with all due
3 respect. The one place where the PUD,
4 Waterside PUD is in effect came -- PD-2
5 Overlay District is significantly
6 underdeveloped, below what was
7 permitted is actually in nonresidential
8 categories because in those categories
9 there was a total of some 27,000 square
10 feet permitted and 5,000 in change got
11 built and we're asking to build another
12 7,500. That would give you a total of
13 12, 5, 12 -- max, 13,000 square feet,
14 so, one reason things fit the way they
15 do is because you don't have the other
16 14,000 square feet of nonresidential
17 use going on on the properties.

18 MR. CUTRER: Do we know how much
19 acreage is taken up by the existing
20 nonresidential, the 52 --

21 MR. JOHNSON: I don't know. I
22 don't think it's in the record. I
23 don't think it's material because it
24 could well be that the hotel density is
25 greater than would be permitted today

1 and the Waterside by Spinnaker density
2 is greater and that nonresidential
3 that's in there is really kind of an
4 activity center. It's really a -- you
5 know, it's really part of the project.

6 MR. CUTRER: Sure. It's where
7 people check-in, I assume.

8 MR. JOHNSON: No, they check-in
9 elsewhere.

10 MR. CUTRER: Oh.

11 MR. JOHNSON: There was testimony
12 in the record of it. I forget the
13 details of it but it's a small
14 facility. They use it for storage.

15 They have some activity spaces there.

16 MR. CUTRER: I've seen it. Right
17 about the pool.

18 MR. JOHNSON: Yes, sir. So I
19 suspect that does not have a segregate
20 surveyed piece of land that goes with
21 it other than it's floor plan and I
22 suspect it is owned by the Waterside by
23 Spinnaker Property Owners Association
24 as part of the common elements of the
25 project. It's not an office or retail

1 use in the classic nonresidential

2 sense.

3 MR. CUTRER: Okay.

4 MR. JOHNSON: I mean I don't go to

5 the hotel staying -- where you come in

6 and check-in and have meals. They've

7 got a restaurant in there is anything

8 other than part of the hotel.

9 In fact, the early definitions of

10 the hotel or lodging facility in the

11 original development standards

12 ordinance and the earlier iterations of

13 the LMO required you to have those

14 facilities as part of something like

15 that.

16 MR. CUTRER: Okay. I hope some of

17 my colleagues will have some questions,

18 too. I don't mean to dominate this but

19 the third question from the Judge --

20 MR. JOHNSON: Yes.

21 MR. CUTRER: Questions -- the

22 answer to questions 1 and 2 have

23 established that, yes, Parcel E is in

24 the Overlay District and is the subject

25 property subject to the PD-2 Overlay

1 District, so let's go back to what we
2 all agree is the critical question, If
3 Parcel E is subject to PD-2 -- which we
4 determined it is -- what effect does
5 that have on the development of Parcel
6 E, and must the existing development on
7 the other parcels in the Overlay
8 District be taken into account? And I
9 believe your argument is, because of
10 16-10-102B1 about density, it doesn't
11 have an effect?

12 MR. JOHNSON: Does not have an
13 effect other than potentially to
14 include in the analysis the
15 5,262 square feet. If -- I will just
16 for discussion -- if 27,000 and change
17 square feet of nonresidential were
18 already also built out there prior say
19 to 2000 when categorical exemptions
20 expired, then you couldn't qualify
21 under it no matter what about the
22 acreage and there wouldn't be anything
23 to put on Parcel E, which still raises
24 a valid question related to a
25 confiscatory taking.

1 MR. CUTRER: Right.

2 MR. JOHNSON: Because the law
3 doesn't favor making land of no
4 economic value.

5 MR. CUTRER: And then the second
6 question the Judge posed related to
7 Number 3, must the existing development
8 on the other parcels within that PD-2
9 Overlay District be taken into account
10 in connection with any proposed
11 development of Parcel E?

12 MR. JOHNSON: Yes, sir.

13 MR. CUTRER: And your argument is?

14 MR. JOHNSON: Same thing.

15 MR. CUTRER: No, it doesn't
16 because --

17 MR. JOHNSON: Well, it's taken
18 into account only to determine what
19 other development is -- what other
20 commercial development is there and
21 given the nature of that attribute I
22 don't think it's a commercial
23 development.

24 MR. CUTRER: It's -- looks like
25 it's an ancillary use of residential.

1 MR. JOHNSON: Yes, sir. I
2 would -- but at worst case you consider
3 that there's 5,262 care feet of that
4 use worst case from our perspective.

5 MR. CUTRER: I'll agree with your
6 -- if I could use that word,
7 ancillary --

8 MR. JOHNSON: Yes, sir.

9 MR. CUTRER: -- use. I spent my
10 career financing multi-family
11 properties and they rezoned
12 multi-family but you had to have a
13 leasing office and clubhouse. Nobody
14 lived in those but it was part of
15 the -- okay, so the existing
16 nonresidential you would argue is
17 actually part of the residential and
18 ancillary?

19 MR. JOHNSON: That's my first
20 argument.

21 My second argument on that is even
22 if you count it, A, it's not on our
23 one acre site and that's site specific
24 under the RD District and it's allowed
25 to have 7,500 square feet per acre --

1 excuse me, 8,000 square feet per acre

2 and we've got a hair over 8,000 --

3 allowable, we're at 7,500. (Phonetic)

4 MR. CUTRER: Thank you.

5 MR. FINGERHUT: Other questions

6 for Mr. Johnson by members of the

7 Board? I have a few.

8 MR. JOHNSON: Yes, sir.

9 MR. FINGERHUT: SDC Properties

10 Inc. owns Parcel E, is that correct?

11 MR. JOHNSON: Yes.

12 MR. FINGERHUT: Does that entity

13 have any relationship to the owner of

14 Parcel F?

15 MR. JOHNSON: Parcel F is -- any

16 relationship, the answer is probably,

17 yes, but it's not as direct a

18 relationship as you might have

19 contemplated.

20 MR. FINGERHUT: Fair enough. Does

21 the S stand for Spinnaker?

22 MR. JOHNSON: SD --

23 MR. FINGERHUT: Does the S stand

24 for Spinnaker though or is for Steve,

25 something like that?

1 MR. JOHNSON: I don't -- I can
2 guess the acronym but Spinnaker -- SDC
3 Properties is in a big Spinnaker family
4 of the properties. Exactly what the
5 connections are, I don't know.

6 MR. FINGERHUT: Fair enough.

7 MR. JOHNSON: But much of Parcel F
8 is owned by the POA as common property,
9 including the shell of all the
10 buildings and the footprint of the
11 buildings. The condominium owners only
12 own the space inside.

13 MR. FINGERHUT: Correct, the
14 development.

15 MR. JOHNSON: They each have an
16 undivided interest in the common
17 elements.

18 MR. FINGERHUT: Yeah.

19 MR. JOHNSON: So -- and, you know,
20 do we have some kind of connection, at
21 all, but yeah, it's not direct.

22 MR. FINGERHUT: What about with
23 the entity that developed Parcel F?

24 MR. JOHNSON: That would be
25 Waterside by Spinnaker LLC I think.

1 MR. FINGERHUT: Okay. So --

2 MR. JOHNSON: And that was a
3 Spinnaker development company.

4 MR. FINGERHUT: I mean is it a
5 fair to statement, do you think, then,
6 that -- because you're talking about
7 regulatory taking which is a strong but
8 important term, but the use of Parcels
9 E and F collectively represent the sum
10 choice of the same principals at some
11 point. I mean Spinnaker did develop
12 the property and what -- your argument
13 is that the owner of Parcel E is
14 somehow being unconstitutionally or
15 unlawfully prejudiced by that.

16 MR. JOHNSON: Right.

17 MR. FINGERHUT: But the owner of
18 Parcel E is not a stranger to the
19 developer of the Parcel F.

20 MR. JOHNSON: Not a stranger. At
21 the time Parcel F was developed it may
22 have been a stranger. It was certainly
23 a stranger when the Beachwalk property,
24 whatever, it's Number A and C was
25 developed, that was originally built

1 for a group of investors and was

2 flagged as a Super 8 Motel --

3 MR. FINGERHUT: Right.

4 MR. JOHNSON: -- way, way back.

5 Mr. -- built it for them. He's a

6 builder, as well, and how it migrated

7 to Beachwalk I don't really know.

8 But, case law is clear that where

9 a rezoning has the effect of

10 confiscating the economic utility

11 that's a regulatory taking. That would

12 be zoning here. (Phonetic)

13 MR. FINGERHUT: Okay. So now,

14 let's see, Parcel E was not developed

15 but I don't think there's any

16 disagreement that it could have been

17 developed during the categorical

18 exemption, would that be correct?

19 MR. JOHNSON: It could have been

20 developed any time over the last couple

21 hundred years.

22 MR. FINGERHUT: Well, but

23 certainly during the categorical

24 exemption?

25 MR. JOHNSON: It could have been.

1 MR. FINGERHUT: Is it your
2 contention that the existence of
3 categorical exemption, even though it's
4 expired, has some carry forward effect
5 on that property?

6 MR. JOHNSON: In my opinion it's
7 like a -- I would analogize it and
8 I won't go all the way through but I
9 would analogize it to the appendix in
10 the body. Nobody quite knows what it
11 does. It's been construed to create
12 some problems but I think it lost its
13 impact when the categorical exemption
14 died except it lives on in the appendix
15 of the PD-2 overlay and perhaps Town
16 council and its -- will get around to
17 just removing that overlay because it
18 really doesn't do anything anymore. If
19 they remove that overlay nobody can say
20 we can do more than what the current
21 LMO says it can do which is probably
22 where the Town really wants to be, but
23 conjecture.

24 MR. FINGERHUT: Right. Different
25 law, different result.

1 MR. JOHNSON: Right.

2 MR. FINGERHUT: Okay. Now, with
3 respect to the formula for average
4 density, is it -- I guess -- hold on.
5 I want to state this correctly, I don't
6 want to confuse the question, I'm
7 sorry -- do you -- can you or do you
8 have a computation indicating that the
9 way you're viewing the LMO the density
10 calculations would come under the
11 numbers that counsel demonstrated in
12 their brief?

13 MR. JOHNSON: I think, without
14 having written it down and handed it to
15 you, I've given that calculation today
16 a couple of times and it is -- I can
17 add one more step to -- you have
18 5,232 square feet and the use that I
19 think is excessively to the condominium
20 project we're asking for 7,500, so if
21 you adds those together 12,700 and --
22 whatever it is, 12, 13,000 square feet.
23 This property was approved for -- take
24 the 13,000 square feet.

25 MR. FINGERHUT: Uh-huh.

1 MR. JOHNSON: Divide that by
2 15 acres, which I have not done.

3 MR. FINGERHUT: I certainly have
4 not. I'm trying to avoid arithmetic at
5 all costs so if you could map it out
6 that would be helpful.

7 MR. JOHNSON: This gentleman here
8 could.

9 MR. WALCZAK: 40,000 per acre.

10 MR. FINGERHUT: I'm --

11 MR. WALCZAK: -- 43568.

12 MR. JOHNSON: 43,560.

13 MR. WALCZAK: Is an acre.
14 653,400-acre square feet. What do you
15 want me to divide?

16 MR. JOHNSON: By 13,000.

17 MR. CUTRER: 13,5 -- 1.9 percent.

18 (All phonetic)

19 MR. JOHNSON: We're doing this on
20 the fly. I don't know how you get
21 where you want to get to but I know
22 that the density for the use of this
23 acre is less than the LMO requires.

24 MR. FINGERHUT: Fair enough. I'm
25 just trying to understand what you're

1 asserting. I think -- let me move on.

2 I have a different -- I guess a

3 different question. It's a little

4 confusing. Are you arguing that

5 the strip application for the LMO

6 supports your decision or that the

7 stripped allocation of the LMO is

8 regulatory taking?

9 MR. JOHNSON: I'm arguing that my

10 strip interpretation of the LMO

11 supports my position.

12 The appellants arguments for --

13 strict interpretation of the LMO

14 creates a regulatory taking.

15 MR. FINGERHUT: Okay, Okay.

16 MR. ROBERT JOHNSON: Can I ask a

17 question?

18 MR. FINGERHUT: Please.

19 MR. ROBERT JOHNSON: Earlier on it

20 was mentioned by one party or the other

21 that in some circumstances there was in

22 dividing up or borrowing of pieces of

23 land to get densities and room,

24 quantities, etc. I think it's

25 pertinent to the process if the

1 original owner was all Spinnaker
2 properties. In other words, if in the
3 past they were taking just for an
4 example, E and borrowing from that to
5 get more units and, you know, dolling
6 it out to increase the densities in
7 certain places, they've already used up
8 the bank and now that the bank's used
9 up they want to have their cake and eat
10 it, too, so to speak, that I think
11 should be explained.

12 MR. JOHNSON: There's nothing in
13 the record about that and I don't know
14 the answer to that but my impression
15 from all the conversations I've had
16 that that did not happen there.

17 The only time the borrowing
18 happened was when the land exchanged
19 with Aunt Chiladas resulted in having
20 more hotel rooms -- mutual and I'm not
21 aware of anything occurring that added
22 density to the condominium project
23 which is the only other real use
24 besides this one acre.

25 MR. ROBERT JOHNSON: So it's your

1 opinion that property E never came into
2 the picture as far as helping any of
3 the other properties increase their
4 densities levels during that?

5 MR. JOHNSON: That is my
6 understanding.

7 MR. ROBERT JOHNSON: Okay, thank
8 you.

9 MR. JOHNSON: But also know it's
10 not part of the record because it
11 hadn't been explored by anybody that
12 I'm aware of.

13 MR. FINGERHUT: Any other
14 questions for Mr. Johnson?

15 MR. CUTRER: Mr. Johnson, it's my
16 understanding that Parcels A and C make
17 up what we have referred to as the
18 Beachwalk Hotel.

19 MR. JOHNSON: Yes, sir, that's my
20 understanding.

21 MR. CUTRER: I am assuming that
22 the parties that have brought this
23 appeal are the owners of the Beachwalk
24 Hotel and in response to my question to
25 Mr. Williams, at the beginning, of how

1 was his clients being injured if this
2 development was permitted to which I
3 got, at least for me an unsatisfactory
4 answer, other than everybody wants to
5 make sure that the Town ordinance is
6 complied with.

7 My question to you is, in your
8 opinion, what effect would allowing
9 Parcel E development, which is your
10 property, what effect would allowing
11 Parcel E development have on the future
12 development rights -- pardon me, future
13 development rights of Parcel A and B,
14 the Beachwalk Hotel -- I'm sorry, A and
15 C.

16 MR. JOHNSON: I think I understand
17 your question. My answer is none.

18 MR. CUTRER: Okay.

19 MR. JOHNSON: Because under the
20 density definition in Subsection 102B1
21 that we've been talking about, you
22 don't compare those. Those are apples
23 and oranges. You only compare apples
24 and apples and they're not comparable.

25 MR. CUTRER: Thank you.

1 MR. JOHNSON: And I would
2 reiterate the answer to that, that I
3 don't see how they're injured, at all.

4 MR. FINGERHUT: One other
5 question, I'm sorry, just a quick one.

6 MR. JOHNSON: Sure.

7 MR. FINGERHUT: In the
8 November 2016 hearing there was a
9 question asked of Ms. Dixon, obviously
10 -- disagreeing of the interpretation of
11 the law -- of The town but she was
12 asked specifically whether or not the
13 appellant's math was correct on density
14 and the answer to that yes. She agrees
15 with the meaning but the math was
16 correct on that. Do you agree that the
17 math is correct and relevant or not
18 correct?

19 MR. JOHNSON: If you posit their
20 assumption on the correct formula, the
21 average density I'm not trying to
22 retract their numbers. For example, I
23 don't know if it's 91 or 94 or 68 or 78
24 hotel rooms being built and I actually
25 don't know -- by Spinnaker there are

1 but I've got no reason to think that
2 they've got ahold of the wrong numbers.
3 They've simply got the wrong equation
4 and therefore it's immaterial and
5 irrelevant.

6 MR. FINGERHUT: Okay. Thank you.
7 Anything else for Mr. Johnson? Thank
8 you, sir.

9 MR. JOHNSON: Thank you.

10 MR. CUTRER: I'd like to offer
11 that we have a five-minute recess.

12 (Whereupon, a short break was
13 taken.)

14 MR. FINGERHUT: Okay. We're back.
15 Mr. Alford?

16 MR. ALFORD: Good afternoon. Greg
17 Alford. I represent the Town of Hilton
18 Head Island in a courtroom recently I
19 represented a decision made by this
20 body although not all the same members.

21 You know, things get too
22 complicated, too quickly I think.
23 People over think stuff.

24 I think one of the first questions
25 asked today Mr. Cutrer was, why? Why

1 are you doing this? What's your
2 interest? Are you aggrieved? And Mr.
3 Williams' answer was well, we just want
4 to know the rules.

5 Well, then you're not aggrieved.
6 Either you're aggrieved or you're not.

7 The standing issue is this whole
8 other -- you know, you've got a right
9 to bring a claim if you're within a
10 certain geographic distance but you
11 have to be aggrieved.

12 On the record, he basically
13 conceded that they're not aggrieved.

14 I don't know the answer to the
15 question. I think there's a reason. I
16 think the reason is there's X amount of
17 density in each category;
18 nonresidential, hotel, residential.

19 You ever heard the expression
20 'built out'? Oh, that subdivision's
21 been built out. Sea Pines' built out,
22 which it's really not.

23 Take the Sea Pines master plan,
24 for example, it has an allocation of X
25 number of commercial square footage. X

1 number of residential X units, X number
2 of hotel units, okay. That's why you
3 do it.

4 So, when Mr. Williams kind made
5 this argument I had a lawyer one time
6 -- people use big words on me --
7 somebody told me I was conflating
8 something so I had to look it up, I
9 wasn't by the way, but this argument
10 right here, in your memorandum on page
11 eight, Mr. Williams' memorandum, this
12 is where you get into this conflation
13 of this density question that I think
14 all of you have asked about. You asked
15 about the bank, Mr. Johnson. I think
16 you were saying, all right, now, have
17 you gone to this property, sucked some
18 of the density off that so you can use
19 it in another area and the answer is no
20 in the commercial context.

21 A, this isn't residential or hotel
22 context but clearly in this 15-acre
23 development there's very little
24 commercial, right?

25 I mean is that -- do we agree that

1 the record reflects there's 5,600 and
2 change of actual built commercial
3 there? I mean I don't think there's
4 any evidence in the record to the
5 contrary, so, that being the case how
6 much commercial density was allowed for
7 this entire acreage or is there
8 evidence that's somewhere along the
9 line which has happened in places, it
10 happened in Shelter Cove, the
11 development there.

12 The developer came in and said,
13 look, I don't need all this commercial.
14 I've got too much commercial. Will you
15 let me swap some of my commercial
16 density for some residential density?
17 And that was done. There's a record of
18 it. It's documented. You don't have
19 anything in the record and it doesn't
20 exist by the body to show that someone,
21 it would have been the Spinnaker guy or
22 whomever was -- somebody at one point
23 who was the control hold and the
24 developer, cohesively, we're going to
25 have this much commercial, this much

1 residential, and you've going to have
2 this much hotel and as time goes on
3 things don't always work out once the
4 shooting starts, so you end up, this
5 guy owns that and then his interest
6 competes with this guy who owns that
7 and that's a pretty common thing. It
8 happened at Sea Pines it happened at --
9 I haven't really heard about Palmetto
10 Dunes but it happens.

11 There's not any commercial out
12 there except 5,600 and change. Meaning
13 that there's still a substantial amount
14 of commercial to be allocated to be
15 used there. That argument is a
16 conflation and it tries to use what's
17 called the averaging of density, okay.
18 You don't average commercial, hotel,
19 and residential, they're each their
20 own, apple, orange, banana, that's how
21 that works.

22 There is a place where you can
23 talk about average density and it goes
24 to the concept Mr. Johnson eluded to
25 and they cite this in a prior page of

1 memo 7. Here's a part of the element;
2 only places I could find is Subsection
3 A where they talk about average
4 density, last sentence in A.

5 What this is doing is saying,
6 okay, if we've zoned and planned this
7 one section of land and let's say I'm
8 only allowed, hypothetically, I'm only
9 allowed ten units per acre of
10 residential but within the whole thing
11 I'm allowed a hundred units of
12 residential. What the code will let me
13 do is build 125 percent of what's
14 allowed in the base --

15 MR. CUTRER: What page is this?

16 MR. ALFORD: I'm sorry, this out
17 of the LMO. This is Section 16, 163106
18 and A it's kind of what you were
19 talking about, Mr. Johnson, where you
20 take basically within the PUD you can
21 shift density around in a reasonable
22 manner and let's you do that and so
23 that hasn't happened, commercially,
24 here so I think what you might have
25 been asking hadn't happened.

1 Really, if we look at the LMO and
2 I'm -- I hate it but I have to look at
3 it sometimes maybe that's why I hate
4 it -- I really find that's the only
5 place you see average density, okay,
6 and what they're talking about here is
7 you've got to read -- under the law you
8 have to read things, if you can you,
9 read statutes and codes, you try to
10 read them consistently.

11 To take that word 'average
12 density' and then you have to do what
13 Mr. Johnson did and you have to jump
14 over to 1610 I think -- I'm terrible
15 about losing stuff -- so I've stuck one
16 section over the other here. Well
17 sorry, I'm trying.

18 So you've got to read this stuff
19 again. What that's telling you is you
20 look at it, apple being residential,
21 orange being hotel and banana being
22 commercial and B1 tells you how to do
23 that and it's pretty -- I mean it's
24 kind of the question you're asking,
25 what's out there? 5,600 feet of

1 commercial. Okay, how much commercial
2 do we have allocated for this PUD? How
3 much? 15,000? 27,000.

4 27,000. So if we build this,
5 we're at 12, 13. There's still some
6 left, I think. Now, is there any land
7 left to build it on? I don't know.

8 Did they spread out their hotel in such
9 a manner that they can't put commercial
10 on top of it -- that's not my problem,
11 it's not your problem respectfully,
12 although I think I need to dovetail a
13 little bit here because the judge had a
14 question - which is do I need to think
15 about -- how's the -- do I need to
16 calculate -- and I think what he's
17 asking is has the commercial been built
18 out on that site within that PUD
19 because if it has then you would have
20 to say no.

21 In other words, if there were
22 27,000 square feet of commercial out
23 there today or some number less than
24 that, slightly, you wouldn't be able to
25 build anymore, right? I mean it stands

1 to reason that you wouldn't be able to
2 do it. So, I believe there's been a
3 conflation, although I use that word --
4 I looked it up and I kind of like it --
5 by the appellants in trying to blend
6 this density argument together there
7 today -- when the LMO tells you how to
8 do it and that's exactly what the LMO
9 has told them in the first place. They
10 said, look, there's only this much
11 commercial out here. They've got as
12 much acreage -- they could have built,
13 however, it X per acre. Here it is.
14 We're done.

15 Not real smart and I've got a lot
16 to say but I'll try to answer any
17 questions.

18 MR. ROBERT JOHNSON: For
19 clarification purposes and this is a
20 question for Mr. Johnson, I think that
21 27,000 was prior to --

22 MR. ALFORD: The expiration of the
23 deed --

24 MR. ROBERT JOHNSON: Right.

25 MR. ALFORD: What do you call --

1 MR. ROBERT JOHNSON: And now you
2 took the Town's overlay. It's
3 15,000'ish just for clarification, is
4 that correct?

5 MR. ALFORD: I think that's why I
6 said 15 -- I do not take issue with
7 that.

8 MR. JOHNSON: To answer your
9 question -- Barry Johnson, I don't take
10 issue with that either. I might say I
11 don't think it's relevant.

12 MR. ROBERT JOHNSON: Right.

13 MR. JOHNSON: But I don't take
14 issue.

15 MR. ALFORD: Well, respectfully,
16 it's relevant only if you get up
17 against that ceiling. If you're not,
18 you're using a bank, if you will. If
19 you're not cashing all those chips --
20 and I think that's what the judge was
21 trying to ask. In Question 3 he says,
22 and must -- must the existing
23 development on the other parcels of
24 that PD-2 Overlay District take into
25 account any -- Parcel E? (Phonetic)

1 I would answer that in the
2 affirmative. I would say, yes, you
3 have to take it into account so that
4 you make sure you don't go over that
5 15,000 feet ceiling. That's my reading
6 of it because that would -- that would
7 prevent anymore commercial construction
8 out there if they went over whatever
9 the -- I'm sure there'll be a fight
10 about that, sorry, you know, is it 15?
11 Is it 27? I don't know. And I'm
12 not -- I have no authority to take
13 position on that at this juncture
14 but -- so that's -- I think one of the
15 questions that's been asked is, okay,
16 what do you want us to do? What are
17 you asking this body to do -- asking
18 you to do on behalf of the Town and on
19 behalf of yourselves, frankly -- if I
20 have to argue that.

21 I'm asking to you answer these
22 three questions and I think Ms. Dixon
23 did an excellent job in answering these
24 questions. I would ask you to
25 supplement that answer with reliance on

1 the -- 16-10-102B1 and I think that
2 takes care of the mathematical
3 questions that finance people have
4 because you're then how many apples,
5 how many oranges, how many bananas that
6 you're getting there. You're breaking
7 out -- just like the Sea Pine master
8 plan, how much commercial do we have?
9 How much residential do we have? How
10 many resorts do we have? So those are
11 my -- how many hotel spaces do we have?

12 MR. FINGERHUT: So are you saying
13 that it doesn't lend itself to
14 averaging?

15 MR. ALFORD: It would -- within
16 the categories it lends itself to
17 average, otherwise, no.

18 MR. FINGERHUT: So then -- okay.
19 But then this section of the LMO that
20 you have up there this -- obscured.
21 Let's talk about it let's do it.

22 MR. FINGERHUT: Because it sounds
23 like you can only -- you can't apply
24 both of them and come out with the
25 result that you want, at least I don't

1 think so.

2 MR. ALFORD: I respectfully

3 disagree. Let me try --

4 MR. FINGERHUT: Explain to me,

5 yeah.

6 MR. ALFORD: Yeah, yeah. So -- I

7 mess up so, density, little 'd' --

8 section planned development may be

9 built adding density which is greater

10 than the site specific density allowed

11 by the -- provided that any such

12 concentration density is offset by an

13 area of lower density in the other

14 sections -- based on the LMO.

15 Okay, if I have approval to build,

16 how do I say this, you -- if I take up

17 all the land building residential I

18 can't build a commercial. I've

19 precluded myself, right? Vice versa.

20 If I -- well, space -- residential

21 density is probably the only one you

22 can -- already tells you can expand so

23 much I don't think commercial is based

24 on square foot, so you'd -- kind of

25 footprint but you have to read them

1 together, I mean the law requires you
2 do and it says little 'd' density,
3 okay, so in a planned unit development
4 you've got commercial but you don't
5 average, okay, I've used this many
6 residential units so I'm going to
7 average it over -- and take out
8 commercial. Does that make any sense?

9 MR. FINGERHUT: A little bit.

10 MR. ALFORD: -- application.

11 MR. FINGERHUT: But then I go back
12 to then in November 2016 when I thought
13 it was stipulated to that the Town's
14 map was correct on density, they just
15 didn't think it applied, so are you
16 telling me now that that --
17 notwithstanding that testimony, you
18 don't think the calculation is correct
19 in which case I would ask you the same
20 thing, Mr. Johnson, let me see your
21 calculation.

22 MR. ALFORD: Sure. Well, let me
23 say this. I go with Mr. Johnson then,
24 math is math, one plus one is two. The
25 math may be correct. The formula

1 wasn't. The formula was -- the
2 formula, as a matter of law, being
3 16-10-103 B, is it 103? I'm sorry
4 16-10-102B, that's where the formula
5 is. They didn't use that formula.

6 MR. FINGERHUT: Are you certain
7 they didn't or not? I'm just asking?

8 MR. ALFORD: Which they go
9 through.

10 MR. FINGERHUT: Yeah. I have a
11 copy of it. Yeah, they clearly said
12 what they did so I'm asking you the
13 same thing.

14 MR. ALFORD: I don't believe they
15 did, no, sir. I think they did not. I
16 believe they spread they did -- here's
17 what I think he did and I think I --

18 MR. WILLIAMS: Mr. Chairman, he's
19 testifying contrary to what the sworn
20 testimony from the last hearing was and
21 we object.

22 MR. FINGERHUT: I'll overrule it.
23 He is answering my question and during
24 his argument I think it's --

25 MR. ALFORD: For the record,

1 lawyers don't get to testify and I'm
2 not testifying, okay, but I would say
3 this about that, if -- I think the math
4 that I think they want to do is and I
5 understand why and it's because they
6 want to use the density, they want to
7 use the space and -- up and running, I
8 think that's the answer. Mr. Garrett,
9 he asked the question, it's only one or
10 two reasons -- they don't care about
11 the rules. The rules are going to
12 change in the next five or six years
13 and they're -- that's how it works. If
14 you don't like the rules you apply for
15 variances -- kind of zoning magic that
16 these people are famous for -- I'm just
17 saying, it is not based on the rules.
18 There's a competitive business reason
19 that they are doing, okay. They're in
20 a competing business, hotel, timeshare,
21 short-term rentals. It's a competing
22 business.

23 Within that competition now
24 they're all in this Circle, square,
25 whatever shape the property is, there's

1 only so much to go around. There's
2 only so much hotel, there's only so
3 much commercial, there's only so much
4 residential, so I don't -- I would have
5 answered the question differently. I
6 would have been truthful. I'd said,
7 I'm here because I'm stuck in this PUD
8 with this guy and there's only so much
9 density to go around and I want to take
10 mine, that would have been my answer
11 because I think that's the truth, just
12 my opinion.

13 But going back to your calculation
14 question, I just don't want to
15 overcomplicate things. There's X
16 amount of hotel rooms allowed there.
17 There's X amount of commercial allowed
18 in there and there's X amount of what
19 do you call it, non-hotel or
20 nonresidential, so either it is or it
21 isn't and I believe, respectfully, I
22 don't -- I mean no disrespect, I don't
23 care what their calculations are. This
24 is how we have to do it.

25 MR. FINGERHUT: Would you like a

1 ten-minute recess to do that for us so
2 we can see it? I'm asking for
3 evidence, that's all because you're
4 asking us to do something, so --

5 MR. ALFORD: I was a -- in college
6 so I've got to stop for a minute and
7 ask -- yes, I would love a short break.
8 Would that be okay?

9 MR. FINGERHUT: If you're going to
10 come back with a number and a --

11 MR. ALFORD: I will endeavor to do
12 that.

13 (Whereupon, a short break was
14 taken.)

15 MR. FINGERHUT: Back in session.

16 MR. ALFORD: Yes, sir. As I told
17 you, I'm not a mathematician. Mr.
18 Walczak can attest.

19 I had a moment to consult with
20 staff and so this is what's out there
21 today. If you want to talk about kind
22 of the average density concept.

23 Right now there's 91 hotel units
24 spread over the 15.1 acres, that's 6.56
25 -- there's 5,260 square feet commercial

1 spread over 15.1, take that out and you
2 get the 3408.

3 There's 198 residential units,
4 which are timeshares that are out there
5 and then that times 15.01, average out
6 13 on those units -- so, going back to
7 this document, everything out there is
8 under built. Everything category.

9 They could have built 94 or --
10 they could have built 94, they built
11 91.

12 They could have built 200 and they
13 only built 198 and out of the density
14 that they had -- so if you look at the
15 table and I think I understand what
16 they're trying to do, now, they're
17 trying to say the PUD exists. Under
18 the old rules we have what we have
19 under the PUD but now there's no
20 commercial and I think what staff said
21 is, well, no, we're going to apply the
22 density, the base density numbers to
23 the acreage and they get to build
24 8,400 square feet and they applied for
25 7,500, so, in other words, the

1 commercial density has not been built
2 out. I don't know if I answered your
3 question.

4 MR. FINGERHUT: Well you --
5 actually -- I'm sorry, Mr. Walczak.

6 MR. WALCZAK: I was going to say,
7 so what is the allowable density under
8 the base district?

9 MR. ALFORD: You could build 8,000
10 square feet per acre right now today
11 under the bas district.

12 MR. WALCZAK: And what is our
13 average density based on your
14 calculations?

15 MR. ALFORD: Average density?

16 MR. WALCZAK: Average density. It
17 seemed to me that those three numbers
18 you found an average? No, or something
19 similar to that?

20 MR. ALFORD: We think they're
21 mixing apples and oranges.

22 MR. WALCZAK: Yeah but that does
23 -- that's what -- isn't that what the
24 ordinance says? The LMO says that?

25 MR. ALFORD: No. Actually it says

1 -- that section of the LMO that we held
2 up says --

3 MR. CUTRER: There's no
4 co-mingling.

5 MR. ALFORD: Thank you.

6 MR. FINGERHUT: No co-mingling.
7 You calculate these densities here
8 separate, that's correct, but then once
9 you have done that it seems to me that
10 103G4 -- 163G4 says you average them,
11 doesn't it?

12 MR. ALFORD: It's telling you to
13 average, at least I think. Yes, I
14 think what it's telling you to do is
15 you average -- average them within
16 their categories is what I'm saying,
17 so, I do think you can say, okay,
18 that's what I -- that's my belief, you
19 average them within your category,
20 because it otherwise would say to you,
21 you average it this way and you
22 disregard Section 16-10-102.

23 MR. FINGERHUT: Okay. So then but
24 if you look at Section G1, the same --
25 163G1, the purpose the PD-2 Overlay

1 District is intended to encourage
2 creativity and design planning and
3 development of parcels -- acres by
4 allowing greater site flexibility than
5 the underlying base zoning district so
6 that natural futures may be protected
7 and development concentrated in more
8 suitable or -- environmentally
9 sensitive areas, so it's intended to
10 give perhaps have more of one thing
11 less of another and that's why I think
12 the G4 asks you average them and
13 that's -- (Phonetic)

14 MR. ALFORD: I respectfully
15 disagree. I think now I'm starting to
16 think maybe understand it.

17 It's telling you that the PD or
18 PUD planned district, I'm going to get
19 this much residential, I'm going to get
20 this much hotel, I'm going to get this
21 much commercial and what this section
22 -- the G section you're referring to
23 talks about averaging but it also says
24 you can take more off of one parcel and
25 overpopulate another parcel provided

1 that you then account for that by
2 creating more open space, things of
3 that nature. There's nine acres of
4 open space in this PUD that his client
5 created nine-acres of open space, so
6 he's -- and you asked the important
7 question, are they related, those
8 entities, the answer is, yes, and so
9 they've given up -- they've for -- I
10 guess they've banked, if you will,
11 already by creating that over space as
12 the section -- I need to find that
13 section, that G section because I think
14 now I'm understanding -- yeah, you
15 don't cross -- yeah, Mr. Johnson made
16 his point. I think it's a good one --
17 right here in mixed use developments,
18 acreage allocated to residential shall
19 not be used to calculate
20 nonresidential. Acreage allocated for
21 nonresidential shall not be used -- so
22 you're not -- I think that -- because
23 you're not going to cross pollenate.
24 MR. FINGERHUT: Well, no, when you
25 calculate the density but overall you

1 need to know what the total density is
2 and once you have calculated each
3 category correctly you put them
4 together, at least that's how I read it
5 in G4, but that's -- to me that's what
6 the plain language is saying and I'm
7 trying to understand if there's another
8 formula that shows a different number
9 that's great, that's what I'm asking.

10 MR. ALFORD: I guess my --

11 MR. ROBERT JOHNSON: The only
12 thing that doesn't add up there is that
13 some densities are by units and other
14 densities are by square footage. You
15 can't put those two together, you know,
16 it's like putting metric with, you
17 know, American imperial, you just can't
18 do that, that's not possible.

19 MR. ALFORD: That is I think what
20 the LMO is trying to say when they come
21 back about with this other section.

22 MR. ROBERT JOHNSON: The One thing
23 I do take issue with, I believe you're
24 using an old document --

25 MR. ALFORD: I am.

1 MR. ROBERT JOHNSON: That was pre

2 2000 --

3 MR. WILLIAMS: 2002, pre-2002.

4 MR. TAYLOR: Mr. Chairman, could

5 that be marked for the record, please?

6 MR. FINGERHUT: Absolutely. It

7 can reside in the record, correct.

8 That would be --

9 MR. WILLIAMS: No, but his

10 calculations --

11 MR. TAYLOR: And the calculations

12 both should be marked.

13 MR. ALFORD: Yeah, this in the

14 record.

15 MR. WILLIAMS: Let's mark it so

16 it's attached to the transcript.

17 MR. ROBERT JOHNSON: We need to go

18 by today's LMO and not an agreement

19 that was made pre-LMO.

20 MR. ALFORD: Yes, sir.

21 MR. ROBERT JOHNSON: You're mixing

22 those two up. You need to take that,

23 put it aside.

24 MR. ALFORD: Under today's LMO

25 they're allowed 8,000 feet -- average

1 per acre on a piece of property --

2 MR. FINGERHUT: Regardless of what
3 else is going on in the --

4 MR. ALFORD: Yeah, as long as they
5 haven't used up everything in the
6 commercial category and that was
7 staff's determination because there's
8 hardly any commercial out there.

9 MR. FINGERHUT: I looked at that.
10 Most of the files that were done in the
11 Circuit Court, did you make this
12 argument there?

13 MR. ALFORD: We didn't get that
14 far in Circuit Court.

15 MR. FINGERHUT: You picked the
16 questions, you sit down --

17 MR. ALFORD: Evidence was put up
18 and Tom was like, he went through the
19 record. He asked us questions. They
20 made those lengthy arguments.

21 Our arguments were more way -- you
22 know, generally when -- you know what
23 the standard of review says, you guys
24 got it made. You can almost never be
25 wrong. It's the any evidence standard.

1 If there's any evidence in the record
2 to support your decision you're upheld
3 because the court feels like local
4 bodies should make zoning decisions and
5 I think that's a good rule.

6 His problem was, the record -- he
7 wanted to know whether or not -- I
8 guess he wanted to know the question
9 you're asking, have you used up the
10 other density in the commercial, that's
11 question 3. Question 3 is his real
12 meat of trying to make his decision and
13 so we spent time formulating that.

14 The arguments that were made in
15 front of him were essentially, hey,
16 zoning appeals heard all of this.
17 There's some evidence here to support
18 the decision. Look how big this record
19 is. And there's a lot of conflicting
20 statements in this record and a lot
21 of -- you know, I don't know, I think
22 the old zoning document that was --
23 categorical exemption is out. We're
24 going under the new rules, 8,000 feet.

25 MR. WALCZAK: If I may.

1 MR. FINGERHUT: Please.

2 MR. WALCZAK: Under 16-3-106G4.

3 MR. ALFORD: Yes, sir.

4 MR. WALCZAK: A.

5 MR. ALFORD: Yes.

6 MR. WALCZAK: Sentence says -- we
7 discussed in the past, the average
8 density for PD-2 Overlay District shall
9 not exceed the maximum density
10 permitted in the base zoning direct.

11 MR. ALFORD: Right.

12 MR. WALCZAK: So, how would you
13 calculate the average density with PD
14 overlay so that you can compare it so
15 that it meets this --

16 MR. ALFORD: Well, and I think
17 that goes that then you need to go and
18 look at D1 and it tells you how to
19 apply that formula because there's
20 different kinds of density just as
21 you've noted. There's square footage
22 of commercial density, there's number
23 of units in residential and there's
24 number of hotel rooms and hotel density
25 -- and I think your point's very well

1 taken, you can't mix --

2 MR. WALCZAK: So if there's three
3 different densities then what are the
4 three different requirements or base
5 requirement which will you have in the
6 PD-2? (Phonetic)

7 MR. ALFORD: Well, I'm sorry, it
8 would depend on what you're trying to
9 build.

10 If you were trying to build hotel
11 rooms you would have one allocation.

12 If you were trying to build
13 residential you'd have X number of
14 units and if you're trying to build
15 commercial you'd have --

16 MR. WALCZAK: Well, we have
17 existing and you're saying in all three
18 cases they're under the requirement of
19 the base district?

20 MR. ALFORD: I am. If you do the
21 math on -- I'm I'll mark it. I'm not
22 scared.

23 MR. WALCZAK: Okay.

24 MR. FINGERHUT: What he's saying
25 is how many acres -- for this use?

1 MR. CUTRER: There are -- excuse
2 me, one, two, three, four, five. There
3 are five parcels list in this property.

4 MR. WILLIAMS: 15.1 acres.

5 MR. CUTRER: A through F. D is
6 the Waterside Drive right-of-way. What
7 I think you have to do --

8 MR. ALFORD: I'm sorry. Go ahead,
9 sir. A lot of smart people -- there's
10 your answer.

11 MR. CUTRER: I can't do that
12 calculation unless I know how many
13 acres were used. What I want to know,
14 I think we need to know, is how many
15 acres comprise Parcels A and C? How
16 many acres comprises Parcel F? And how
17 many acres comprises Parcel E? We know
18 --

19 UNIDENTIFIED SPEAKER: What's the
20 total?

21 MR. FINGERHUT: I'd like to hear
22 his answer before -- you have rebuttal
23 after that so I'd like to hear if you
24 don't mind.

25 MR. ALFORD: This in the record,

1 right, Chet?

2 MR. WILLIAMS: Yes, a copy of that
3 is attached to Nicole's memo of
4 August 1st.

5 MR. ALFORD: All right. So I'll
6 go through the numerical designation.

7 Parcel F is 10.735 acres, although
8 nine of those acres are open space.

9 MR. CUTRER: Nine are what?

10 MR. ALFORD: Are open space.

11 Parcel D is the right-of-way which
12 has no allocation and it consists of
13 .697 acres.

14 Parcel E is 1.608 acres.

15 Parcels A and C constitute
16 2.6 acres.

17 Parcel B is .377 acres.

18 MR. CUTRER: B as in Bravo?

19 MR. WILLIAMS: B was taken out.

20 MR. ALFORD: Okay. B is out, I'm
21 sorry. So, really you've got F, E and
22 A and C, right?

23 MR. WILLIAMS: And D.

24 MR. ALFORD: And D is --

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

1 MR. ALFORD: D is the --

2 MR. CUTRER: 10.735.

3 MR. ALFORD: Yes, sir. Parcel F,
4 10.735. Parcel D, 0.697.

5 MR. CUTRER: Okay. .697.

6 MR. ALFORD: Yes, sir. Parcel
7 E -- 1.068.

8 MR. FINGERHUT: Point 06?

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

11 MR. CUTRER: That adds up to 15.1.

12 MR. ALFORD: Yes.

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

16 MR. ALFORD: Yes, sir.

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

19 MR. ALFORD: Yes, sir.

20 MR. CUTRER: That's 198 units.
21 You telling me they compromise
22 1.7 acres?

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

25 MR. CUTRER: That's 198 units. I

1 drove that whole property. Can't be.

2 Those units can they really be on 1.7

3 acres?

4 MR. ROBERT JOHNSON: For

5 clarification, the nine acres is spread

6 throughout these other acreage.

7 MR. ALFORD: Clearly, when you

8 call it 'open space' it is open space

9 that is utilized by and sprinkled

10 around in the Spinnaker developments

11 there. Is that what you were asking?

12 MR. ROBERT JOHNSON: Yes. The

13 other clarification I think for some of

14 the board members is the right-of-way

15 is actually allowed to be put into that

16 acreage --

17 MR. ALFORD: It is.

18 MR. ROBERT JOHNSON: -- to increase

19 the density?

20 MR. ALFORD: That's correct.

21 That's correct.

22 MR. FINGERHUT: So, how much

23 acreage do you need for 198 units?

24 MR. ALFORD: Well, I think the way

25 the PD operates you needed -- because

1 keep in mind, when they were built,
2 they were operating in the different --

3 MR. FINGERHUT: Right. Today, how
4 much? I think it's in the LMO right in
5 front of you.

6 MR. ALFORD: Hold on. Hold on.
7 16 units per net acre.

8 MR. FINGERHUT: Okay. So what
9 does that mean?

10 MR. ALFORD: You'd need 13.

11 MR. FINGERHUT: 13 acres?

12 MR. ALFORD: (Witness nods head.)
13 Right?

14 MR. FINGERHUT: That's for 198
15 units, so then what would you need for
16 the hotel?

17 MR. ALFORD: Unless --

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

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

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

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

1 MR. TAYLOR: Yes.

2 MR. ALFORD: So you would need

3 from --

4 MR. WILLIAMS: 91 divided by 35 is

5 2.6.

6 MR. FINGERHUT: Then the only

7 other thing to add is the

8 nonresidential development, correct?

9 MR. ALFORD: So 8,000.

10 MR. FINGERHUT: Okay. And so how

11 much acreage do you need for that?

12 MR. ALFORD: One.

13 MR. WILLIAMS: Existing?

14 MR. ALFORD: 7,500. It's less

15 than -- oh yeah, the 52 -- there's

16 5,262 square feet already -- yes, built

17 and that is on a -- that takes up

18 .65 acres. (Phonetic)

19 MR. FINGERHUT: I think that gets

20 us over 15.1 and that's -- that was my

21 point to the exercise. How do we avoid

22 that? It's all very interesting. The

23 other thing, it's really confusing but

24 how do we avoid that?

25 MR. ALFORD: Because I don't think

1 you can have it both ways. He doesn't
2 get the PD-2 flexibility and then take
3 away the use of the land. (Phonetic)

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

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

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

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

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

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

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

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

22 MS. LAUDERMILCH: Greg, forgive my
23 ignorance. Parking and driveways, do
24 they constitute open space? I --

25 MR. ALFORD: I'll have to defer.

1 MS. LAUDERMILCH: It doesn't seem
2 like open space to me.

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

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

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

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

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

19 MR. ALFORD: What section is that?

20 MS. DIXON: It's in the
21 definition.

22 MR. ALFORD: My concern is, you
23 take their reading with -- 102B1 out --
24 density, then it's apples to oranges
25 and I also think you would render 4A to

1 take their -- do your strict
2 mathematical calculation. You walk me
3 through -- and you're right, it exceeds
4 the 15.1 but then it leaves 4A,
5 flexibility built in and the Spinnaker
6 guys who own this piece of land gave up
7 acreage exactly as the code told them
8 to do and now it's, oh no, now, you
9 don't get to use your property. Puts
10 the Town in a tough spot.

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

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

18 MR. WILLIAMS: Correct.

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

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

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

25 MR. FINGERHUT: With the same

1 information on it, as well?

2 MR. WILLIAMS: Yes. It's

3 attached, as well.

4 MR. FINGERHUT: Then the sheet

5 from -- the charts from 1987, is that

6 --

7 MR. ALFORD: That is in the

8 record.

9 MR. FINGERHUT: That is? Okay. I

10 didn't see it. Okay.

11 UNIDENTIFIED SPEAKER: Part of

12 Attachment H --

13 MR. TAYLOR: Mr. Chairman, I would

14 propose that be, though, as an

15 attachment just so that we don't have

16 to dig through it and that --

17 MR. FINGERHUT: That's fine.

18 Are there other questions for the

19 Town? There are, I apologize. My

20 apologies.

21 MR. CUTRER: I have one question.

22 MR. FINGERHUT: Mr. Alford, I

23 think we have one more question.

24 MR. ALFORD: I hope I have one

25 more answer.

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

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

6 MR. ALFORD: A and C.

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

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

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

20 The way that they want to do the
21 math and exclude the nine acres of
22 common property which I think skews the
23 math and then I think there's even part
24 of the code -- I think the fear that
25 they have, being honest with you, is

1 that any other development out there
2 might impede their ability to come back
3 and ask for whatever else might be
4 there.

5 In other words, if there was -- if
6 there was X amount within that PD-22
7 development.

8 MR. CUTRER: They've got
9 2.6 acres.

10 MR. ALFORD: Yes, sir.

11 MR. CUTRER: Zoning permits 35
12 hotel units per acre. You can do the
13 math.

14 MR. ALFORD: Right.

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

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

25 MR. CUTRER: And they have -- am I

1 correct that Beachwalk Hotel has no
2 right to Parcel E.

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

5 MR. CUTRER: Thank you.

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

8 MS. DIXON: Good afternoon.

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

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

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

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

22 EXAMINATION

23 BY MR. CUTRER:

24 Q The appellants on Beachwalk Hotel,
25 Parcels A and C, 2.6 acres on which currently

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

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

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

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

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

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

21 BY MR. CUTRER:

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

24 A Yes.

25 Q Which is what currently exists.

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

4 A Correct.

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

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

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

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

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

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

1 standards. We were talking about the average
2 that the appellant is using to calculate those,
3 staff does not believe that that is how the site
4 should currently be looked at. It was a PD-2
5 that was developed back many years ago. We
6 don't think that there was any kind of use it or
7 lose it clause where once that capital exemption
8 expired in 2000 that that meant they could no
9 longer develop the property, it specifically
10 said they had to abide by the current LMO's
11 regulations which allows for 8,000 square feet
12 per net acre and that's how I came to my
13 determination that they can have 8,400 square
14 feet on that property.

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

17 A Uh-huh.

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

23 A Yes, sir.

24 Q Which leaves us with the Spinnaker
25 Development, itself, 198 units, I believe.

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

5 A Can you break -- restate that?

6 Q There are three uses or three parcels
7 at discussion here.

8 Parcel E, which is proposed for
9 development.

10 Parcel A and C, which is the hotel.

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

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

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

24 A I believe so because I believe the math
25 that was done earlier indicated that 12 acres is

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

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

9 A Yes, sir.

10 MR. CUTRER: Thank you.

11 MR. FINGERHUT: Any other
12 questions?

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

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

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

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

6 MS. DIXON: No, I do not. In
7 discussions that I had with the LMO
8 official and with the Town attorney we
9 determined or interpreted the section
10 that the appellant's referring to where
11 you average the density and all of
12 those development standards would apply
13 to new development of a PUD, so where
14 it talks about where you could take
15 density from one area of the proposed
16 PUD and concentrate open place in one
17 area and use that density in other --
18 in the PUD, those are old development
19 standards we would looked at when in
20 the new PUD came in. This is something
21 that was created a long time ago prior
22 to the Town incorporating this master
23 plan.

24 So, there was a categorical
25 exemption that vested them for certain

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

10 BY MR. CUTRER:

11 Q Without -- PD-2 regulations? Because
12 those only apply to new units? I'm just trying
13 to -- because that's different from, yes.
14 That's all I'm implying. That's why -- like,
15 yes, it applies, you're saying.

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

1 So when you -- RD District allows 8,000
2 square feet per net acre.

3 MR. FINGERHUT: Thank you. Any
4 other questions for Ms. Dixon?

5 MR. CUTRER: I have a followup.

6 BY MR. CUTRER:

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

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

16 MR. CUTRER: Thank you.

17 MR. FINGERHUT: Thank you.
18 Counsel, do you have questions for Ms.
19 Dixon before you give your rebuttal?

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

24 MR. FINGERHUT: Thank you.

25 MR. WILLIAMS: Nine acres of open

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

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

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

22 When you're talking about
23 construing the LMO, the LMO has its own
24 rules for that and those are the rules
25 that you have to follow.

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

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

17 Note the use of the mandatory
18 term, 'shall'.

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

25 In this case, regulations --

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

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

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

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

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

23 Dwelling units for residential.

24 Hotel rooms for hotel.

25 Square footage for commercial.

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

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

9 (Phonetic)

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

24 Okay.

25 And as close as I can follow what

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

9 163-106G4A.

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

17 So, again, if you had a
18 10,000-square foot -- ten-acre parcel
19 in the RD District that was in a PD-2
20 overlay, well then you could take, you
21 know, 140 residential units and put it
22 on half of the property but at the same
23 time that restricts the other half
24 because, like it says, a section or
25 phase of a plan development may be

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

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

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

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

24 MR. WILLIAMS: And afterwards it
25 says -- and Nicole said it dealt with

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

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

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

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

24 And Mr. Johnson, I apologize, I
25 need to ask you a question. You had

1 said that there was 15,000 square feet
2 of nonresidential -- I don't recall
3 that figure coming up can you?

4 MR. ROBERT JOHNSON: I don't
5 recall saying that. Did I?

6 MR. WILLIAMS: Mr. Fingerhut, your
7 questions to Mr. Johnson about SDC
8 Properties I would submit to you that
9 SDC is an acronym for Spinnaker
10 Development Corporation which is I
11 think the overall master umbrella that
12 those folks have for all of those
13 affiliates. I don't think there's any
14 questions that SDC Properties is an
15 affiliate of the developers new --

16 Mr. Cutrer, I was struck by your
17 comment, you got 198 units on
18 1.7 acres? I don't see how that's
19 possible.

20 And, again, I would submit to you
21 that there's nothing in the record that
22 deals with nine acres of open space
23 that's out there and even if there is,
24 the issue here isn't open space, it's
25 the density. That's the underlying

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

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

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

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

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

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

21 MR. WHITE: 735.

22 MR. ALFORD: In that 10.735 acres
23 and you've got it -- it's sprinkled
24 around. Keep in mind that the acres
25 calculation because these are -- I

1 don't want to say Hilton Head high-rise
2 units, they're not, something like --
3 they're dense in the sense that
4 they're --

5 MR. CUTRER: This is five stories
6 with a -- under parking.

7 MR. ALFORD: Parking. And they're
8 going close together, so they're -- you
9 have that common space interspersed
10 around which would -- drains -- those
11 kinds of things does not include the
12 parking and those kinds of things, so
13 that's --

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

17 MR. WILLIAMS: And there is --

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

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

1 multi-family buildings, parking or
2 loading areas.
3 Maybe but I don't see how you get
4 9.6 acres out of 15 acres is about
5 two-thirds of the total acreage and I
6 don't see how there's any way possible
7 that you got two-thirds -- you have
8 67 percent open space. I mean that's
9 far in excess of what the code requires
10 and I just don't see that those figures
11 are there.

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

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

22 MR. FINGERHUT: Well this -- we're
23 dealing now with the appellants
24 rebuttal case and although I'm inclined
25 to agree we will be pretty liberal with

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

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

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

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

15 MR. FINGERHUT: Yes, I agree.

16 EXAMINATION

17 BY MR. WILLIAMS:

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

20 A Nicole Dixon Development Review
21 Administrator.

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

25 A Yes, sir.

1 Q Earlier Mr. Cutrer asked you if the
2 existing development on Parcel F, which is I
3 think we've all agreed, 198 residential units
4 and 5,262 square feet of commercial spaces, if
5 that is conforming with the RD requirements?

6 As I recall the testimony from Mr.
7 Alford and Mr. Johnson's calculations that the
8 198 units requires 13 acres under the RD
9 District to support that density and then the
10 5,262 square feet requires about 6 -- point 65
11 acres.

12 Now, would you look at -- tell us the
13 acreage of Parcel F?

14 A 10.735.

15 Q The testimony earlier was we needed a
16 little over 13 and-a-half acres to support the
17 existing density, so do you still stand by your
18 statement that the Spinnaker Development on
19 Parcel F is conforming with the current RD
20 requirements?

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

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

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

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

11 A Well, I --

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

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

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

18 MR. WILLIAMS: But she's --

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

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

1 objection.

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

4 MR. FINGERHUT: My issue with the
5 objection is that she's already
6 answered the question and nobody's
7 objected so it's fair game out.

8 It's --

9 MR. ALFORD: Thank you.

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

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

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

25 MR. ROBERT JOHNSON: Mr. Williams,

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

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

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

1 go to the district or whatever the next
2 level is. I don't think, as a Board,
3 we can deny somebody the right to build
4 on a piece of property. I mean I -- I
5 don't know much about --

6 MR. WILLIAMS: About the law.

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

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

11 Several weeks ago the Town council
12 considered rezoning application for a
13 little I guess it's a -- Florence
14 Graham Island, which is out in Jarvis
15 Creek right behind Oldhouse Creek and
16 notwithstanding the fact that the Town
17 planners freely admitted with all the
18 hearings that without the zoning the
19 owners had no permitted uses of the
20 property. Nonetheless, Town council
21 refused to change the zoning, so those
22 people have no economically viable use
23 of their property but that's not an
24 issue for this hearing. That is an
25 issue that is the subject of a

1 condemnation action shall Mr. Johnson
2 choose to file that later on.

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

10 In hindsight maybe not such a
11 great decision but that was a decision
12 that they made.

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

24 MR. CUTRER: Mr. Williams?

25 MR. WILLIAMS: Yes.

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

4 MR. WILLIAMS: Right.

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

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

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

25 MR. WILLIAMS: Well, it's not on

1 the use -- is a permitted use, the
2 density is nonconforming.

3 MR. CUTRER: Okay.

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

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

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

16 This is a situation where Parcel F
17 was built at a density which is greater
18 than the site specific density allowed
19 by the underlying base zoning district
20 and you can do that provided that you
21 offset that by other area that has a
22 density that is lower than the base
23 zoning district. That's where the
24 averaging comes into play. That is --
25 that's one of the primary, if not the

1 primary function of the PD-2 Overlay
2 District. It allows for that density
3 average and the fact that Parcel F is
4 over developed and means that Parcel E
5 needs to be underdeveloped, the
6 question is, how much?

7 And the -- I went through for you
8 before shows that off density -- so
9 that's -- I mean that's how the effect
10 of Parcel F being overbuilt impacts
11 Parcel E.

12 MR. CUTRER: You answered me what
13 your feeling is. Let's go to Parcel A
14 and C of the 2.6 acres owned by your
15 client.

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

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

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

1 B and B.

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

7 This property could be redeveloped
8 with another new 91 torn down and
9 redeveloped with 91 hotel units.

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

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

1 units.

2 Those are all the rights which
3 your clients have. If Parcel E is
4 developed as proposed, how is your
5 client prejudiced in any of these
6 development opportunities?

7 How are you injured?

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

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

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

1 you to maximize your property, so I

2 can't answer that.

3 MR. CUTRER: But your client owns

4 2.6 acres on which it sits a derelict

5 hotel. All they've got is 2.6 acres.

6 That's all they can develop.

7 So whatever the pervious or

8 impervious or the wetlands or all these

9 other things that have setbacks and

10 buffers and all these things that

11 impact the actual development of

12 acreage, your clients owns 2.6 acres

13 which can be zoned or is zoned for 91

14 hotel units, 41 residential units,

15 20,800 square feet of nonresidential or

16 26 B and B units.

17 If Parcel E is developed, how is

18 your client's prejudiced from doing any

19 of those things within the setback and

20 impervious, pervious --

21 MR. WILLIAMS: The overall average

22 density for PD-2 --

23 MR. CUTRER: That's not my

24 question.

25 MR. WILLIAMS: Well but it's

1 Germain to the --

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

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

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

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

22 MR. CUTRER: You know, my
23 understanding is this property has been
24 viewed as an eye sore and a real
25 problem within the Town and I would

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

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

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

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

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

25 MR. WILLIAMS: And you're entitled

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

5 MR. CUTRER: All right.

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

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

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

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

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

9 MS. DIXON: Uh-huh.

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

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

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

25 MS. DIXON: A legally

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

13 MR. CUTRER: Thank you.

14 BY MR. WILLIAMS:

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

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

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

24 A It was in conformance with the approved
25 conceptual plan and had committee authority --

1 Q You're talking about the master plan,
2 the Waterside community master plan?

3 A Yes.

4 Q Okay. So -- and I agree that the
5 200 units were allowed, at that point. Was it
6 in conformance with the RD District at the time?

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

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

17 A Uh-huh.

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

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

25 Q Okay. And so then after that's done I

1 want to build 91 hotel rooms, how much do I have
2 to subdivide out of the parcel to do that?

3 A The 2.61 --

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

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

11 BY MR. WILLIAMS:

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

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

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

19 A No.

20 Q So it wasn't fully developed?

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

23 Q So --

24 A It meets -- standards.

25 Q All right. So let's look at LMO

1 Section 16-3-106.G.4.A, where in the code does
2 it say this section is applicable only to
3 previously approved PD-2 plans that are
4 substantially completed?

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

10 Q So --

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

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

16 A Correct.

17 Q So, Parcel E is in the PD-2 Overlay
18 District and it's subject to the P-D2 overlay
19 regulations but not to this PD-2 Overlay
20 District.

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

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

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

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

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

16 MR. ALFORD: Object to the form.

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

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

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

5 BY MR. WILLIAMS:

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

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

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

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

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

17 A It is.

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

21 A This is a decision staff made.

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

25 MR. FINGERHUT: Any further

1 questions for Ms. Dixon?

2 MR. TAYLOR: No further questions

3 for Ms. Dixon but I would like to have

4 a minute on the stand if I could.

5 MR. WILLIAMS: No further

6 questions.

7 MR. FINGERHUT: Anybody else have

8 any questions for Ms. Dixon?

9 MR. ALFORD: No.

10 MR. FINGERHUT: Thank you.

11 Anything else on rebuttal?

12 MR. WILLIAMS: We just want to

13 address -- issues but one of the things

14 that I would like to address is I think

15 at least once, maybe several times Mr.

16 Alford has ascribed to our client's --

17 well, they've all got density here.

18 If you follow our argument, there

19 is no density but one, so I don't know

20 where he gets these ideas and I don't

21 know why he's throwing them out there

22 but, you know, all our client wants

23 everybody to do is play by the rules

24 that everybody else has to play by.

25 We think the Town staff has made

1 an incorrect interpretation.

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

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

13 It's include -- the portions from
14 the transcript are attached to our
15 memorandum on demand at Exhibit D and
16 if you don't mind, Mr. Fingerhut, your
17 question was; 'You would stipulate to
18 the math?

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

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

23 Ms. Dixon, if you're going to look
24 at the entire PD-2 and based on your
25 density and current LMO but use of what

1 is existing out there right now then
2 Chet has demonstrated in his math that
3 they would not be allowed to do what
4 they're proposing.

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

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

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

19 The law is that when there's
20 nothing that's ambiguous, there's no
21 interpretation to be had. You apply
22 the -- attached and in this case that
23 means you get the average density.
24 When you look at the average density
25 you used it all up for this PD-2s and

1 that's an unfortunate state of affairs
2 for the property owner but they could
3 have done something about that several
4 years ago and they chose not to.

5 Questions?

6 MR. FINGERHUT: Any questions?

7 No. Thank you.

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

10 MR. FINGERHUT: Sure.

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

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

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

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

23 Because the question that has been
24 repeatedly asked by Mr. Cutrer, today,
25 about standing is one that has already

1 been decided in this case and, believe
2 me, Greg handed it very smoothly like
3 he does but this question is one of
4 pleadings which has already been in
5 front of Judge Dukes and if there was
6 any question to our standing he would
7 have already addressed it and everybody
8 in here knows that. It was before
9 Judge Dukes, there was no question
10 about but what we had happen here today
11 was someone who came from this Board
12 and raised that issue repeatedly, you
13 saw lawyers come to it like blood in
14 the water. That issue is not before
15 you. It was not raised by staff. It
16 was not raised by lawyers. It has not
17 been adjudicated by Judge Dukes. It is
18 clearly something that only one member
19 of this Boards wants to hammer out
20 today and, once again, it came in that
21 everybody came to it. It's the same as
22 Barry's argument about it being a take.
23 That issue is not before this Board.
24 Everybody may have an idea about
25 it. It may not seem fair to people but

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

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

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

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

20 Thank you, Mr. Chairman.

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

23 Counsel, you want to do some
24 rebuttal?

25 MR. JOHNSON: No, sir. I've been

1 waiting a few minutes now
2 notwithstanding the comments just made
3 by my friend, Tom Taylor.

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

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

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

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

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

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

12 MR. ALFORD: I'll about be.

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

15 I think -- I disagree with Mr.
16 Taylor when he says that it's not
17 something for you to consider.
18 Jurisdiction can be raised at any time.
19 Standards can be raised at any time
20 and, keep in mind, we all agreed with
21 Judge Dukes that this would be a full
22 rehearing. Everything's on the table.
23 They wanted testimony, goose/gander.
24 They said, no, we want you to hear this
25 testimony. Okay, it's a rehearing.

1 It's a new day. That issue's on the
2 table now. They've conceded. They
3 have no injury.

4 MR. WILLIAMS: Mr. Johnson is
5 incorrect when he says this is the
6 first time it's been raised. We
7 specifically -- we had standing when we
8 filed the initial appeal. It's all in
9 the record.

10 MR. FINGERHUT: Anything else on
11 that particular issue?

12 MR. WILLIAMS: No.

13 MR. TAYLOR: No, sir.

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

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

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

24 MR. HULBERT: You've got the room
25 for as long as you want tonight but if

1 you come back in the morning I have to
2 check the calendar but I do believe
3 it's open tomorrow morning.

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

6 Let's discuss the standing issue
7 first.

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

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

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

21 So that's page 2 --

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

25 MR. CUTRER: I'd like to find it

1 in my book.

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

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

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

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

20 MR. FINGERHUT: Yes.

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

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

1 MR. ROBERT JOHNSON: Which is your
2 client?

3 MR. WILLIAMS: Yes.

4 MR. ROBERT JOHNSON: Yes.

5 MR. FINGERHUT: How do you feel
6 that impacts on standing in your
7 experience?

8 MR. ROBERT JOHNSON: In my
9 experience, if there was a distance of,
10 you know, could be hundred yards, could
11 be ten feet. If there's a distance
12 between it there's some -- there could
13 be some discussion or argument that you
14 can't be aggrieved from a thousand feet
15 away. I mean you've got to have
16 some -- you know, can you see this
17 building? Can you see that building?
18 Can you --

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

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

1 MR. FINGERHUT: Mr. Walczak?

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

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

9 MR. FINGERHUT: Yes.

10 MR. WALCZAK: So I think we should
11 honor that judge's decision and take it
12 as it was said, a brand new hearing and
13 I think the -- really, the issue is the
14 interpretation of the code and I just
15 -- that's where we should be at.

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

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

24 I would argue increased density
25 could, not necessarily does, but could,

1 reduce future property value in the
2 eyes of a prospective buyer, so, I do
3 think -- I agree with the fact that the
4 location of the tract, the fact that
5 it's contiguous, I think it has a very
6 direction impact. To me there's
7 standing.

8 MR. FINGERHUT: Mr. White?

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

12 MR. WALCZAK: Correct.

13 MS. LAUDERMILCH: Correct.

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

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

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

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

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

23 MR. FINGERHUT: Let's keep on.
24 We're going to dispose of the motion
25 and then go to the next step.

1 MR. CUTRER: It seems to me that
2 -- well, the testimony is that Parcels
3 A and C conform to the current LMO of
4 35 units per -- 35 hotel rooms per
5 acre.

6 Parcel E, which is the proposed
7 welcome center, if developed, as
8 requested would have 7,500 square feet
9 out of an allowable 8,000 per acre, you
10 actually have a little more than an
11 acre so -- Parcel E, if developed as
12 proposed, would comply with the current
13 LMO.

14 Parcel F is a bit of a problem.
15 With 198 units and 5,262 square feet of
16 nonresidential but it was built prior
17 to the 2014 LMO and what the testimony
18 today I believe has been is that we've
19 got to comply with the current LMO.

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

24 You can't make them tear down
25 units in the Spinnaker Development, so

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

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

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

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

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

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

24 MR. CUTRER: All right.

25 MR. FINGERHUT: -- a position from

1 counsel and we're discussing how we're
2 going to resolve that issue and get it
3 out of the way, one way or the other.

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

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

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

16 MR. WALCZAK: Correct.

17 MR. FINGERHUT: Is there a second?

18 MR. WHITE: I'll second it.

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

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

24 MR. FINGERHUT: Correct. This is
25 a motion to deny the motion to dismiss

1 for standing.

2 MR. CUTRER: Okay.

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

5 MS HALEY: Mr. Walczak?

6 MR. WALCZAK: For the motion.

7 MS. HALEY: Mr. Johnson?

8 MR. ROBERT JOHNSON: For the
9 motion.

10 MS. HALEY: Mr. Fingerhut?

11 MR. FINGERHUT: For the motion.

12 MS. HALEY: Mr. Cutrer?

13 MR. CUTRER: For the motion.

14 MS. HALEY: Mr. White?

15 MR. WHITE: For the motion.

16 MS. HALEY: Ms. Laudermilch?

17 MS. LAUDERMILCH: For the motion.

18 MR. FINGERHUT: Okay, thank you.

19 Now we just have the appeal.

20 I think it would be appropriate,
21 because we were ordered by Judge Dukes
22 to do this, let's answer his questions
23 and then after we -- because, frankly,
24 as we answer the questions I think it's
25 going to lead to the result but it may

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

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

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

12 MR. WALCZAK: Second.

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

15 Okay. Teresa, please call the
16 roll.

17 MS. HALEY: Mr. Walczak?

18 MR. WALCZAK: For the motion.

19 MS. HALEY: Mr. Johnson?

20 MR. ROBERT JOHNSON: For the
21 motion.

22 MS. HALEY: Mr. Fingerhut?

23 MR. FINGERHUT: For the motion.

24 MS. HALEY: Mr. Cutrer?

25 MR. CUTRER: For the motion.

1 MS. HALEY: Mr. White?

2 MR. WHITE: For the motion.

3 MS. HALEY: Ms. Laudermilch?

4 MS. LAUDERMILCH: For the motion.

5 MR. FINGERHUT: Thank you.

6 Question B, If parcel E is in the

7 PD-2 Overlay District, is Parcel E

8 subject to the LMO's PD-2 Overlay

9 District regulations?

10 And we've heard testimony, the

11 appellants are clearly a yes. I

12 believe that the Town and the SDC are,

13 in essence a yes but perhaps -- if you

14 will, anybody have any thoughts on that

15 rule or would like to make a motion on

16 that question?

17 MS. LAUDERMILCH: I would make the

18 motion that Parcel E is subject to the

19 LMO's PD-2 Overlay District

20 regulations.

21 MR. FINGERHUT: Do we have a

22 motion to second?

23 MR. ROBERT JOHNSON: I second the

24 motion.

25 MR. FINGERHUT: Any discussion on

1 that motion? Teresa, please call the
2 roll.

3 MS. HALEY: Mr. Walczak?

4 MR. WALCZAK: For the motion.

5 MS. HALEY: Mr. Johnson?

6 MR. ROBERT JOHNSON: For the
7 motion.

8 MR. HALEY: Mr. Fingerhut.

9 MR. FINGERHUT: For the motion.

10 MS. HALEY: Mr. Cutrer?

11 MR. CUTRER: I guess for the
12 motion.

13 MS. HALEY: Mr. White?

14 MR. WHITE: For the motion.

15 MS. HALEY: Ms. Laudermilch.

16 MS. LAUDERMILCH: For the motion.

17 MR. FINGERHUT: Thank you.

18 Question C, If Parcel E is subject
19 to the LMO's PD-2 Overlay District
20 regulations -- which we decided they
21 are -- what effect does that have on
22 the development of Parcel E, and must
23 the existing development on the other
24 parcels within that PD-2 Overlay
25 District be taken into account in

1 connection with any proposed
2 development of Parcel E? A more
3 complex question. Any thoughts on that
4 question?

5 Mr. Cutrer?

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

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

17 MR. WHITE: The issue here is --
18 the issue is the importance of legally
19 nonconforming and what we heard was
20 that, in fact, this is what's driving
21 the process and that based on the
22 master plan what was in effect at the
23 time that it was conforming and that
24 subsequent changes have taken place to
25 develop the plan -- the LMO that allows

1 them to continue as long as they are
2 going to redevelop and once they
3 redevelop it goes back into the hopper
4 and they've got to re -- with respect
5 to you all. Is that basically what I
6 heard?

7 MR. FINGERHUT: He can't -- we
8 can't talk -- so are you saying that --
9 well, that it has to comply with the
10 current law, I don't think that's in
11 dispute, I guess, but does the
12 development of Parcel E as approved by
13 the Town comply to the LMO? What do
14 you think?

15 MR. WHITE: I do think it applies.
16 Again, when you dissect this there are
17 sections, Section F is legally
18 nonconforming.

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

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

25 MR. WHITE: I guess my own

1 personal opinion is that the density
2 question again gets back to the
3 co-mingling of the different aspect in
4 and of itself -- except for --
5 (inaudible)

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

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

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

25 The specific density of the other

1 individual parcels is irrelevant but
2 the total density is what's important.

3 MR. FINGERHUT: Mr. Cutrer?

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

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

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

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

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

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

16 MR. CUTRER: That's a good point.
17 The whole purpose, as I understand it,
18 of allowing legally nonconforming uses
19 are densities is all this gets done
20 over time and you can't take away
21 something that's already there, so I
22 don't know how we penalize Parcel E
23 because of a legally nonconforming use
24 in Parcel F.

25 MR. WALCZAK: Can I say something?

1 MR. FINGERHUT: Yes.

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

9 MR. ROBERT JOHNSON: No.

10 MR. WALCZAK: Why is that?

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

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

25 MR. ROBERT JOHNSON: Well, that's

1 what we're supposed to do.

2 MR. WALCZAK: I see this as one
3 thing. It's a one -- it's a one PUD
4 named PD-2, it's one unit and it's like
5 your neighbor's having an effect on
6 your property, all right, so we have to
7 consider all the neighbors, not just
8 the one man and, you know, I look at
9 this, I'm trying to put myself in the
10 position of both sides and if I were
11 the owner here and I'm going to have
12 somebody that's going to beat me or I
13 look at myself as trying to develop the
14 E parcel apparently, you know, am I
15 going to have an effect on someone
16 else?

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

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

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

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

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

23 MR. WALCZAK: So can we make a
24 motion here?

25 MR. CUTRER: I wanted to ask

1 Charlie a followup.

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

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

14 MR. CUTRER: How?

15 MR. ROBERT JOHNSON: Because they
16 have 91 units and they can have 91
17 units if they redevelop or they can
18 have any of the other three categories
19 up to the limit, so they're really not
20 the --

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

25 MR. WALCZAK: Aren't we at maximum

1 density or over maximum density?

2 MR. FINGERHUT: We're over that.

3 MR. WALCZAK: For the entire

4 neighborhood? Okay. But how many --

5 MR. ROBERT JOHNSON: But are we

6 calculating that density based on the

7 overflow on Parcel F?

8 MS. LAUDERMILCH: We have to.

9 MR. ROBERT JOHNSON: Well, why?

10 Why do you --

11 MS. LAUDERMILCH: Because it's --

12 MR. ROBERT JOHNSON: Well I'm just

13 --

14 MS. LAUDERMILCH: -- totality.

15 MR. ROBERT JOHNSON: And I --

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

17 tried to say before is take it back to

18 what the LMO says now and use that as a

19 calculation, not the fact that it's

20 over like ten units because basically

21 what you're doing is penalizing

22 somebody else for a grandfathered

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

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

25 average density for the PD-2 Overlay

1 District shall not exceed the maximum
2 density permitted -- so how do we
3 get -- I just don't see how we -- the
4 calculations have been done actually by
5 both sides here in front of us. They
6 both come up with the same numbers -- I
7 just don't see how we don't -- because
8 it's not fair.

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

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

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

20 MR. FINGERHUT: Agreed.

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

1 MR. WALCZAK: See, I look at

2 the --

3 MR. CUTRER: And A and C comply.

4 I'm sorry, F complies because it's a

5 legally nonconforming development with

6 respect to density.

7 MR. WHITE: Charlie, you made a

8 good point. If you're trying to do

9 this in totality and do the mathematics

10 of coming up with the total density,

11 then if, in fact, F has been accepted

12 as a legally nonconforming piece of

13 property, then what you also would have

14 to do is take the next step and say,

15 okay, you also have to accept that

16 legally nonconforming density from way

17 back.

18 MR. WALCZAK: Well, it was

19 conforming way back.

20 MS. LAUDERMILCH: Right.

21 MR. WALCZAK: And has this changed

22 that they have not conformed but

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

24 had the opportunity to development

25 Parcel E at the time when it could have

1 been conforming. The -- opportunity
2 was gone. (Phonetic)

3 MR. WHITE: We can't change what's
4 happened. We can only deal with --

5 MR. WALCZAK: Right.

6 MR. WHITE: -- with what's --
7 what's we have now.

8 MR. CUTRER: Well, when this
9 property was originally a master plan
10 way back in the dark ages there was
11 contemplations that all of these
12 parcels would be developed. One of
13 them got developed with what must have
14 been a permitted density at the time
15 because they got a building permit, and
16 so, Parcel F, which is the Spinnaker,
17 got developed legally but the master
18 plan and the Town fathers at the time
19 all anticipated that each of these
20 parcels would be developed, so now --
21 now there's a passage of time and a
22 changing of the LMO. Parcel F is
23 nonconforming but it's okay because
24 it's permitted under the code.

25 MS. LAUDERMILCH: Yes, it is --

1 MR. CUTRER: It's nonconforming so
2 it's okay --

3 MS. LAUDERMILCH: -- LMO, uh-huh.

4 MR. CUTRER: -- now, because it
5 was developed over density sometime in
6 the past -- I'm sorry, because it was
7 developed in accordance with the
8 permitted regulations at some time in
9 the past but the density has changed
10 subsequent to that how do you penalize
11 E or what is okay on F? And now --

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

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

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

1 If they come back one year later,
2 you know, you might have some sympathy
3 or suggest they seek an extension of
4 their exemption but they had a
5 five-year you're on notice --

6 MR. FINGERHUT: Right.

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

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

14 MR. WALCZAK: In Totality.

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

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

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

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

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

16 MR. CUTRER: I would propose that,
17 yes, they did. Yes, they must and, in
18 fact, they comply because Parcel F is a
19 nonconform -- legally nonconforming use
20 with respect to density and so, you
21 can't do the calculation of
22 10.735 acres at 16 units to the acre
23 and say that impacts the other.

24 Parcel F complies with the LMO.

25 MR. FINGERHUT: Okay. So you're

1 saying if this is --

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

7 MR. ROBERT JOHNSON: I'd agree
8 with Jerry. I think what he's been
9 proposing or advocating for is you take
10 each one of these as a parcel, okay,
11 and decide whether they meet the
12 current code but then you put them all
13 together at the end and you say,
14 there's still some room for development
15 because we can't use Parcel F as -- in
16 its entirety. I just can't see how you
17 can -- because it was allowed at the
18 time.

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

23 And then the added thing we didn't
24 discuss is depending on what our
25 response is we either take -- we either

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

3 MR. ROBERT JOHNSON: Right.

4 MR. WHITE: And it is my
5 understanding -- has always been my
6 understanding -- that that is not
7 something you want to do. You -- on a
8 piece of property. (Phonetic)

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

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

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

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

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

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

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

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

13 MR. WHITE: I adopt that.

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

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

1 And in response -- the judge's
2 question is; If Parcel E subject to
3 PD-2 -- if Parcel E is subject to --
4 I move in response to Judge Dukes'
5 question, Number 3, which is, If Parcel
6 E is subject to PD-2 Overlay District
7 regulations, A -- this is my A -- what
8 effect does -- on Parcel E development,
9 what is its effect on Parcel E
10 development and, B, must existing
11 development of other parcels in the
12 Overlay District be taken into account,
13 and my motion would be that in response
14 to the judge's question to what effect
15 does -- on Parcel E development is the
16 PD-2 Overlay District have that applies
17 and must the existing development of
18 other parcels in the Overlay District
19 be taken into account for any
20 development of Parcel E and I would
21 submit, yes, so, I think it applies and
22 we must take it into account. I
23 guess --
24 MR. FINGERHUT: You're still
25 making -- sorry, go ahead.

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

5 Parcel F complies because it's legally
6 nonconforming.

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

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

16 MR. WHITES: I'll second that.

17 MR. FINGERHUT: Any discussion?

18 MR. ROBERT JOHNSON: Yes.

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

1 the whole development would comply --

2 less than 8,000.

3 MR. ROBERT JOHNSON: I'm agreeing

4 with what you're saying right now but I

5 think it should be two motions.

6 I think you should make the first

7 part of the answer to these two parts

8 of the -- C, and then I think we ought

9 to make -- introduce a second motion

10 that addresses how we're taking it into

11 consideration.

12 MR. CUTRER: So you're asking me

13 to withdraw the motion?

14 MR. ROBERT JOHNSON: I'm asking

15 you to modify your motion, withdraw it

16 and restate it answering just the two

17 items -- the two halves of Question C

18 from the judge.

19 MR. CUTRER: I agree with what I

20 said here --

21 MR. ROBERT JOHNSON: Doesn't his

22 approach answer those two questions? I

23 mean you can't get to the second part

24 of Judge Duke's question without

25 understanding what the methodology is,

1 either. That's what we're talking

2 about, the methodology.

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

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

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

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

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

19 MR. FINGERHUT: Yes.

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

25 MR. FINGERHUT: Absolutely. We

1 have to answer these three questions
2 regardless of whatever else we do, we
3 have to answer these three.

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

8 MR. FINGERHUT: We decided that.

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

20 MR. FINGERHUT: Yes.

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

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

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

2 it's --

3 MR. FINGERHUT: We want to make a

4 good record for all of these folks who

5 have to live with this after today, but

6 yes, so -- okay, what effect does that

7 have on the development of Parcel E?

8 There are six of us here and I think

9 three of us would say is that answer is

10 none and I think the other three would

11 have a different response to that, so

12 I'm not -- I would just ask for I guess

13 a motion on that and then for the next

14 question, again, and must the existing

15 developments on the other parcels be

16 taken into account?

17 UNIDENTIFIED SPEAKER: Yes.

18 MR. FINGERHUT: Well, I hear three

19 of us I think said yes and the other

20 three think, no, but that doesn't

21 answer the questions and then we can

22 discuss appeal but I think --

23 MR. UNIDENTIFIED SPEAKER: I heard

24 Jerry say yes to 3, Number 3.

25 MR. FINGERHUT: Well then --

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

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

9 MR. FINGERHUT: Okay.

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

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

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

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

20 UNIDENTIFIED SPEAKER: Sure.

21 UNIDENTIFIED SPEAKER: Let me make
22 sure.

23 UNIDENTIFIED SPEAKER: So your
24 motion --

25 MR. CUTRER: I'm agreeing to

1 withdraw my motion. Tell us how to do
2 it.

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

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

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

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

20 MR. WALCZAK: -- three motions.

21 MR. ROBERT JOHNSON: I agree.

22 MR. WALCZAK: For each one of
23 those things so I'll make the first
24 motion to say, yes, I move that Parcel
25 E is, in fact, subject to the PD-2

1 Overlay District.

2 MR. FINGERHUT: We did vote on

3 that.

4 MR. WALCZAK: We did vote on that?

5 MR. FINGERHUT: We're on C.

6 MR. WALCZAK: Yeah, that's not

7 what it says. No, I'm reading C. If

8 Parcel E is subject to the --

9 UNIDENTIFIED SPEAKER: That comes

10 from B.

11 MR. WALCZAK: All right. So we

12 don't need that so we really only need

13 two motions.

14 MR. FINGERHUT: Right. What

15 effect --

16 MR. WALCZAK: All right. So --

17 UNIDENTIFIED SPEAKER: What effect

18 does it have on Parcel E?

19 MR. CUTRER: In response to the

20 judge's question of If Parcel E is

21 subject to the LMO's PD-2 Overlay

22 District, what effect on Parcel E

23 development does this have?

24 MS. LAUDERMILCH: I will move that

25 because we've determined Parcel E is

1 subject to the LMO's PD-2 Overlay
2 District we need to take into
3 consideration the existence of the PD-2
4 Overlay District and it's regulation as
5 we consider development for Parcel E.

6 MR. CUTRER: Second.

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

9 Teresa, will you please call the
10 roll.

11 MS. HALEY: Mr. Walczak?

12 MR. WALCZAK: For the motion.

13 MS. HALEY: Mr. Johnson?

14 MR. ROBERT JOHNSON: For the
15 motion.

16 MS. HALEY: Mr. Fingerhut?

17 MR. FINGERHUT: For the motion.

18 MS. HALEY: Mr. Cutrer?

19 MR. CUTRER: For the motion.

20 MS. HALEY: Mr. White?

21 MR. WHITE: For the motion.

22 MS. HALEY: Ms. Laudermilch?

23 MS. LAUDERMILCH: For the motion.

24 MR. FINGERHUT: Thank you. Okay.

25 Now, the PD Overlay District, it

1 has to be -- overlay regulations must
2 be considered in the development of
3 Parcel E, that's what we voted on.

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

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

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

14 MS. LAUDERMILCH: Yes.

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

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

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

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

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

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

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

25 MR. CUTRER: The motion is how do

1 we take that into account?

2 MR. FINGERHUT: Well, that's after

3 we -- the answer is yes.

4 MR. WALCZAK: Why don't we just

5 say that we move that the existing

6 development of other parcels must be

7 taken into account.

8 MS. LAUDERMILCH: Yes --

9 MR. ROBERT JOHNSON: I've got one

10 objection to it being one total and

11 then when you made your --

12 UNIDENTIFIED SPEAKER: You

13 discussed the motion when first you

14 should ask is there a second to the

15 motion, if it doesn't then you have

16 another option.

17 MR. FINGERHUT: I'm not sure I

18 would restate that as a motion. I'm

19 not --

20 MR. WALCZAK: I'll withdraw.

21 MR. CUTRER: I have a -- did we

22 not just vote in the affirmative the

23 answer to the judge's question that,

24 what effect does that have on the

25 development of Parcel E and must the

1 existing development on the other
2 parcels within that PD-2 Overlay
3 District be taken into account?

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

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

14 MR. CUTRER: Second.

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

18 MR. CUTRER: Second.

19 MS. HALEY: Mr. Walczak?

20 MR. WALCZAK: For the motion.

21 MS. HALEY: Mr. Johnson?

22 MR. ROBERT JOHNSON: For the
23 motion.

24 MS. HALEY: Mr. Fingerhut?

25 MR. FINGERHUT: For the motion.

1 MS. HALEY: Mr. Cutrer?

2 MR. CUTRER: For the motion.

3 MS. HALEY: Mr. White?

4 MR. WHITE: For the motion.

5 MS. HALEY: Ms. Laudermilch?

6 MS. LAUDERMILCH: For the motion.

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

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

14 MR. FINGERHUT: I would agree.

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

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

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

24 MR. FINGERHUT: There isn't a
25 motion. I would be happy to make one.

1 MR. CUTRER: I move -- I offer the
2 following motion, that the Board of
3 Zoning Appeals uphold the
4 determination -- I offer the following
5 motion;

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

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

13 Because Parcel E is in a PD-2
14 Overlay District Parcel E is subject to
15 the LMO's PD-2 district regulations and
16 that the development of Parcel E is
17 governed by the PD-2 Overlay District
18 regulations and the existing
19 development on the other parcels within
20 that PD-2 Overlay District must be
21 taken into account with connection or
22 in connection with any proposed
23 development of Parcel E.

24 The further finding of fact, that
25 the property is composed of three

1 separate significant parcels and one
2 not significant, that one being the
3 road right-of-way.

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

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

10 The Spinnaker property, Parcel F
11 complies with the current LMO as well
12 as the PD-2 Overlay District because it
13 is a legally conforming development,
14 legally nonconforming development with
15 respect to density.

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

22 And further, that failure to
23 sustain the staff's determination
24 would, pursuant to the Lucas case,
25 cause all economic utility to be zoned

1 out of existence and that would result
2 in a taking which we should not do.

3 That's my motion.

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

6 MR. FINGERHUT: Any discussion on
7 the motion before we vote? Teresa,
8 please call the roll.

9 MS. HALEY: Mr. Walczak?

10 MR. WALCZAK: Against the motion.

11 MS. HALEY: Mr. Johnson?

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

14 MS. HALEY: Mr. Fingerhut?

15 MR. FINGERHUT: Against the
16 motion.

17 MS. HALEY: Mr. Cutrer?

18 MR. CUTRER: For the motion.

19 MS. HALEY: Mr. White?

20 MR. WHITE: For the motion.

21 MS. HALEY: Ms. Laudermilch?

22 MS. LAUDERMILCH: Against the
23 motion.

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

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

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

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

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

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

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

22 MR. JOHNSON: It does.

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

25 The LMO determination is upheld.

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

10 MR. FINGERHUT: Right, right.

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

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

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

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

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

24 MR. FINGERHUT: Anybody interested
25 in reconsidering their position on

1 affirmative?

2 Okay. Hearing no interest in
3 doing so at 6:20 then we move on to the
4 next item on the agenda and this appeal
5 is closed.

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

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1 C E R T I F I C A T E

2

3 STATE OF GEORGIA:

4 CHATHAM COUNTY:

5

6 I, Kyle J. Saniga, Court Reporter and
7 Notary Public in and for the above county and
8 state, do hereby certify that the foregoing
9 testimony was taken before me at the time and
10 place herein-before set forth; that the witness
11 was by me first duly sworn to testify to the
12 truth, the whole truth, and nothing but the
13 truth, that thereupon the foregoing testimony
14 was later reduced by computer transcription; and
15 I certify that this is a true and correct
16 transcript of my stenographic notes so taken.

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

20

21

22

23 _____
 Kyle J. Saniga, CCR

24 Notary Public, B-2038

25 Savannah, Georgia

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- BZA BEACHWALK TRANSCRIPT**

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STATE OF SOUTH CAROLINA

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

COUNTY OF BEAUFORT

APPLICATION FOR APPEAL
NO. APL-001673-2016



MEMORANDUM ON SUBPOENA AND TOWN RESPONSE

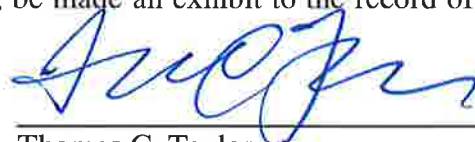
In her Memorandum of August 1, 2018, Nicole Dixon “interprets” the LMO in a manner to say that the average density requirement of LMO Section 16-3-106.G.4 simply does not apply to Parcel E. Because that position is such a tortured interpretation of the LMO--basically amounting to the disregarding of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

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

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

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

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



Thomas C. Taylor
Counsel for Petitioners/Appellants

August 27, 2018

Tom Taylor

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

Tom,

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

R/

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

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

Brian-

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

Regards-

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

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

Teri,

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

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

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

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

To: Hulbert Brian

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

Subject: request for copies of subpoenaed documents in Beachwalk

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

All counsel are copied along with the Chairman.

Tom

Thomas C. Taylor

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

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

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**SUBPOENA
BOARD OF ZONING APPEALS**

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

STATE OF SOUTH CAROLINA

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BEFORE THE
BOARD OF ZONING APPEALS
FOR THE
TOWN OF HILTON HEAD ISLAND, SC

COUNTY OF BEAUFORT

APPLICATION FOR APPEAL
APL-001673-2016

**EXHIBIT A
TO SUBPOENA TO TERI LEWIS**

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

ATTACHMENT H

EXHIBIT
2

**TOUR CENTER PUD
ANALYSIS OF PUD USES
APPROVED AND PROPOSED**

Uses	PUD AS APPROVED			PROPOSED			CRANGES
	Area (Acres)	S.F. of Units	Density	Area (Acres)	S.F. of Units	Density	
Commercial/Office	2.3	36,000	15652 sf/A	1.4	21,913	15652 sf/A	14087 sf reduction
Commercial/Retail	4.3	52,000	12093 sf/A	3.0	36,279	12093 sf/A	15721 sf reduction
Hotel/Motel	1.0	50 rms.	50rm/A	2.6	94 rms.		44 room increase
Common Open Space	—	—	—	1.3	—	24 cm/A	
Residential	7.5	222 u.	29.6 u/A	6.8	200 u.	29.4 u/A	22 unit reduction
TOTALS	15.1	<u>88,000 sf</u> 242 u.	<u>5822 sf/A</u> 16 du/A	15.1	<u>58,152 sf</u> 238 u.	<u>3884 sf/A</u> 15.67 du/A	<u>25808 sf reduction</u> 4 unit reduction

* The total area required for the proposed 54 room motel as a special exception within the R9-1 Zoning District (at 24 rooms/acre) is 3.9 acres. The motel would have to be developed on a 3.9 acre site or as shown in the table. The acreage not utilized for the motel would be set aside as common open space not to be used for any other development or open space requirements.

May 5, 1987

15.1
- 2.9

91	HOEL	15.1	6.026 r/ac
5262	SF COM	15.1	348.48 SF/ac
19.8		15.1	13.113 UNIT/ac

~~8700 SF/ac~~





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 VARIANCE

Case #:	Public Hearing Date:
VAR-001924-2018	September 24, 2018

Parcel or Location Data:	Property Owner	Applicant
<u>Address:</u> 58 Broad Pointe Dr. <u>Parcel:</u> R510 011 000 0257 0000	Greg Poe 49 Haul Away Hilton Head Island, SC 29928	David McNair McNair Building Construction, Inc. P.O. Box 21468 Hilton Head Island, SC 29925

Application Summary:

David McNair of McNair Building Construction, Inc, is requesting a variance from LMO Section 16-6-102.D, Wetland Buffer Standards, to build a residential pool in the 20-foot tidal wetland buffer and five-foot wetland buffer setback. The property is located at 58 Broad Pointe Drive and is owned by Greg and Pam Poe.

Staff Recommendation:

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.

If the Board of Zoning Appeals approves the application, Staff recommends the following condition of approval: The applicant shall provide native wetland vegetation in other portions of the wetland buffer on the property per a planting plan approved by Town Staff.

Background:

The subject property is somewhat of a peninsula surrounded by the tidal wetlands of Broad Creek. Tidal wetlands are defined as critical areas by the South Carolina Department of Health and Environmental Control's (DHEC) Office of Coastal Resource Management (OCRM). The edge of a tidal wetland, the Critical Line, is delineated by OCRM using the existing occurrence of native, tidal wetland vegetation. This can be supported by the understanding that if certain marker species of salt and wet soil tolerant vegetation are present, then the tidal wetland is present. The Critical Line is drawn to encompass the extents of the vegetation and to ensure the areas populated by this vegetation are protected as wetland.

Understanding the implications or potential impact by development of the property, the property owners began planning a single family residence in 2016 prior to purchasing the property. In 2017, the applicant corresponded with Town Staff to review the OCRM and Town Tidal Wetland Standards

that could impact the property owner's plans for the property. What follows is a description of construction and permitting events pertaining to this case. A timeline has been included for reference in Attachment H.

In September 2016, the OCRM Critical Line was reviewed and certified by Paul Wojoski with OCRM. This determination was used to establish the Town Tidal Wetland buffer of 20-feet as per LMO Section 16-6-102.D requirements. This OCRM Critical Line with the buffer are shown on Attachments C, page 1 and Attachment D. Not shown is the five-foot wetland buffer setback that should have been incorporated onto the plan. The property was purchased in October, 2016. In early 2017, emails included in the applicant's submittal, Attachment B, verify the early inquires to confirm the property setbacks and buffers with Community Development Staff. At this time, a pool was part of the conversation as a critical element of importance to the property owners.

On January 29, 2018, the property with silt fence installation was inspected by Rocky Browder, Environmental Planner, with the applicant, as per building permit pre-clear requirements. On February 1, 2018, a building permit for construction of the home including grading, driveway, parking and pool deck were issued. While details about the pool were included in the plans submitted for this building permit, the pool structure is required to have a stand-alone permit, which was applied for at a later date. Construction of the home began in February. By June, 2018, the exterior, service yards, roof and stucco for the home were complete except for the pool deck, which was put on hold to construct concurrently with the pool once the pool permit is obtained.

In late June, 2018, the pool contractor submitted plans for the pool permit. Town permits for pool construction are valid for six months, and when access allows, pools are more safely built when exterior cladding of homes are complete. This offset in time allows for safe construction of an in-ground pool on the construction timeline.

As is required for issuance of pool permits, another pre-clear inspection of the site and silt fence was conducted by Rocky Browder on July 26, 2018. At this time, Mr. Browder determined the previously delineated OCRM Critical Line by Mr. Wojoski with OCRM was potentially incorrect and the inspection failed. Trent Shaw with OCRM was requested to visit the site and resurvey the OCRM Critical Line for the property. A field determination was made in late July and a revised survey showing the revised OCRM critical line of the site was issued to the applicant dated July 31, 2018. See Attachments C, page 2 and Attachment E showing the revised critical line. During this process, the permit application for the pool construction was put on hold, as was construction of the pool deck.

The OCRM Critical Line resurveyed by Mr. Shaw greatly reduced the buildable area of the property as shown in Attachments E and F. Prior to the change in the OCRM line, approximately 14,570 square feet (57.5%) of the site was accessible for development. After the change in the OCRM line, approximately 9,240 square feet (36.5%) of the site remained accessible for development. This is a significant reduction in area, and the resulting new tidal wetland buffer is located landward enough to encompass the area that had previously been permitted for a pool deck and pool. Enforcing the five-foot buffer setback further reduces the area. The applicant has been permitted to finalize the construction of the property as per the approved building permit so as to not hold up the home construction timeline; however, the decision was made to hold on constructing the pool deck since it relies on approval of the pool itself.

Given the circumstance and effect of an OCRM Critical Line alteration for the property in the middle of the construction timeline, the applicant is requesting a variance from the newly defined tidal wetland buffer and buffer setback in order to move forward with construction of the pool and pool deck as proposed. Currently, the pool permit and construction of the pool deck are still on hold.

Applicant's Grounds for Variance, Summary of Facts and Conclusions of Law:**Grounds for Variance:**

The applicant states the variance is necessary because enforcement of the tidal wetland 20-foot buffer and five-foot buffer setback based on a newly defined OCRM Critical Line would unreasonably prohibit any construction of the pool, a primary essential part of the project since inception. The plans for the property were designed with outdoor living space and indoor orientations that considered the pool location in terms of the OCRM Critical Line and resulting buffer. This was established prior to their purchase of the property and approved when inspected for the building permit. The pool and pool deck were not originally designed to be in the buffer and would not have originally required a variance for approval. The property owners did not anticipate the possibility for the OCRM Critical Line to be relocated after their purchase of the property or during construction in a way that would affect plans that were already approved by the Town and Indigo Run ARB. See Attachments B, C and G for items submitted by the applicant for this case.

Summary of Fact:

- The applicant seeks a variance as set forth in LMO Section 16-2-103.S.

Conclusion of Law:

- The applicant may seek a variance as set forth in LMO Section 16-2-103.S.

Summary of Facts and Conclusions of Law:**Summary of Facts:**

- Application was submitted on August 14, 2018 as set forth in LMO Section 16-2-102.C and Appendix D-19.
- Notice of the Application was published in the Island Packet on September 2, 2018 as set forth in LMO Section 16-2-102.E.2.
- Notice of the Application was posted on September 7, 2018 as set forth in LMO Section 16-2-102.E.2.
- Notice of Application was mailed on August 30, 2018 as set forth in LMO Section 16-2-102.E.2.
- The Board has authority to render the decision reached here under LMO Section 16-2-102.G.

Conclusions of Law:

- The application is in compliance with the submittal requirements established in LMO Section 16-2-102.C.
- The application was submitted 41 days prior to the meeting, therefore meeting the 30 day deadline required in the LMO.
- Notice of application was published 22 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
- Notice of application was posted 17 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.
- Notice of application was mailed 25 days prior to the meeting, therefore meeting the 15 day deadline required in the LMO.

- The application and notice requirements comply with the legal requirements established in LMO Section 16-2-102.E.2.

As provided in LMO Section 16-2-103.S.4, Variance Review Standards, a variance may be granted in an individual case of unnecessary hardship if the Board determines and expresses in writing all of the following findings of fact.

Summary of Facts and Conclusions of Law:

Criteria 1: There are extraordinary and exceptional conditions pertaining to the particular piece of property (LMO Section 16-2-103.S.4.a.i.01):

Findings of Fact:

- The subject property is an odd-shaped peninsula surrounded by tidal wetlands at the end of a street.
- Due to the wetlands, the property owners and their builder conducted thorough investigation of the buildable area on the lot prior to purchasing the property and submitting building plans for permits.
- The Town issued a building permit on February 1, 2018 for the house with required grading, parking, driveway and pool deck approved based on the 20-foot wetland buffer for the OCRM Critical Line certified by Mr. Wojoski from OCRM in September 2016.
- At this time, the five-foot buffer setback as per LMO Section 16-6-102.D.2, Note #3, was erroneously not enforced by the Town.
- The OCRM Critical Line was revised on July 27, 2017 by Mr. Shaw with OCRM as a result of a field inspection for the pool permit conducted by Rocky Browder.
- The revised OCRM Critical Line reflects the encroachment of the wetland onto the property since the previous Critical Line determination and building permit inspection. This resulted in the significant reduction of buildable area on the property from approximately 57.5% to 36.5%, which impacted the previously approved location for the pool deck, and the location of the pool under review for permitting.

Conclusions of Law:

- Staff concludes this application **meets the criteria** as set forth in LMO Section 16-2-103.S.4.a.i.01 because there are extraordinary and exceptional conditions that pertain to the specific property.
- Due diligence conducted by the property owners prior to purchasing the property and prior to developing building plans suggests they would not have moved forward with the project if today's OCRM Critical Line delineation with resulting buffer and setback had been apparent in 2016 and 2017.
- The encroachment of the wetland with a change in official determination of the OCRM Critical Line over a short amount of time created a significant enough change to the buildable area on the lot to negatively impact previously approved plans and construction.
- The revised OCRM Critical Line moved the Town enforced tidal wetland buffer landward to envelope the previously approved location for the pool deck, as well as the pool location under review for a Town pool permit.

Summary of Facts and Conclusions of Law:

Criteria 2: These conditions do not generally apply to other properties in the vicinity (LMO Section 16-2-103.S.4.a.i.02):

Findings of Fact:

- None of the other properties in the vicinity on the tidal wetland subject to state regulation through OCRM have experienced significant change in buildable area due to the encroachment of the wetland requiring a re-determination of the OCRM Critical Line during construction.
- None of the other properties in the vicinity had their buildable area revised and significantly reduced after building permits were issued and during construction, such that previously approved elements of the plan were newly placed in the Town’s tidal wetland buffer and buffer setback.

Conclusions of Law:

- Staff concludes that this application does meet the criteria as set forth in LMO Section 16-2-103.S.4.a.i.02 because these extraordinary conditions do not apply to other properties in the vicinity.
- While there are properties adjacent to the subject property on the tidal wetlands of Broad Creek, none of them have had a change to their previously determined OCRM Critical Line, thereby reducing the buildable area on the lot after building permits were issued and during construction.
- None of the adjacent properties had elements of a previously approved plan under construction subjected to a newly relocated tidal wetland buffer and buffer setback.

Summary of Facts and Conclusions of Law:

Criteria 3: Because of these conditions, the application of this Ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property (LMO Section 16-2-103.S.4.a.i.03):

Findings of Fact:

- LMO Section 16-6-102.D, *Wetland Buffer Width*, states that wetland buffers shall comply with the minimum width standards in the “Wetland Buffer Width” table. For single-family homes, the minimum buffer width for tidal wetlands is 20-feet. Note #3 in the table further states that “Buildings, surface parking lots, and vehicular accessways shall be set back at least five-feet beyond the outer edge of the wetland buffer.”
- At this stage in construction, it would be unreasonable to enforce a newly defined tidal wetland buffer and buffer setback for portions of the property already approved for development.
- The property owners and their builder have been compliant with Town regulations since the early stages of planning the property development and have always intended to build a pool surrounded by a pool deck as shown on the approved plans.
- The property owners have plans for the home and pool deck with supporting features permitted by the Town and certified by OCRM.

- The property owners have plans for the home, pool deck and pool approved by the Indigo Run ARB.

Conclusions of Law:

- Staff concludes that this application does meet the criteria as set forth in LMO Section 16-2-103.S.4.a.i.03 because the extraordinary conditions that now apply to this property unreasonably restrict use of the property.
- Enforcement of the new tidal wetland buffer and buffer setback would prohibit the construction of a pool, an essential part of the design and plan for the home since the beginning, as well as the pool deck, a previously permitted structure.
- Enforcement of the new tidal wetland buffer and buffer setback would unreasonably restrict the utilization of the property as intended with already approved outdoor living spaces designed concurrently with a home that has already been constructed.

Summary of Facts and Conclusions of Law:

Criteria 4: The authorization of the Variance will not be of substantial detriment to adjacent property or the public good, and the character of the zoning district where the property is located will not be harmed by the granting of the Variance (LMO Section 16-2-103.S.4.a.i.04):

Findings of Fact:

- The PD-1 Indigo Run master plan is primarily comprised of communities with single-family homes, many of which have pools. In the Owners Club Broad Pointe community, approximately 27 lots are subject to the OCRM critical line due to their location on the tidal wetland. Of these, nine lots are vacant, and nine developed lots have pools on the wetland side of the property.
- Most the single-family homes in this zoning district are inland and not located on a tidal wetland.
- The adjacent property sharing a property boundary with the subject property is vacant and owned by the applicants.
- The applicant has offered to plant other portions of the buffer not occupied by the pool and pool deck to lessen the impact of the pool construction in the buffer.
- The location of the pool on the property is not visible from other properties.

Conclusion of Law:

- Staff concludes that this application does meet the criteria as set forth in LMO Section 16- 2-103.S.4.a.i.04 because the variance will not be a detriment to the adjacent property or public good.
- The overall character of Indigo Run is single-family homes, most of which are not located on tidal wetlands. A very small percentage of homes in this zoning district are located on tidal wetlands, and many of these homes do have pools adjacent to the wetlands. The addition of a pool for the subject property would not be a detriment to the character of the zoning district.
- The property owner has offered to landscape remaining areas of the wetland buffer with native plants to offset the impact of the pool. This will be beneficial to the property and the wetland buffer.

- Based on the pool's location on the property, it will not be visible from other properties or be a detriment to the community.

LMO Official Determination:

Based on the above Findings of Facts and Conclusions of Law, the LMO Official determines that the request for a variance should be granted to the applicant with the following condition: The applicant shall provide native wetland vegetation in other portions of the wetland buffer on the property per a planting plan approved by Town Staff.

BZA Determination and Motion:

The "powers" of the BZA over variances are defined by the South Carolina Code, Section 6-29-800, and in exercising the power, the BZA may grant a variance "in an individual case of unnecessary hardship if the board makes and explains in writing ..." their decisions based on certain findings 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, Disapprove the application, or Approve with Modifications. Findings of Fact and Conclusions of Law must be stated in the motion.

PREPARED BY:

TL
Taylor Ladd, Senior Planner

September 17, 2018
DATE

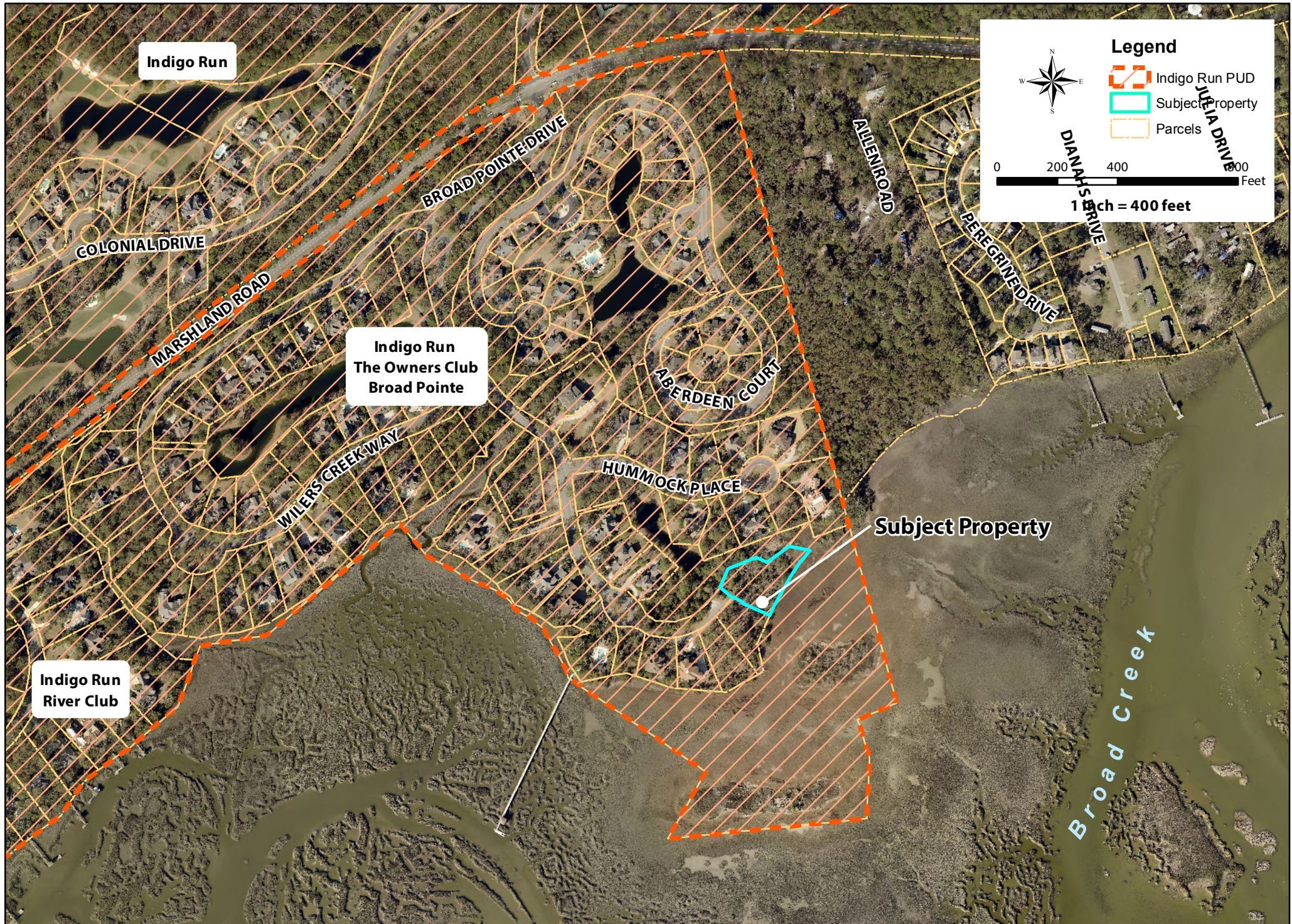
REVIEWED BY:

ND
Nicole Dixon, CFM, Development Review
Administrator

September 17, 2018
DATE

ATTACHMENTS:

- A) Vicinity Map
- B) Applicant's Narrative
- C) Applicant's Site Plans
- D) 2016 OCRM Critical Line and Buffer Exhibit
- E) 2018 OCRM Critical Line and Buffer Exhibit
- F) OCRM Critical Line and Buffer Comparison Exhibit
- G) Applicant's Site Photos
- H) Timeline



58 Broad Pointe Drive and Vicinity
VAR-001924-2018

August 8, 2018

Chairman and Honorable Members

Board of Zoning Appeals
Town of Hilton Head
One Town Center Court
Hilton Head, SC 29928

Re: Variance Request, LMO Section 16-6-102, wetland buffer standards. for 20 ft. Wetlands Buffer Lot 48 Broad Point, Indigo Run, HHI; Greg and Pam Poe Residence under construction

Dear Chairman and Honorable Members,

As an Island Builder since 1983, we provide our best efforts to satisfy our customers, Architectural Review Boards, and the Town of Hilton Head for each home we build, and we continue that effort with this request for a variance exception for the pool to be constructed within the 20 foot buffer from the July 27th, 2018 relocated OCRM Critical Line as required within **LMO Section 16-6-102, wetland buffer standards.**

To generally summarize our predicament, below we've identified the major affecting events in a sequential order to provide an easier explanation. Generally they are as follows: (further details and conversations are more fully documented with attachments, also additional details are available upon request):

1. Planning for the single-family property use, design, and construction began before Greg and Pam Poe's land purchase. Including establishment of the OCRM Critical line on a Tree and Topo 09/29/2016, Certified by Mr. Paul Wojoski with DHEC/OCRM (See Highlighted Plans attached for reference and a copy of the original 2018 Town Permit Set site-plan).
2. Home and Pool plans were developed together for approvals of the Indigo Run ARB and issuance of a Town of Building Permit February 1st 2018 after a field inspection of the critical line and silt barrier with David McNair (myself) and Mr. Rocky Browder, Town Inspector, Environmental Planner, January 29th 2018 while walking the silt fence with plans in hand. There was no mention of any concern for the location of the OCRM Critical Line or fence location from Mr. Browder. The plans submitted to the Town for permitting included details for the pool, pool deck, house stairs on the pool deck, pool equipment yard, electrical for pool, grading for pool, and all other details for the home construction, and the silt barrier was located accordingly. The permit from the Town included the construction of the driveways, parking, grading, pool deck, and pool equipment yard.
3. Construction of the home began immediately thereafter, and in less than 6 months, the scaffolding was removed, stucco, roofing, and exterior of the structures completed including service yards. According to our construction time line, July 2018 was time for the start of the pool shell construction. The pool deck (part of the original home construction permit and square footages) was a part of the house Town Building Permit.
4. On June 28, 2018, Year Round Pool Co., Inc. began their normal process submitting for the Town Permit for the pool construction. Town permits for pool construction are valid for 6 months, and

Attachment B
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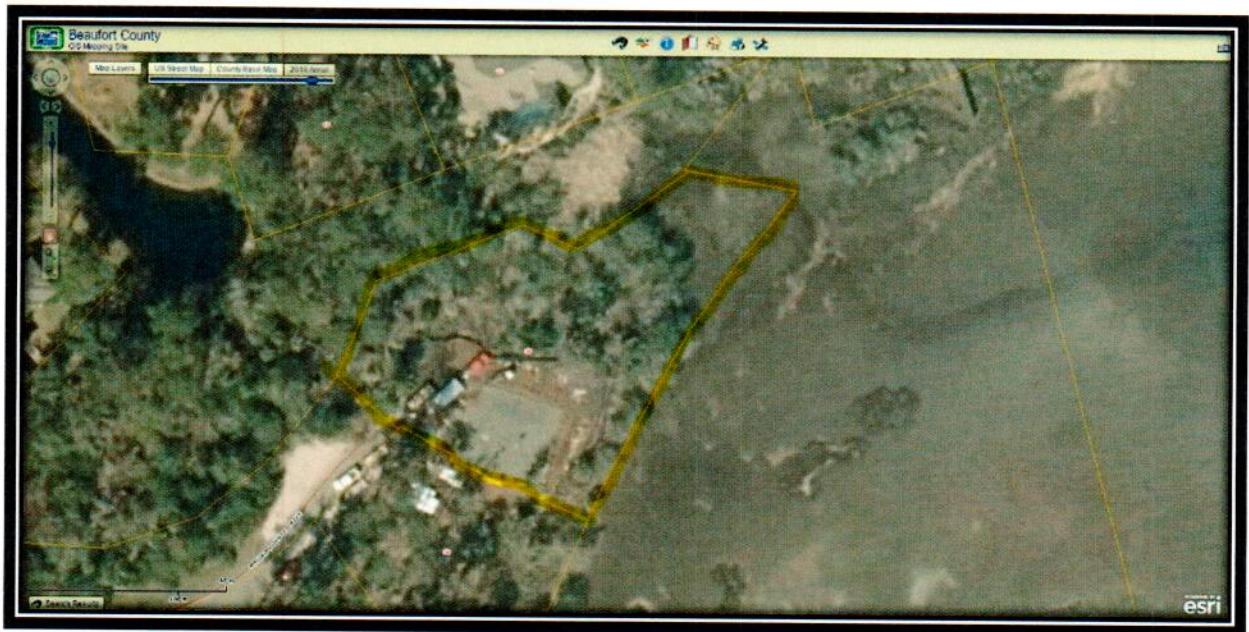
- when access allows, pools are more safely built (not having an open hole) when exterior cladding of homes are completed, and finished at the same time as the home's certificate of occupancy.
5. Prior to issuance of a Town permit for a single family pool, if the pool is on a site with an OCRM Critical line, silt fences shall be installed and inspected prior to issuance of the pool permit, despite the necessity that the contractor has to insure that the silt fence remains functional as a critical structure during the process of the original house building permit. In this case, the inspection by Rocky Browder, Thursday July 26th 2018 with McNair Building Construction, Inc. project manager Leon Rivchun, at which time the silt fence installation inspection was failed since Rocky felt the OCRM Paul Wojoski Certified Critical Line noted on our surveyed plans was incorrect, despite Rocky's inspection February 1, 2018, less than 6 months before. Follow-up conversations indicated that Rocky thought the OCRM Critical line should be re-identified by DHEC/OCRM with an on-site inspection by Trent Shaw, and resurveyed and provided to the town before any further review of the Town pool permit would occur. Friday, July 27th, 2018, it is our understanding, Mr. Browder and Mr. Shaw met at the site, reidentified the OCRM Critical line, at which point we requested a survey update by Coastal Surveying, Monday, July 30th. (See survey attached).
 6. Follow-up conversations with Mr. Browder, and Ms. Nicole Dixon at the Town, indicated we could proceed with all construction originally permitted under the Town's Building Permit for the home construction. We explained that the construction of the pool deck as shown on the plans made no sense without the pool, so we would proceed with the rest of the exterior work and apply for a variance for the pool construction prior to the pool deck construction. We will also work to determine an alternate construction detail for the home's exterior pool deck stair construction, which stairs were to bear on the pool deck area, to help the Poe's home project schedule to progress while awaiting this appeal process.

This home design and construction project has been an exciting and enjoyable undertaking for our customers Greg and Pam Poe. We became involved in this property prior to the Poe's purchase of lot 48 (58) and lot 46 (56) Broad Point Landing October 6, 2016 to help evaluate the property and it's potential to meet the Poe's needs. After their purchase, and as Greg and Pam decided to move forward with a home concept for lot 48, we contacted the Town of Hilton Head Community Development Office, Donna Horsman and Nicole Dixon, February 9, 2017 and March 28, 2017 (via emails attached) to clarify and confirm setbacks prior to proceeding with preliminary and final house and pool plans, in which the emails expressed the inclusion of a pool with our plans, which was deemed in our emails as "*critical importance to the owners*" and if this variance is not approved, enforcement of the 20 ft buffer would unreasonably prohibit any construction of a pool, the primary essential part of the project since inception. Nicole Dixon was extremely helpful with these setback clarifications, and the design process moved forward into PUD review boards. The property is certainly unique, since it is somewhat of a peninsula lot with wetlands on two sides (as can be seen in the Google image attached) and at the end of the street. All plans approved by the Indigo Run Architectural Review Board were submitted to the Town and ARB with the pool plans, pool decks, pool equipment yard, grading plans, and final approval by the ARB was received November 6, 2017 (see letter included). The plans, since their inception in early 2017, were designed with outdoor living space and indoor orientations which considered the pool with each step of the process (for example: Lanai under house, decks over-looking the pool, outside pool shower, and exterior stairs on the pool deck from the first floor). The pool and home design together were the reason Greg and Pam Poe decided to build on Lot 48 instead of the adjacent lot 46 (56) (which they purchased at the same time as lot 48 (58))

Attachment B
VAR-001924-2018

which is now on the market and for sale. The hardship is the potential loss of the emotional, financial, and time investments since 2016 associated with this property, design, and home construction. The pool has always been a part of the plan and intentions for the project. Design started in 2017 and construction started February 5th of 2018 with the knowledge of a current certified OCRM Critical Line 9/29/16, and reaffirmation by the Town February 1 of 2018. Construction is complete for the: pool shower area, the lanai area, pool equipment yard and associated electrical to the pool equipment (pool pumps, heater, etc. not installed). With this new July 31, 2018 abrupt and dramatic shift in the interpretation of the location of the DHEC/OCRM Critical line, 21+% more of the property has been lost since the Town's Building Permit issuance February 2, 2018, together with the original expected loss, a total 63.3% is lost to wetlands and LMO setbacks, and therefor pool construction is prohibited and no longer possible without an approved LMO variance.

This property is the last lot on the street, and the adjacent property is owned by Greg and Pam Poe. No other property is detrimentally affected by this pool installation. It is our understanding that the pool deck would be installed under the original construction permit if the variance for the pool shell is not granted and in either case, no views or property are affected in any way.

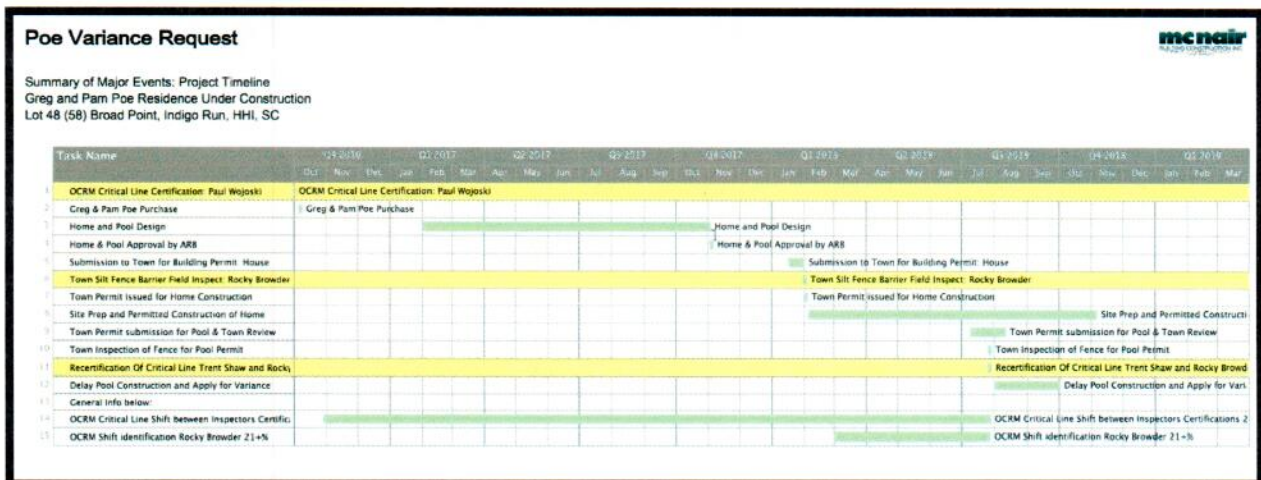


**Attachment B
VAR-001924-2018**

Below is an image from Google Earth on/or about March 12, 2018.



Below is a critical path schedule representing the major events in a timeline format:



**Attachment B
VAR-001924-2018**

Poe Variance Request

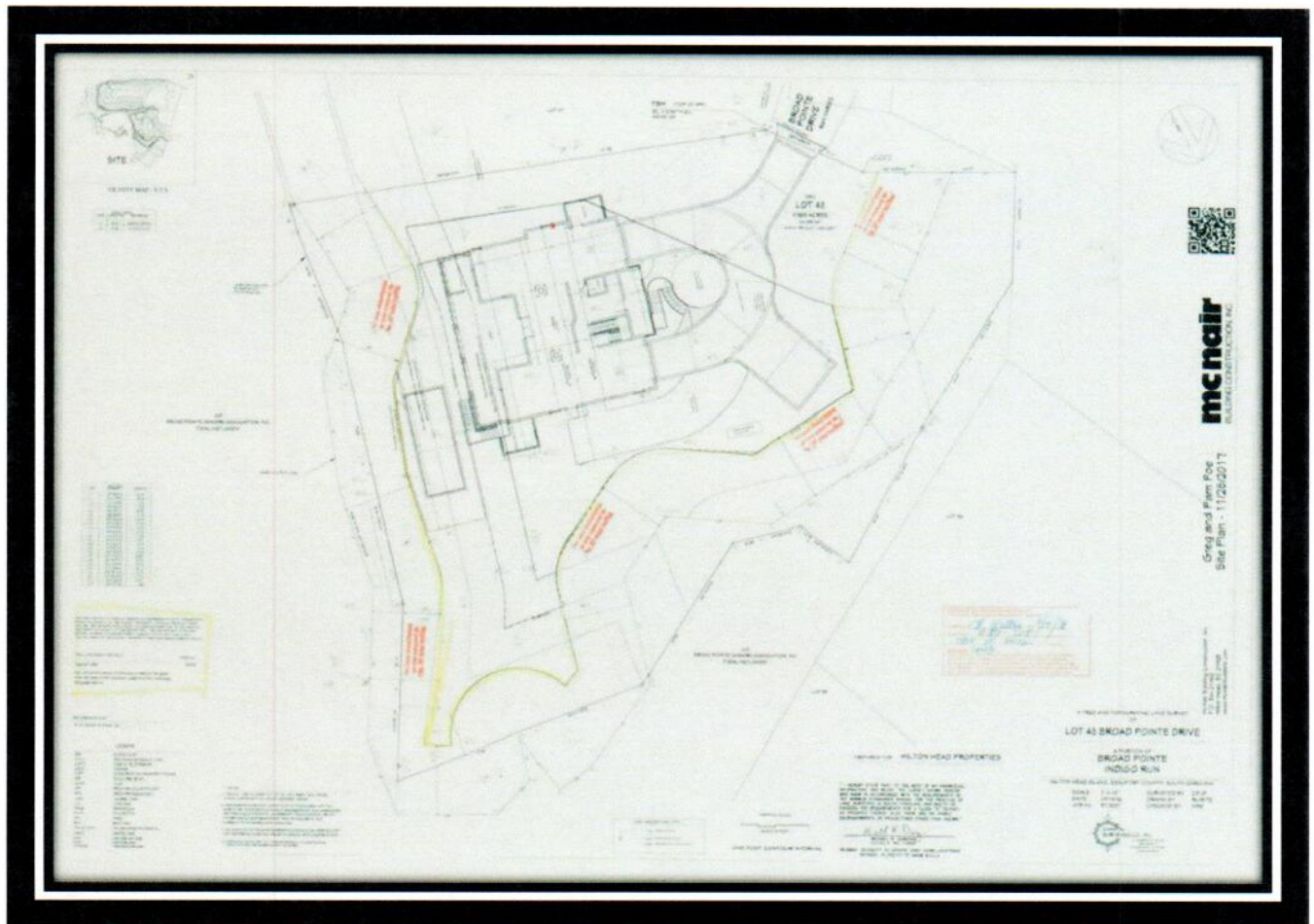


Summary of Major Events: Project Timeline
Greg and Pam Poe Residence Under Construction
Lot 48 (58) Broad Point, Indigo Run, HHI, SC

Task Name	Q4 2016			Q1 2017			Q2 2017			Q3 2017			Q4 2017			Q1 2018			Q2 2018			Q3 2018			Q4 2018			Q1 2019					
	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar			
1 OCRM Critical Line Certification: Paul Wojoski	OCRM Critical Line Certification: Paul Wojoski																																
2 Greg & Pam Poe Purchase	Greg & Pam Poe Purchase																																
3 Home and Pool Design				Home and Pool Design																													
4 Home & Pool Approval by ARB													Home & Pool Approval by ARB																				
5 Submission to Town for Building Permit: House													Submission to Town for Building Permit: House																				
6 Town Silt Fence Barrier Field Inspect: Rocky Browder													Town Silt Fence Barrier Field Inspect: Rocky Browder																				
7 Town Permit issued for Home Construction													Town Permit issued for Home Construction																				
8 Site Prep and Permitted Construction of Home													Site Prep and Permitted Construction of Home																				
9 Town Permit submission for Pool & Town Review																Town Permit submission for Pool & Town Review																	
10 Town Inspection of Fence for Pool Permit																Town Inspection of Fence for Pool Permit																	
11 Recertification Of Critical Line Trent Shaw and Rocky																Recertification Of Critical Line Trent Shaw and Rocky																	
12 Delay Pool Construction and Apply for Variance																Delay Pool Construction and Apply for Variance																	
13 General Info below:																																	
14 OCRM Critical Line Shift between Inspectors Certific	OCRM Critical Line Shift between Inspectors Certific																																
15 OCRM Shift identification Rocky Browder 21+%																OCRM Shift identification Rocky Browder 21+%																	

Attachment B
VAR-001924-2018

Below is the scan of the Siteplan with Town of HH Red Stamps, with no red X on pool area deck, etc. Building Permit set for Home and Site Construction as currently being used for construction indicating previous 20 foot LMO Buffer from Critical Line.



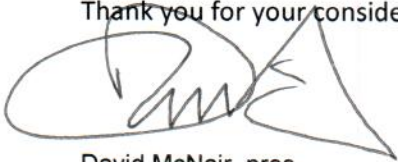
We meet all of the “Variance Criteria” listed in the application for an approvable variance as it relates to LMO Section 16-6-102, Wetland Buffer Standards. Summarizing those as follows:

1. The conditions associated with this piece of property are exceptional and extraordinary, as the OCRM Critical line and buffer have been revised substantially and extraordinarily significantly during less than 6 months since the start of the permitted house construction thereby preventing the expected issuance of the pool construction permit due to the shift of the OCRM Critical Line and the 20 foot buffer respectively. Permission for the pool deck construction is provided with the original house building permit, but is delayed until the pool is built, and the 20 foot revised OCRM buffer would be affected in either case.

Attachment B
VAR-001924-2018

2. This property is unique and surrounded on 2 sides with saltwater wetlands, no other properties should anticipate such a dramatic and more than 63% loss of property area to wetlands related to a reinterpretation of OCRM Critical line location in such a short period of time. The property is also located at the end of the street in Broad Point a part of Indigo Run.
3. Because of these conditions above, the application of the 20 foot buffer shift completely prohibits the completion of the design and construction concept of Greg and Pam Poe's home with pool, which planning began before the selection and purchase of this property.
4. The approval and authorization of this Variance will not be detrimental to any adjacent properties. The difference between the pool deck vs. no pool has no impact to adjacent properties. The Owner has agreed to plant materials within the buffer area which are in accordance with the LMO standards and native salt water tolerant species. Currently the adjacent property is owned by Greg and Pam Poe.

Thank you for your consideration,



David McNair, pres.

McNair Building Construction, Inc.

MAIL TO:

P.O. Box 21468

Hilton Head, SC 29925

Building on HH & Low-Country since 1983

Moss Creek Village

1533 Fording Island Road,

Suite 300

Hilton Head, SC 29926

843 681 9543 (O)

843 815 9556 (F)

www.mcnairbuilders.com



Town of Hilton Head Island
Community Development Department
One Town Center Court
Hilton Head Island, SC 29928
Phone: 843-341-4757 Fax: 843-341-2087
www.hiltonheadislandsc.gov

FOR OFFICIAL USE ONLY
Date Received: _____
App. #: _____
Form revised 10-2012

**AFFIDAVIT OF OWNERSHIP AND
HOLD HARMLESS PERMISSION TO ENTER PROPERTY**

The undersigned being duly sworn and upon oath states as follows:

1. I am the current owner of the property which is the subject of this application.
2. I hereby authorize MCNAIR BUILDING, CONSTRUCTION, INC to act as my agent for this application only.
3. All statements contained in this application have been prepared by me or my agents and are true and correct to the best of my knowledge.
4. The application is being submitted with my knowledge and consent.
5. Owner grants the Town, its employees, agents, engineers, contractors or other representatives the right to enter upon Owner's real property, located at _____ (address),
R510 011 000 0257 0000 (parcel ID) for the purpose of application review, for the limited time necessary to complete that purpose.
Description of Work: New Home and Pool
6. Owner agrees to hold the Town harmless for any loss or damage to persons or property occurring on the private property during the Town's entry upon the property, unless the loss or damage is the result of the sole negligence of the Town.
7. I acknowledge that the Town of Hilton Head Island Municipal Code requires that all construction in a Special Flood Hazard Zone be constructed in accordance with the following provisions that:
 - a. any enclosed area below the base flood elevation will be used solely for parking of vehicles, limited storage or access to the building. This space will never be used for human habitation without first becoming fully compliant with the Town's Flood Damage Controls Ordinance in effect at the time of conversion.
 - b. all interior walls, ceilings and floors below the base flood elevation will be constructed of flood resistant materials.
 - c. all mechanical, electrical and plumbing devices will be installed above base flood elevation.
 - d. walls of the enclosed area below base flood elevation will be equipped with at least two openings which allow automatic entry and exit of flood water. Openings will be on two different walls with at least one square inch of free area for every square foot of enclosed space and have the bottom of openings no more than a foot above grade.
 - e. the structure may be subject to increased premium rates for flood insurance from the National Flood Insurance Program.
8. I understand that failure to abide by Town permits, any conditions, and all codes adopted by the Town of Hilton Head Island deems me subject to enforcement action and or fines.

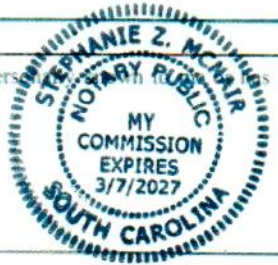
Print Name: GREGORY A. POE Owner Signature: [Signature]
 Phone No.: 440-479-8323 Email: gpoe@OUTLOOK.COM
 Date: 11/6/2017

The foregoing instrument was acknowledged before me by Gregory A. Poe, who is personally known to me, and who did not take an oath.

WITNESS my hand and official seal this 6 day of Nov, A.D. 2017

[Signature]
Notary Public Signature

My Commission expires 3/7/2027
Please affix seal or stamp.





McNair, David <david@hhbuilder.com>

Lot 48 Broad Point, Indigo Run

McNair, David <David@mcnairbuilders.com>
To: Horsman Donna <DonnaH@hiltonheadislandsc.gov>

Thu, Feb 9, 2017 at 9:02 AM

Donna,

Attached is a tree and topo survey for lot 48 Broad Pointe Drive, Indigo Run (Broad Point section). We have looked everywhere for a definition of the 40 ft. "Conservation District Buffer" that is noted on the plat and the tree and topo provided, and located at the rear of the property related to residential development. Coastal Surveying doesn't know what it is, and they did the original plat, but they didn't review the plat relative to the 40 ft. buffer (apparently). The only thing we can find indicates it is a commercial construction setback related to the LMO Sec 16-5-806-c (See the Notes on the plat 3A, 3B)

Can you ask someone to take a look at this and provide some clarify for us ?

Thanks very much !

Regards,

David

David McNair, pres.



McNair Building Construction, Inc.

MAIL TO:

P.O. Box 21468

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2 attachments

30632S-Broad Pointe- Subdivision.pdf
2108K



McNair, David <david@hhbuilder.com>

Lot 48 Broad Point, Indigo Run

McNair, David <David@mcnairbuilders.com>
To: Dixon Nicole <nicoled@hiltonheadislandsc.gov>
Cc: Horsman Donna <DonnaH@hiltonheadislandsc.gov>

Tue, Mar 28, 2017 at 9:28 AM

Nicole,

I understand you had a conversation this morning with Mike Dunnigan at Coastal Surveying regarding conservation setbacks referenced in the original property plats, and some of the other items we were concerned about back in February, referenced in your email below. We have been designing a home for lot 48 (58) Broad Point Drive since early February and it does indeed include a pool, which is of critical importance to the owners of this lot and the plan we are wrapping up. It was our understanding that the 40 ft. setback was indeed for commercial construction only and wouldn't relate to any residential construction. Attached is our site-plan we are currently working on for this home for Greg and Pam Poe. The pool doesn't infringe upon the 20 ft. OCRM setback, but it is within the 40 ft. commercial construction conservation district setback.

Are we correct in this matter per our previous correspondence ?

Regards,

David McNair, pres.



McNair Building Construction, Inc.

MAIL TO:

P.O. Box 21468
Hilton Head, SC 29925
Building on HH & Low-Country since 1983

Moss Creek Village
1533 Fording Island Road,
Suite 300
Hilton Head, SC 29926
843 681 9543 (O)
843 815 9556 (F)
www.mcnairbuilders.com

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On Mon, Feb 13, 2017 at 11:52 AM, Dixon Nicole <nicoled@hiltonheadislandsc.gov> wrote:

[Quoted text hidden]

Poe Siteplan 3.28.2017.pdf
970K

10/30/2017

McNair Builders Mail - Lot 48 Broad Point, Indigo Run



McNair, David <david@hhbuilder.com>

Lot 48 Broad Point, Indigo Run

Dixon Nicole <nicoled@hiltonheadislandsc.gov>
To: "McNair, David" <David@mcnairbuilders.com>
Cc: Horsman Donna <DonnaH@hiltonheadislandsc.gov>

Tue, Mar 28, 2017 at 10:37 AM

David, The plan is a little hard to understand with all the different lines on it. When I spoke with Mike he said that OCRM was changing their critical line and asked if we measured the buffer from the old or new critical line. It would be measured from where OCRM certifies their critical line is. You are correct, the 40 foot conservation buffer shown on the original subdivision plat does have a note that says it does not apply for single family residences. Does the property line (that was once the OCRM critical line) change with the new OCRM line?

Also, you can remove the setbacks that don't apply so that it doesn't cause any confusion. The only setbacks/buffers that apply are the 20 foot tidal buffer from the OCRM critical line, the 20 foot adjacent street setback/buffer and 5 foot setbacks on the sides.

Nicole Dixon, CFM

Development Review Administrator

Community Development Department

Town of Hilton Head Island

One Town Center Court

Hilton Head Island, SC 29928

843-341-4686

fax 843-842-8908

From: McNair, David [mailto:David@mcnairbuilders.com]
Sent: Tuesday, March 28, 2017 9:28 AM
To: Dixon Nicole
Cc: Horsman Donna
Subject: Re: Lot 48 Broad Point, Indigo Run

[Quoted text hidden]

[Quoted text hidden]



INDIGO RUN

Indigo Run Community Owners Association, Inc.
103 Indigo Run Drive
Hilton Head Island, SC 29926
Office: 843-689-7300

November 3, 2017

Mr. & Mrs. Gregory Poe
9965 Little Mountain Rd
Concord OH 44060

RE: Lot 48- #58 Broad Pointe

Mr. & Mrs. Poe,

Your plans for a new home, including a pool, were reviewed at an ARB meeting held on November 2, 2017.

The project received Final Approval based on the site plan, the LDP plan dated 9/30/17 and the Year Round pool plans dated 10/17/17.

We are in receipt of both your application fee and compliance deposit.

The ARB reserves the right to verify that your project/plans (*including landscape*) meet all requirements of the ARB Guidelines dated October 26, 2017.

Sincerely,

Chip Munday

Chip Munday, CMCA, AMS, PCAM
General Manager



**INDIGO RUN ARCHITECTURAL REVIEW BOARD
APPLICATION FOR RESIDENTIAL CONSTRUCTION**

Plans will not be accepted for review without completed application and fee paid

Date: 10/18/17 FEE PAID \$ 6000

Project (new home, addition, pool, new patio, screened porch, etc.)
NEW HOME W/POOL

Owner Name Greg & Pam Poe

Indigo Run Address 48 Broad Point

Phone 440-479-8323

Email: prmpoe@yahoo.com

Contractor Name McNair Building Const.

Address PO. Box 21468

Hilton Head, S.C. 29925

Phone 843-681-9543

Email: David@HHBUILDER.COM

Architect/Designer Name, Address & Phone:

McNAIR BUILDING CONST. INC
PO. BOX 21468

Hilton Head, S.C. 29925

Email: David@hhbuilder.com

Type of Approval Requested:

Concept Preliminary Final

Documents Attached (all must be coordinated*):

Architectural Plans* Landscape Plans*

Grading & Drainage Plan w/seal*

Exterior Finishes* Pool Plan if applicable

Cut sheets for exterior lighting:

Type of HVAC System if applicable:

Heat Pump

Please complete for NEW homes:

A. Lot Area =	SF	<u>24,555</u>	$\frac{16}{(B+D+E)/A} = \underline{\hspace{2cm}}$ $\frac{24}{(B+D+E+F)/A} = \underline{\hspace{2cm}}$
B. First Floor Interior		<u>2424</u> SF	
C. Second Floor Interior		<u>1402</u> SF	
D. Garage (All under house)		<u>2103</u> SF	
E. Covered porches, decks, patios		<u>1479</u> SF	
F. Hardscape		<u>2030</u> SF	
G. Height (above F.F.) =	FT		

FINISHED FLOOR ELEVATIONS – First Finished Floor (AMSL): 18.52 FT

GARAGE FINISHED FLOOR (AMSL): 8.0 FT

When garage(s) are under first floor living areas, eliminate "D" in calculation.

SUBMISSIONS FOR APPROVAL REQUIRE EXTERIOR ELEVATIONS, PHOTOS OF ADJACENT PROPERTIES,
SPEC SHEETS FOR EXTERIOR LIGHTING & SAMPLE SHEET OF MATERIALS and COLORS (see next page)



Town of Hilton Head Island
Community Development Department
One Town Center Court
Hilton Head Island, SC 29928
Phone: 843-341-4757 Fax: 843-842-8908
www.hiltonheadislandsc.gov

FOR OFFICIAL USE ONLY
Permit #: _____
Fee: _____

**APPLICATION PACKET FOR
SINGLE FAMILY RESIDENTIAL BUILDING PERMIT**

New Structure Addition Detached Garage Modular Structure Accessory

Project Address: Lot (48) 58 Broad Point Subdivision: Broad Point / Indigo Run
Parcel Number [PIN]: R510 011 000 0257 0000 Flood Zone: A7(15)

Are there recorded private covenants and/or restrictions that are contrary to, conflict with, or prohibit the proposed request? If so, a copy of the private covenants and/or restrictions must be submitted with this application. YES NO

Is the work that is to be completed to include the building & area of the site that will be disturbed over .5 acres or 21,780 sq. ft.? YES NO

Fees & Forms: Please see www.hiltonheadislandsc.gov for Building Plan Review and Approval fees. The Town accepts cash or check made Payable to Town of Hilton Head Island. Credit cards are accepted as payment for some items.

License Requirements: Individuals and entities involved in the construction, repair or renovation of structures are required to comply with licensing requirements of the State of South Carolina and the Town. No contractor or sub-contractor shall begin work on a job without a business license. Both the contractor and the sub-contractor shall be subject to a suspension of his license in accordance with Section 10-1-150 of the Town of Hilton Head Island Code of Ordinances.

Acknowledgement: Application is hereby made to perform work on the building and accompanying features, and I am authorized to submit this application. To the best of my knowledge, information included in this application is factual and complete. I hereby agree to abide by all conditions of any approvals granted by the Town and understand that such conditions shall apply to the subject property only. I acknowledge that the Town Municipal Code requires that all construction in a Special Flood Hazard Zone be constructed in accordance with floodplain provisions. I understand that failure to abide by this approval, any conditions, and all codes adopted by the Town of Hilton Head Island deems me subject to enforcement action and/or fines.

Print Name: DAVID MCNAIRE, PRES. Signature: [Signature]
Company Name: MCNAIRE BUILDING CONST, INC. Date: 11/3/17

Building Owner:		Applicant:		
Name: <u>Greg & Pam POE</u>	Name: <u>MCNAIR BUILDING CONST, INC</u>	Name: <u>MCNAIR BUILDING CONST, INC</u>	Name: <u>MCNAIR BUILDING CONST, INC</u>	
Address: <u>49 HAUL AWAY</u>	Address: <u>PO BOX 21468, HHI, SC 29925</u>	Address: <u>PO BOX 21468, HHI, SC 29925</u>	Address: <u>PO BOX 21468, HHI, SC 29925</u>	
Address: <u>Hilton Head, SC 29928</u>	Address:	Address:	Address:	
Phone:	Phone: <u>843-681-9543</u>	Phone: <u>843-681-9543</u>	Phone: <u>843-681-9543</u>	
Email: <u>PMPOE@yahoo.com</u>	Email: <u>DAVID@HHBUILDER.COM</u>	Email: <u>DAVID@HHBUILDER.COM</u>	Email: <u>DAVID@HHBUILDER.COM</u>	
Contractor:		Primary Contact:		
Name: <u>MCNAIR BUILDING CONST, INC.</u>	Name: <u>DAVID MCNAIR</u>	Name: <u>DAVID MCNAIR</u>	Name: <u>DAVID MCNAIR</u>	
Address: <u>PO BOX 21468 Hilton Head, SC</u>	Address: <u>PO Box 21468</u>	Address: <u>PO Box 21468</u>	Address: <u>PO Box 21468</u>	
Superintendent Phone: <u>843-247-8059</u>	Address: <u>Hilton Head SC 29925</u>	Address: <u>Hilton Head SC 29925</u>	Address: <u>Hilton Head SC 29925</u>	
Contractor Phone: <u>843-681-9543</u>	Phone: <u>843-681-9543</u>	Phone: <u>843-681-9543</u>	Phone: <u>843-681-9543</u>	
Phone:	Email: <u>DAVID@HHBUILDER.COM</u>	Email: <u>DAVID@HHBUILDER.COM</u>	Email: <u>DAVID@HHBUILDER.COM</u>	
Email: <u>DAVID@HHBUILDER.COM</u>	Contractor State License/registration #: <u>11051</u>	Contractor State License/registration #: <u>11051</u>	Contractor State License/registration #: <u>11051</u>	
Contractor State License/registration #: <u>11051</u>	License Group: <u>BD-5</u>	License Group: <u>BD-5</u>	License Group: <u>BD-5</u>	
License Group: <u>BD-5</u>	Town Business License #: <u>2926</u>	Town Business License #: <u>2926</u>	Town Business License #: <u>2926</u>	
Town Business License #: <u>2926</u>	Architect/Designer:		Engineer:	
Name: <u>MCNAIR BUILDING CONST, INC</u>	Name: <u>MCNAIR BUILDING CONST, INC</u>	Name: <u>Southern Consulting & Engineering</u>	Name: <u>Southern Consulting & Engineering</u>	
Phone: <u>843-681-9543</u>	Phone: <u>843-681-9543</u>	Phone: <u>843-718-2525</u>	Phone: <u>843-718-2525</u>	
Email: <u>leon@hhbuilder.com</u>	Email: <u>leon@hhbuilder.com</u>	Email: <u>SUSAN@SCI-ENG.COM</u>	Email: <u>SUSAN@SCI-ENG.COM</u>	
State License #: <u>SAME AS APPLICANT</u>	State License #: <u>SAME AS APPLICANT</u>	State License #: <u>13542-C03355</u>	State License #: <u>13542-C03355</u>	
Town License #: <u>SAME AS APPLICANT</u>	Town License #: <u>SAME AS APPLICANT</u>	Town License #: <u>NA</u>	Town License #: <u>NA</u>	

Detailed Description of Work:

NEW SINGLE FAMILY RESIDENCE

BUILDING INFORMATION:			
Total Pervious (sq ft)	18622	Number of Fireplaces	1
Total Impervious (sq ft)	5933	Type of Exterior Materials	STUCCO
Heated Sq. Ft. (new or added)	3826	Fire Alarm System	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
Unheated Sq. Ft. (new or added)	5061	Sprinklered	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
Number of Stories	2	Type of heating/air	ELECT-H/P
Number of Bedrooms	4	Gas appliances	YES
Number of Bathrooms	4.5	Size of Liquid Propane tank	500 GALLON
Total Residential Rooms	9	Septic Tank Number	N/A
AIR BARRIER TEST - Yes or No - if Yes, need prior to inspection being scheduled	yes	Blower Door Test - Yes or No - if Yes, need prior to CO OR FINAL inspection being scheduled	NO
Number of Elevators	1	Insulation (Prescriptive or Performance Base)	Rescheck-foam

ROOF INFORMATION	
Material: METAL/ASD FIBERGLASS	Wind Uplift: 140
Amount of Fasteners: 6/sh	Years of Guarantee: 50
Type of Fasteners: 1/2 GAL	Roofing screws

VALUE OF CONSTRUCTION (includes materials, labor, profit)	
Plumbing	\$ 14,675
Electrical	\$ 34,450
Mechanical	\$ 16,864
Building	\$ 917,827
TOTAL	\$ 967,000

Note: No deductions shall be made on the permit application by a general or independent contractor for value of work performed by a subcontractor.

Flood Hazard Areas as per International Building Code 3403.1.1:

In flood hazard areas, any addition/alteration/improvement to an existing building or structure in a flood hazard area must come into compliance with this code section if the value of construction equals or exceeds 50% of the appraised building value. The Town requests a more detailed construction cost estimate for substantial improvement determination.

Detailed cost estimates requested? YES NO

Town of Hilton Head Island Municipal Code requires that all construction in a Special Flood Hazard Zone be constructed in accordance with the following provisions:

1. Any enclosed area below the base flood elevation will be used solely for parking of vehicles, limited storage or access to the building. This space will never be used for human habitation without first becoming fully compliant with the Town's Flood Damage Controls Ordinance in effect at the time of conversion.
2. All interior walls, ceilings and floors below the base flood elevation will be constructed of flood resistant materials.
3. All mechanical, electrical and plumbing devices will be installed above base flood elevation.
4. Walls of the enclosed area below base flood elevation will be equipped with at least two openings which allow automatic entry and exit of flood water. Openings will be on two different walls with at least one square inch of free area for every square foot of enclosed space and have the bottom of openings no more than a foot above grade.
5. The structure may be subject to increased premium rates for flood insurance from the National Flood Insurance Program.

McNair Building Construction, Inc.

Confidential

Greg and Pam Poe, Lot 48 Broad Point, IR, HHI		
Area Calculation		
Impervious for Building and ARB permits		
Garage	2,103	sf
Area under deck/Lanai	658	sf
Area under stair	65	sf
Pool Deck	845	sf
Service Yards	168	sf
Front Porch	135	sf
Driveway	1,959	sf
Total Impervious	5,933	sf

INSPECTION WORKSHEET (001852-2018)

Town of Hilton Head Island, Community Development Department

Telephone: 843-341-4757. Address: One Town Center Court, HHI SC 29928

Case Number: BLDR-000182-2018

Case Module: Permit

Inspection Date: 01/30/2018

Inspection Status: Passed

Inspector: Rocky Browder

Inspection Type: PRE CLEAR INSPECTION

Job Address: 58 BROAD POINTE DRIVE
Hilton Head, SC 29926

Parcel Number: R510 011 000 0257 0000

Contact Type	Company Name	Name
HVAC Contractor		[EAC INC] JONES, MARTIN
Owner		POE, GREGORY A PAMELA R
Contractor		[McNAIR BLDG CONSTR INC] MCNAIR, DAVID
Plumbing Contractor		[CHAPS PLUMBING SERVICES] CHAPPELEAR
Applicant		[McNAIR BLDG CONSTR INC] MCNAIR, DAVID
Electrical Contractor		[PLANTATION ELEC CO INC] Godbee, Christop

Checklist Item

Comments - Comments

Passed

Comments

YES

Inspection has failed due to the wetland buffer silt fencing not being completely installed along the OCRM critical line.

01/30/2018 Inspection: APPROVED

DAVID MCNAIR MET with Rocky Browder 1/29/18 to discuss fence location, Relative to tree removal, and other items with survey in hand.

Browder, Rocky (Inspector)



**TOWN OF HILTON HEAD ISLAND
SOUTH CAROLINA
BUILDING PERMIT #:**

called by 2/1/18
BLDR-000182-2018

Date Issued: 02/01/2018	Parcel ID: R510 011 000 0257 0000	Permit Fee: \$6,496.50	Value of Construction: \$967,000.00
Address: Street # & Street Name 58 Broad Pointe Drive	Lot #	Subdivision: Indigo Run	Building # Unit #
Type of Construction: New Residence	Occupancy: Residential	Flood Zone/Minimum Finished Floor Elevation: A7(15)	

Scope of Work: IR/ NEW CONSTRUCTION - HEATED SF 3826 UNHEATED SF 5061

Heated Square Ft.	3,826	Unheated Square Ft	5,061	Total Square Ft	8,887	Number of Units	
Stories	2	Exterior Finish	STUCCO	Square Feet of Pool		Fireplaces	1
Bedrooms	4	Roofing Type	ASPHALT	Septic Tank #		Fire Alarm System	No
Bathrooms	4.5	Heating/Air	ELECTRIC HEAT PUM	Elevators	1	Fire Sprinkler	No
Total Rooms	9	Type of Fuel					

	Name	Address	City, State	ZIP Code	Phone
Owner:	GREGORY A PAMELA R POE	49 Haul Away	Hilton Head Island, SC	29928	
Contractor:	McNAIR BLDG CONSTR INC	Po Box 21468	Hilton Head Island, SC	29925	(843) 681-9543
Applicant:	McNAIR BLDG CONSTR INC	Po Box 21468	Hilton Head Island, SC	29925	(843) 681-9543

I acknowledge the following: All work must comply with Town of Hilton Head Island adopted codes.

This is in a special flood hazard zone

Conditions of the Approval:

Town Staff conditions are included, additional pages may be attached.

Print Name: Stephanie McNair Signature: Stephanie McNair Date: 2/1/18

2/1/18

Expiration: Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced.

If you have questions or concerns regarding this permit, please call the Community Development Department at 843-341-4757.

2/22/18

Attachment B
VAR-001924-2018



≈ 2/28/18

Attachment B
VAR-001924-2018





3/12/18



McNair, David <david@hhbuilder.com>

58 Broad Point, Permit Number: BLDR-000182-2018

McNair, David <David@mcnairbuilders.com>
To: Dixon Nicole <nicoled@hiltonheadislandsc.gov>

Tue, Jul 31, 2018 at 10:25 AM

Nicole,

Good Morning !

I've discussed this project with Rocky Browder twice yesterday, and he and Trent with the OCRM/DHEC, discussed the matter with Leon Rivchun, a project manager at our office last week while I was out of town. Rocky was performing an inspection last week of the silt fence at our home under construction for Greg and Pam Poe and met with Leon at the site indicating he felt the OCRM line was in error and it needed to be resurveyed by Trent (OCRM), which is now redone and resurveyed by Coastal Surveying. This surveyed line has moved significantly closer to the house since Rocky's inspection with me at the site less than 6 months ago (22% more of the property) and apparently creates a problem for the issuance of our pool Town Building Permit. Rocky suggested if we had any questions to get with you regarding the impact to our home construction for Greg and Pam Poe.

Briefly, I'd like to recap where I think we are relative to the issuance of a Town Pool Permit for the Poe Residence, and our current house Permit, and hope that you and I can sit down and discuss what our next step might be in order to move the project along for our customers.

1. You, Donna, Mike with Coastal Surveying and I, had conversations about the setbacks on this property in February and March of 2017. While at the time, I also reflected upon the importance of the pool construction to our customer's, Greg and Pam Poe and as due diligence on our part, we wanted to make sure we were headed down the correct "path" prior to finalizing the plans, pricing and contract with our customers and eventually submission for a Town Building Permit. You were very helpful and responsive in our effort to clarify the setbacks on the property to the OCRM line and property lines.
2. Our construction plans were then developed, including the pool, pool deck, driveway, and drainage plans for the site and submitted to the town January 16, 2018 for review and issuance of the Town Building Permit dated 2/1/2018. During this process, I met with Rocky at the site to ask him specifically about the location of the silt fence installation at the rear of the property, since it was to go through tree roots of a dead tree we were planning to remove. Rocky reviewed the fence location, referenced the OCRM line with me, and we set up the silt fence re-inspection for the next day. We finished the installation for his inspection and approval was received the next day 2/1/2018, less than 6 months ago. There was no mention by Rocky that he felt the OCRM line was in error or any doubt that it was incorrectly located on the plans. In the last 5 months+ we have now completed most of the exterior of the home (all stuccoed), while cabinets and interior trim are now progressing on the interior.
3. Our Town Building Permit application included the pool deck, rear steps bearing on the deck, driveway, grading plans, service yards, pool equipment yard, and reflected the pool on the site-plan and drainage plan submissions as a part of our permitting package. The areas defined in the Town permit application for impervious areas also included the pool deck. No red X was placed on the pool area, but we knew as the builder for the entire project, and as a normal part of the project progression, we would submit a permit package for the actual pool shell and pool finish including pumps, wiring, and other normal items included by Year Round Pool under our building contract at a later time. Pool decks many times fall under our house Town building permit since we can save the customer costs when we do the work directly and outside of our contract with the pool company. Many of our pool construction project are planned as part of the building plans submission, including the pool service yards, pool decks, orientation of the rooms, open areas, etc. as a part of the integral integrity of the overall project. And, in this particular case as you know from our early emails a year prior to the permit issuance, Greg and Pam Poe were and are greatly invested in this comprehensive overall design incorporating the pool.
4. The bottom line, we want to make sure we do the right thing for our customers and for the Town of Hilton Head. Rocky Browder told us yesterday to proceed with anything originally permitted under our town permit. The pool deck area is a part of the original permit. We also consider the grading, driveway, and the side loading and unloading parking spot at the left of the house to be a part of the submission. I discussed this with Rocky, he said we could proceed with the fill and finish grading of the area and proceed with the work associated with the driveway. Obviously, we do not want to proceed with the pool deck until we can resolve these concerns associated with the pool permit, since the pool beams must be set prior to

8/6/2018

McNair Builders Mail - 58 Broad Point, Permit Number: BLDR-000182-2018
Attachment B
VAR-001924-2018

the construction of the pool deck. The rear stairs exiting the home as currently designed, also sit on the pool deck, and have been delayed for the construction completion of the pool deck.

Nichole, I would like to meet with you at your offices today or Wednesday morning if you have the time, so we can understand our next steps in the construction process. We originally expected the pool shell to be under construction and to start filling the site this week, so time is of the essence.

11:00 AM today or 9:00 AM Wednesday would work nicely for us (I will be in meetings Wednesday at 10:15-1:30). Or if there is another time this week we could meet, please let me know what is a good time.

Thank you for your assistance in this matter,

Regards,

David McNair, pres

McNair Building Construction, Inc.

MAIL TO:

P.O. Box 21468

Hilton Head, SC 29925

Building on HH & Low-Country since 1983

Moss Creek Village

1533 Fording Island Road,

Suite 300

Hilton Head, SC 29926

843 681 9543 (O)

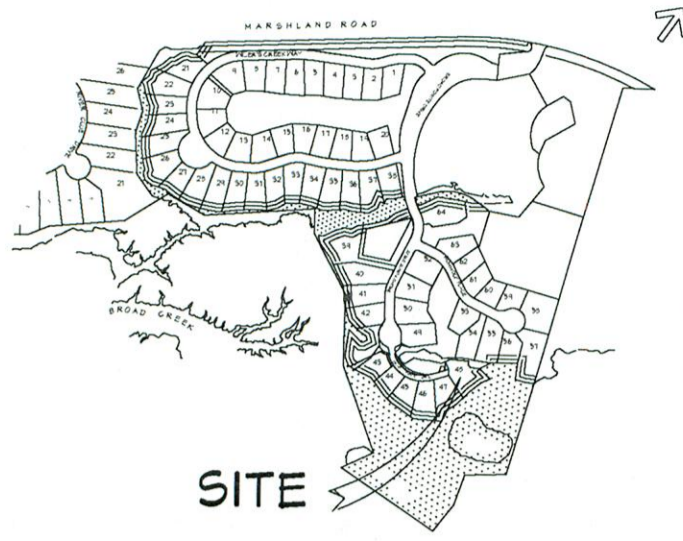
843 815 9556 (F)

www.mcnairbuilders.com

PS Sorry, I accidentally sent this to Nicole Jalbert.

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Attachment C
VAR-001924-2018



SITE

VICINITY MAP - N.T.S.

LINE	LENGTH	BEARING
L1	5.00	N23°31'25"W
L2	8.88	N12°21'18"E

LINE	BEARING	LENGTH
L10	N51°59'57"E	35.76
L11	N14°30'36"E	35.42
L12	N15°30'36"E	2.34
L13	N88°42'27"E	3.88
L14	N88°42'27"E	32.35
L15	S56°50'33"E	31.15
L16	N83°28'24"E	21.43
L17	N15°41'52"E	26.60
L18	N15°41'52"E	2.74
L19	N85°42'27"E	24.76
L20	N82°39'19"E	11.36
L21	S59°41'13"E	19.61
L22	N15°25'21"E	13.04
L23	S81°21'38"E	24.32
L24	S81°21'38"E	23.57
L25	S81°21'38"E	44.06
L26	S12°14'47"E	30.09
L27	S21°19'52"E	33.14
L28	S47°54'14"E	13.77
L29	S47°54'14"E	11.64
L30	S64°23'18"E	39.94
L31	S64°23'18"E	1.92

THE AREA SHOWN ON THIS PLAT HEREON IS A REPRESENTATION OF DEPARTMENT PERMIT AUTHORITY ON THE SUBJECT PROPERTY. CRITICAL AREAS, BY THEIR NATURE, ARE DYNAMIC AND SUBJECT TO CHANGE OVER TIME. BY DELINEATING THE PERMIT AUTHORITY OF THE DEPARTMENT, THE DEPARTMENT IN NO WAY WAIVES ITS RIGHT TO ASSERT PERMIT JURISDICTION AT ANY TIME IN ANY CRITICAL AREA ON THE SUBJECT PROPERTY, WHETHER SHOWN HEREON OR NOT.

PAUL WLOJOSKI (ON FILE) 04/29/16
SIGNATURE DATE

The critical line shown on this plat is valid for five years from the date of this signature, subject to the cautionary language above.

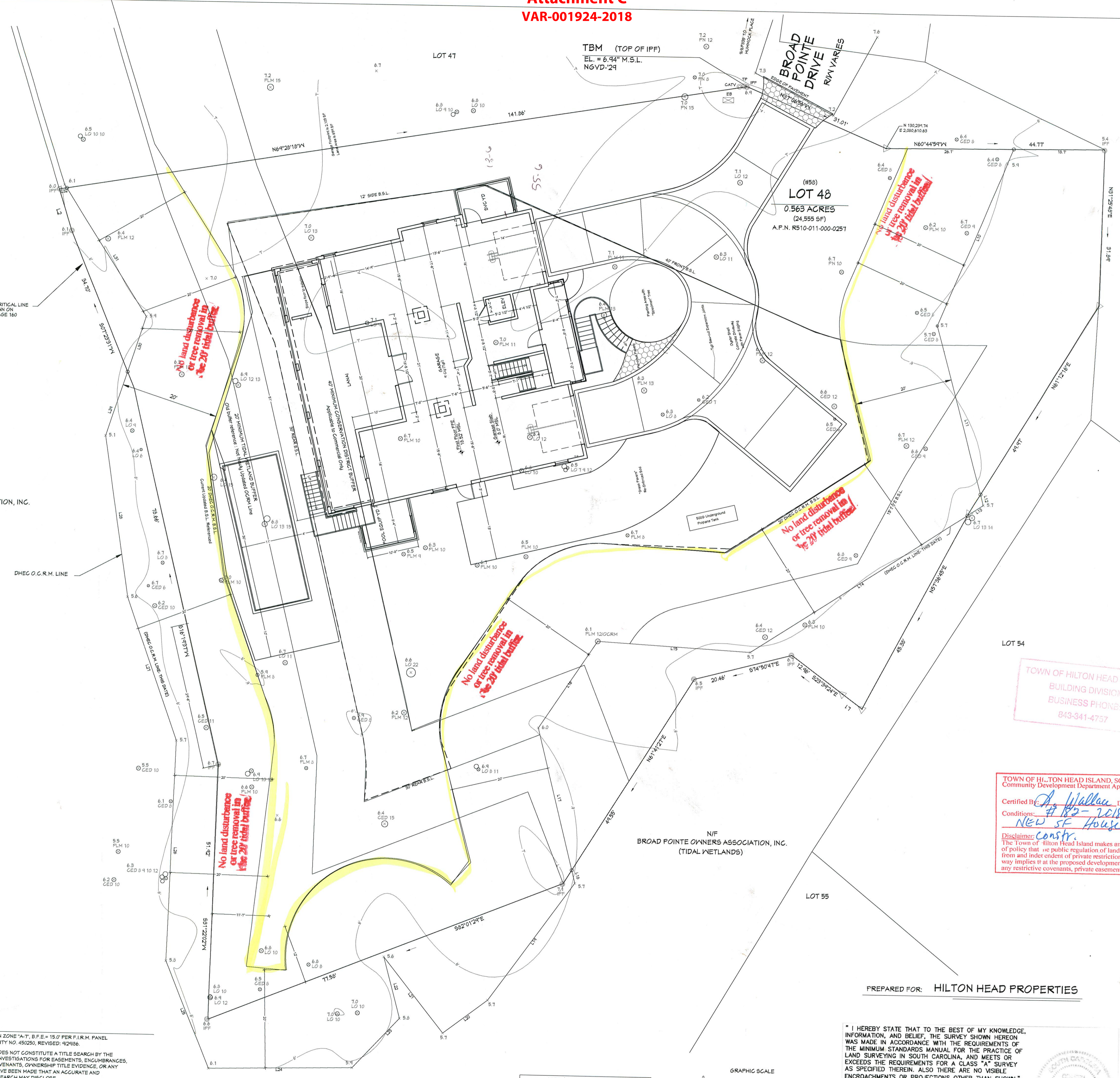
REFERENCE PLAT:
PLAT BOOK 73 PAGE 163

LEGEND

BG	BLACK GUM
B.S.L.	BUILDING SETBACK LINE
CATV	CABLE TELEVISION
CED	CEDEAR
CMF	CONCRETE MONUMENT FOUND
EB	ELECTRIC BOX
GUM	GUM
IFF	IRON PIN (OLD) FOUND
IFS	IRON PIN (NEW) SET
LAO	LAUREL OAK
LO	LIVE OAK
MAG	MAGNOLIA
FLM	PALMETTO
FN	FINE
RO	RED OAK
TELE. PED.	TELEPHONE PEDESTAL
W/O	WHITE OAK
WM	WATER METER
WO	WATER OAK
XFMR	TRANSFORMER

NOTES:

1. THIS LOT LIES IN ZONE "A-T", D.F.E. = 15.0' PER F.I.R.M. PANEL 0005-D, COMMUNITY NO. 490250, REVISED: 04/08/06.
2. THIS SURVEY DOES NOT CONSTITUTE A TITLE SEARCH BY THE SURVEYOR. NO INVESTIGATIONS FOR EASEMENTS, ENCUMBRANCES, RESTRICTIVE COVENANTS, OWNERSHIP TITLE EVIDENCE, OR ANY OTHER FACTS HAVE BEEN MADE THAT AN ACCURATE AND CURRENT TITLE SEARCH MAY DISCLOSE.
3. ALL BUILDING SETBACK REQUIREMENTS SHOULD BE VERIFIED WITH THE PROPER AUTHORITIES PRIOR TO DESIGN AND CONSTRUCTION.
4. CERTIFICATIONS ARE NOT TRANSFERABLE TO ADDITIONAL INSTITUTIONS OR SUBSEQUENT OWNERS.



9.00
- 6.94

2.06 above

TOWN OF HILTON HEAD ISLAND
BUILDING DIVISION
BUSINESS PHONE:
843-341-4757

TOWN OF HILTON HEAD ISLAND, SC
Community Development Department Approval

Certified By: A. Wallace Date: 1/7/18
Conditions: # 102 - 2018
NEW SF HOUSE

Disclaimer: Constr.
The Town of Hilton Head Island makes an expressed declaration of policy that its public regulation of land is entirely separate from and independent of private restrictions. This approval in no way implies that the proposed development is in conformance with any restrictive covenants, private easements or deed restrictions.

A TREE AND TOPOGRAPHIC LAND SURVEY
OF
LOT 48 BROAD POINTE DRIVE

A PORTION OF
**BROAD POINTE
INDIGO RUN**

HILTON HEAD ISLAND, BEAUFORT COUNTY, SOUTH CAROLINA

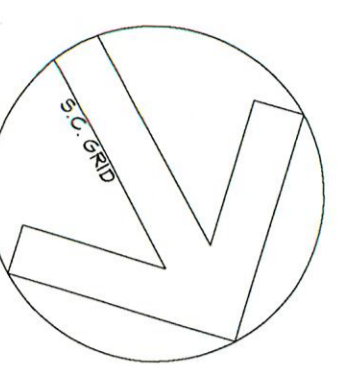
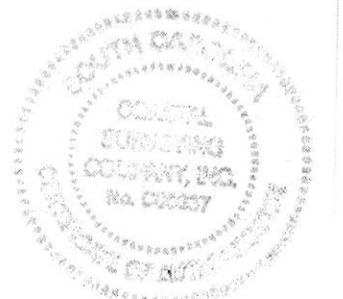
SCALE: 1" = 10'
DATE: 04/14/16
JOB No.: 57,383T

SURVEYED BY: C/PJP
DRAWN BY: RLUNTS
CHECKED BY: MRD

" I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS "A" SURVEY AS SPECIFIED THEREIN. ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN."

Michael R. Dunigan
MICHAEL R. DUNIGAN
S.C.R.L.S. NO. 11905

REVISED: 02/08/17 TO UPDATE DHEC OCRM LOCATIONS
REVISED: 01/25/17 TO SHOW B.S.L.s



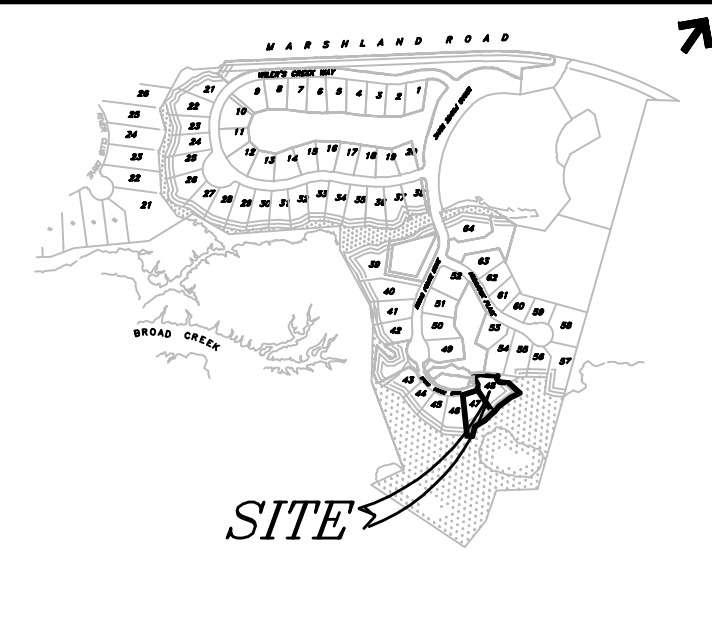
mcNair
BUILDING CONSTRUCTION, INC.

Greg and Pam Poe
Site Plan - 1/12/2017

McNair Building Construction, Inc.
P.O. Box 21468
Hilton Head, SC 29925
www.mcnairbuilders.com

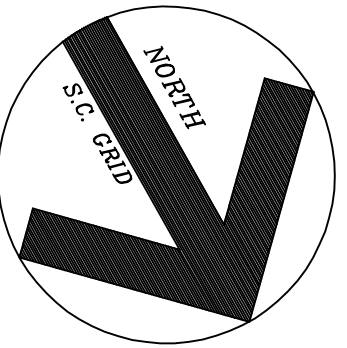
Attachment C
VAR-001924-2018

TBM (TOP OF IPF)
EL. = 6.94' M.S.L.
NGVD - 29



VICINITY MAP - N.T.S.

LINE	LENGTH	BEARING
L1	5.00	N23°31'25"W
L2	8.83	N12°27'18"E



N/F
BROAD POINTE OWNERS ASSOCIATION, INC.
(TIDAL WETLANDS)

N/F
BROAD POINTE OWNERS ASSOCIATION, INC.
(TIDAL WETLANDS)

OCRM CRITICAL LINE
AS SHOWN ON
P.B.73 PAGE 160

OCRM

OCRM

OCRM

OCRM

OCRM

OCRM

OCRM

OCRM

OCRM

OCRM

OCRM

LOT 54

LOT 55

LOT 47

(#58)
LOT 48
0.563 ACRES
(24,555 SF)
A.P.N. R510-011-000-0257

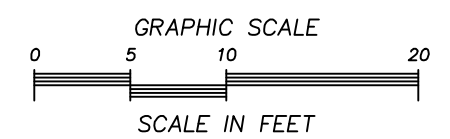
REFERENCE PLAT:
PLAT BOOK 73 PAGE 163

THE AREA SHOWN ON THIS PLAT HEREON IS A REPRESENTATION OF DEPARTMENT PERMIT AUTHORITY ON THE SUBJECT PROPERTY. CRITICAL AREAS, BY THEIR NATURE, ARE DYNAMIC AND SUBJECT TO CHANGE OVER TIME. BY DELINEATING THE PERMIT AUTHORITY OF THE DEPARTMENT, THE DEPARTMENT IN NO WAY WAIVES ITS RIGHT TO ASSERT PERMIT JURISDICTION AT ANY TIME IN ANY CRITICAL AREA ON THE SUBJECT PROPERTY, WHETHER SHOWN HEREON OR NOT.

- NOTES:
1. THIS LOT LIES IN ZONE "A-7", B.F.E. = 15.0' PER F.I.R.M. PANEL 0008-D, COMMUNITY NO. 450250, REVISED: 9/29/86.
 2. THIS SURVEY DOES NOT CONSTITUTE A TITLE SEARCH BY THE SURVEYOR. NO INVESTIGATIONS FOR EASEMENTS, ENCUMBRANCES, RESTRICTIVE COVENANTS, OWNERSHIP TITLE EVIDENCE, OR ANY OTHER FACTS HAVE BEEN MADE THAT AN ACCURATE AND CURRENT TITLE SEARCH MAY DISCLOSE.
 3. ALL BUILDING SETBACK REQUIREMENTS SHOULD BE VERIFIED WITH THE PROPER AUTHORITIES PRIOR TO DESIGN AND CONSTRUCTION.
 4. CERTIFICATIONS ARE NOT TRANSFERABLE TO ADDITIONAL INSTITUTIONS OR SUBSEQUENT OWNERS.

SIGNATURE _____ DATE _____
The critical line shown on this plat is valid for five years from the date of this signature, subject to the cautionary language above.

LABEL DESCRIPTIONS (TYP.)	
18.4	TREE LOCATION
PN 18	GROUND ELEVATION
	TREE SPECIES & DIAMETER (IN.)



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MICHAEL R. DUNIGAN
S.C.R.L.S. NO. 11905

AN DHEC O.C.R.M. LINE LOCATION FOR
LOT 48 BROAD POINTE DRIVE

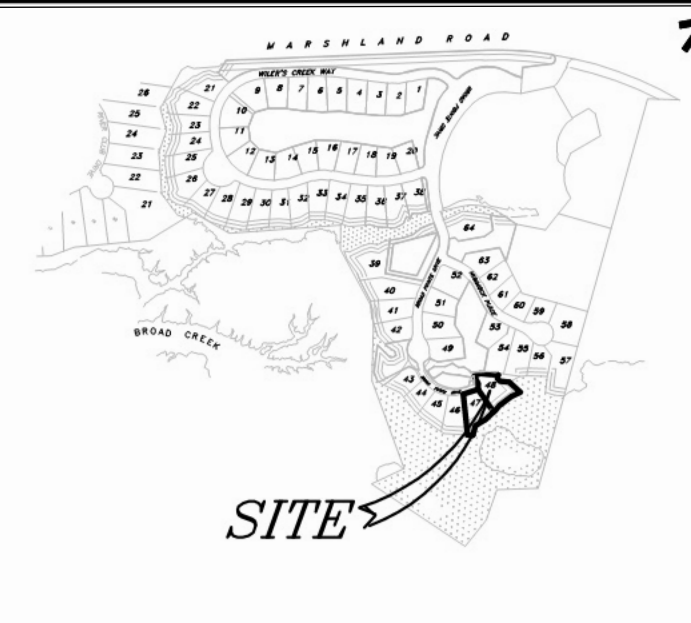
A PORTION OF
BROAD POINTE INDIGO RUN

HILTON HEAD ISLAND, BEAUFORT COUNTY, SOUTH CAROLINA

SCALE: 1" = 10'
DATE: 07/31/18
JOB No.: 61,911T

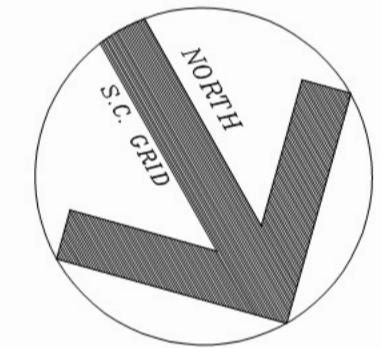
SURVEYED BY: LC
DRAWN BY: MRD
CHECKED BY: TWW





VICINITY MAP - N.T.S.

Attachment C
VAR-001924-2018
 TBM (TOP OF IPF)
 EL. = 6.94" M.S.L.
 NGVD = '29



LINE	LENGTH	BEARING
L1	5.00	N23°31'25"W
L2	8.83	N12°27'18"E

Area Calculation Impervious for Building and ARB permits	
Garage	2,103 sf
Area under deck/Lanai	658 sf
Area under stair	65 sf
Pool Deck	845 sf
Service Yards	168 sf
Front Porch	135 sf
Driveway	1,959 sf
Total Impervious	5,933 sf

No.	Date	By	Description
1	8/7/2018	LSR	OCRM Critical Line Update

Previous Critical Line (BLUE Points)
 Current Critical Line (RED Points)
 Pool Deck In Contract
 Pool (By Yearround Pool)
 Pool Equipment Yard In Contract
 N/F BROAD POINTE OWNERS ASSOCIATION, INC. (TIDAL WETLANDS)

Previous Critical Line (BLUE Points)
 Current Critical Line (RED Points)
 Previous 20' Buffer (BLUE Hash)
 Current 20' Buffer (ORANGE Hash)
 Lot Line (Property Boundary)

Total Lot Size = 24,555 SF
 Area originally Protected = 10,355 SF
 Add'l New Protected Area = 5,184 SF
 Total Protected Area now = 15,544 SF
 or 63.3% of Total Lot Area

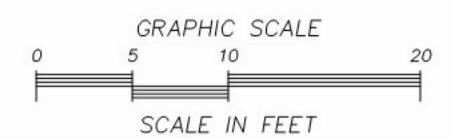
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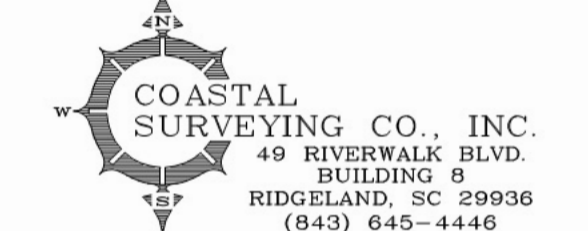
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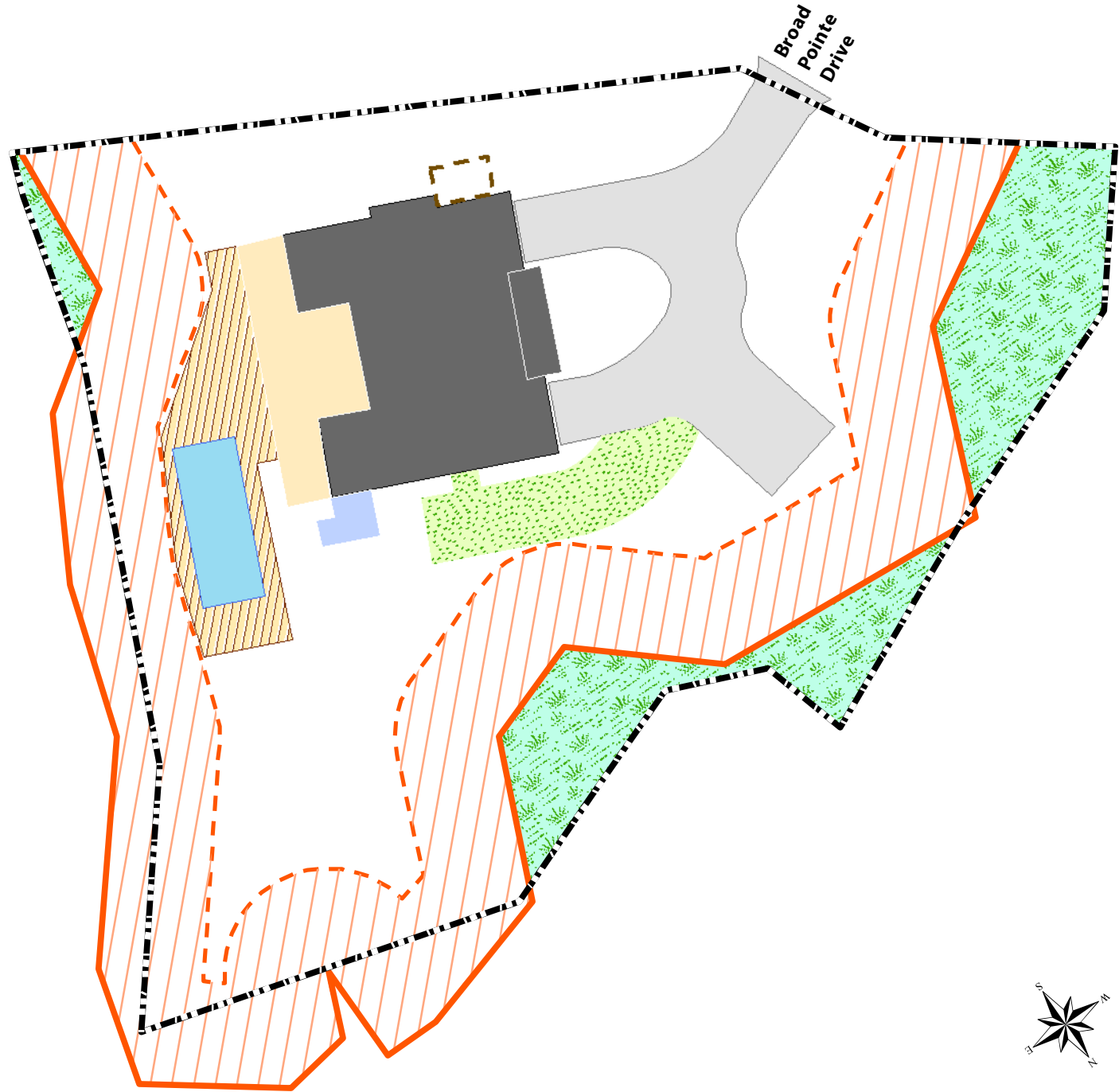
SURVEYED BY: LC
 DRAWN BY: MRD
 CHECKED BY: TWW



Broad Creek

Tidal Wetlands

Broad
Pointe
Drive

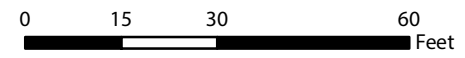


Legend

- Property Line
- OCRM Line 2016
- Wetland Buffer 2016
- OCRM Critical Area 2016

Site Features

- Driveway
- Front Porch
- Grasspave
- House Footprint
- Lanai
- Pool
- Pool Deck
- Pool Equipment
- Service yard



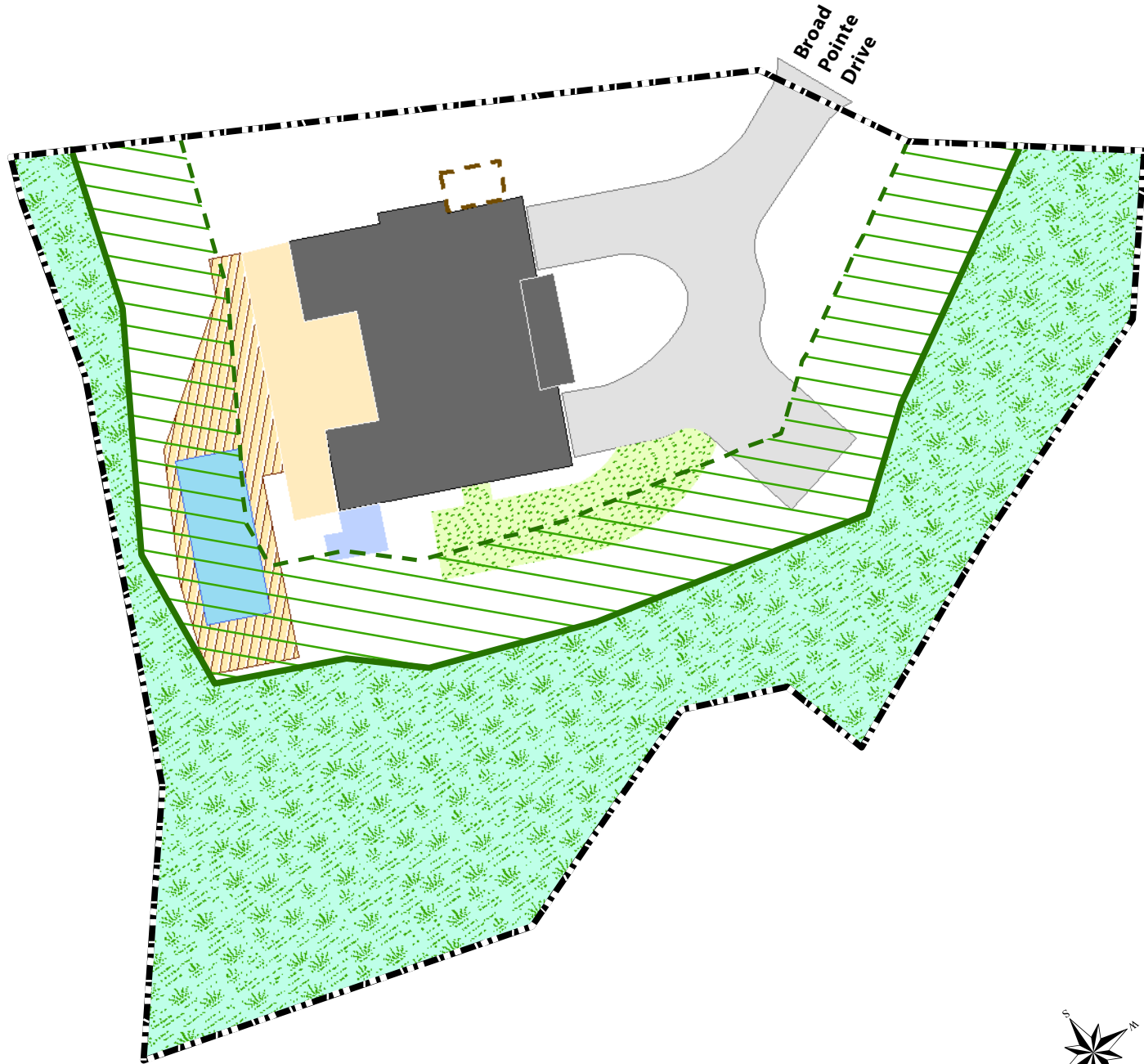
1 inch = 30 feet

2016 OCRM Critical Line and Buffer
VAR-001924-2018

Broad Creek

Tidal Wetlands

Broad Pointe Drive

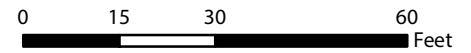
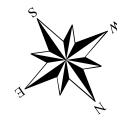


Legend

- Property Line
- OCRM Line 2018
- Wetland Buffer 2018
- OCRM Critical Area 2018

Site Features

- Driveway
- Front Porch
- Grasspave
- House Footprint
- Lanai
- Pool
- Pool Deck
- Pool Equipment
- Service yard



1 inch = 30 feet

2018 OCRM Critical Line and Buffer
VAR-001924-2018

Attachment G
VAR-001924-2018





Attachment G
VAR-001924-2018

















Attachment H
VAR-001924-2018

Timeline

September, 2016

- OCRM tidal wetland critical line for property reviewed and certified by Paul Wojoski (OCRM)
 - See Plan with Critical Line and Buffer, Attachment C, Page 1

October, 2016

- Mr. and Mrs. Poe purchase the property

February & March, 2017

- Building contractor corresponds with Town regarding property setbacks and development

November 2017

- Indigo Run ARB approval for home and pool plans issued

January, 2018

- Pre-Clear inspection conducted by Rocky Browder for building site to check silt fence installation

February 1, 2018

- Building Permit # BLDR-000182-2018 issued
 - See Approved Plan, Attachment C, page 1
- Construction of home begins

June, 2018

- Exterior of home, roof, stucco and service yard construction complete
- Pool contractor submitted pool plans to Town for permit

July 26, 2018

- Pre-Clear inspection conducted by Rocky Browder for pool site

July 27, 2018

- Rocky Browder and Trent Shaw (OCRM) meet on site to review the OCRM critical line

July 31, 2018

- Site survey reflecting the change in the OCRM critical line issued by Coastal Surveying
 - See Survey, Attachment C, Page 2
 - See Buffer Comparison Plan, Attachment C, Page 3 and Attachment G



TOWN OF HILTON HEAD ISLAND

Community Development Department

TO: Board of Zoning Appeals
FROM: Taylor Ladd, *Senior Planner*
DATE: September 17, 2018
SUBJECT: Revisions to Rules of Procedure

At the March 26, 2018 BZA meeting, there was an appeal on the agenda. The owner of the property subject to the appeal was not the appellant and therefore unable to speak at the meeting due to current rules regarding limitations on presentations by the public at appeal hearings. Staff has determined it would be beneficial to amend the Rules of Procedure to allow the owner of a property subject to an appeal to speak at appeal hearings when they are not the appellant.

For the last several appeal hearings, the BZA Chairman has asked the appellant to present first at the hearing, which is contrary to the order listed currently in the Rules of Procedure, but preferable for the proceedings. Staff has determined it would be beneficial to amend the Rules of Procedure to list the appellant as the first presenter at appeal hearings.

As per the Rules of Procedure Article III, Section 2, these rules may be amended at any time by an affirmative vote of a majority of the members of the Board; provided however, that such amendment(s) shall have first been presented to the entire Board, in writing, at a Regular or Special Meeting preceding the Regular or Special Meeting at which the vote is taken.

Please note this memo and attached revisions are presented for your consideration and discussion at the regular September 24, 2018 meeting. See the attached Rules of Procedure Contents on page 3, Article VI, Section 4 on page 11 and Article IX, Section 2 on page 16 for proposed revisions. The revisions have been underlined in the text for your reference. Action may be taken to adopt these revisions at the meeting following September 24, 2018.

*Board of Zoning Appeals
Rules of Procedure
Town of Hilton Head Island*

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Article I
Purpose and Responsibilities

The Board of Zoning Appeals exists to provide final administrative decisions for the Town of Hilton Head Island to enforce the zoning ordinance in accordance with State law, subject to an appeal to circuit court by an appropriate interested party. Its main responsibilities include hearing and deciding: (a) appeals from administrative decisions of the Land Management Ordinance (LMO) Administrator and from Planning Commission actions on certain traffic analysis plans; (b) applications for variances from LMO requirements; and (c) applications to permit uses by special exception. The powers of the Board of Zoning Appeals also include remanding a matter to an administrative official if the record is deemed insufficient, issuing subpoenas for witness appearances, and certifying contempt to the circuit court. In exercising these powers, the Board of Zoning Appeals may, in conformity with State law and the LMO, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination of an Administrator, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit. All final decisions and orders of the Board must be in writing and be permanently filed in the office of the Board as a public record.

Article II
Authority

Section 1. Authority.

The Town of Hilton Head Island Board of Zoning Appeals is established by Appendix A-3 of the Land Management Ordinance (LMO) of the Town of Hilton Head Island pursuant to the authority of Section 6-29-780, *et seq.*, of the Code of Laws of South Carolina, and hereinafter shall be referred to as the "Board."

Section 2. Territorial Jurisdiction.

Pursuant to Appendix A-3.E of the LMO, the Board shall have jurisdiction over all the lands within the Town. This jurisdiction may be expanded by the Town Council by ordinance and/or by intergovernmental agreement, in accordance with Section 6-29-330 of the Code of Laws of South Carolina.

Article III
Rules of Procedure

Section 1. Rules of Procedure.

These *Rules of Procedure* are adopted by the Board to carry out its powers and responsibilities under SC Code 6-29-780, -790, -800, and -810 and Appendix A-3 of the LMO. A portion or section of the *Rules of Procedure* may be suspended by majority vote of the Board to meet particular circumstances. If there is a situation where these *Rules of Procedure* do not specifically apply, then the most recent edition of *Robert's Rules of Order* shall govern the conduct of meetings. An informational chart summarizing types of motions and votes in Robert's Rules of Order is attached.

Section 2. Amendment.

These rules may be amended at any time by an affirmative vote of a majority of the members of the Board; provided however, that such amendment(s) shall have first been presented to the entire Board, in writing, at a Regular or Special Meeting preceding the Regular or Special Meeting at which the vote is taken.

Article IV **Board Organization and Duties**

Section 1. Membership.

- A. Number and Qualifications.** The Board shall consist of seven members appointed by the Town Council. To the extent practicable, the appointed members may include at least one attorney and one design professional (either a registered architect or a registered landscape architect). None of the members shall hold an elected public office or position with the Town of Hilton Head Island or Beaufort County, South Carolina.
- B. Length of Terms.** Members of the Board shall be appointed annually for three-year terms effective each July 1, with all such terms ending on June 30 of the applicable year, unless a member is appointed to fill a vacancy. Vacancies shall be filled by the Town Council by appointments for the balance of any unexpired terms.
- C. Term Limits.** No member may serve more than two successive terms, except for extraordinary circumstances where Council believes it to be in the best interest of the community to have a continuation for a specific period of a particular member of the Board. This limitation shall not prevent any person from being appointed to the Board after an absence of one year. Service for a partial term of less than 1½ years shall not constitute a term of service for the purpose of these term limits.
- D. Attendance/Absences.** Board members are expected to attend all Board meetings. Each member of the Board who has prior knowledge that they will not be able to attend a scheduled Regular Meeting of the board shall notify the Secretary no later than 4:30pm the business day before the meeting. In the case of an emergency, a member shall give the earliest possible notification. The Secretary or Staff shall notify the Chairman in the event that the projected absence(s) will produce a lack of a quorum.
- E. Removal.** Three (3) absences at Regular or Special Meetings of the Board during one Board year (July 1 through June 30) shall be cause for recommendation by the Chairman to the Town Council to reconsider the appointment of that member. Attendance records may be reviewed annually by the Board in executive session during the 9th month of each Board year.
- F. Education.** The Code of South Carolina requires a six (6) hour Orientation Program and a three (3) hour/year Continuing Education Program for each Board member.

Section 2. Election of Officers.

The officers of the Board shall be a Chairman and a Vice-Chairman for one-year terms beginning on the first meeting in July. They are elected annually by the Board members no later than at the last meeting in July. Neither of these two positions shall be filled by a member beginning his or her first year of service as a Board member. Members that leave the Board and are re-appointed after a period of no more than three years may be elected to an officer position in his or her first year of service. Nominations for the Chairman and Vice-Chairman shall be made from the floor at the meeting.

A majority vote is normally required to elect to office. If no one in an election receives a majority vote, the vote must be repeated until one of them does get a majority.

A. Chairman – Term and Duties. The term shall be for one year. At the end of each Board year, the Chairman may be re-elected subject to his/her appointment term. The Chairman shall have the following duties:

1. In consultation with the Staff Board Coordinator, delegate the Secretary to prepare agendas for all meetings;
2. Conduct all meetings and hearings of the Board, meaning that the Chairman—
 - i. Is responsible for maintaining order.
 - ii. Should begin the meeting promptly at the scheduled hour if a quorum is present.
 - iii. Should have a well prepared agenda and abide by it.
 - iv. Should be familiar with the procedural rules of the bylaws.
 - v. Keeps the board working together by explaining procedure clearly and communicating the next business in order.
 - vi. Should “assign” the floor by recognizing those members who wish to speak by calling them by name. No other member may interrupt or call out remarks without being out of order. Private discussion between members while another has the floor is out of order and disruptive members should be reminded of this rule.
 - vii. Should impartially call on members wishing to speak and should give members on both sides of an issue an opportunity to speak.
 - viii. Should remain calm and objective, keeping the meeting moving.
 - ix. Should always confirm that all members understand the motion and that the Secretary has fully recorded the motion.
 - x. Should open debate by saying “Is there any discussion?” The Chairman *must* open all debatable questions to debate.
 - xi. Should recognize members who wish to speak by stating their names.
 - xii. Should be a voting member and vote on all cases before the Board. If the Chairman wishes to make a motion, he/she should pass the gavel to the Vice-Chairman for conducting the meeting.
 - xiii. Should request that a motion with grounds (facts and conclusions) be made by any member. If necessary, may assist the member in formulating the motion. (Complex motions may be brought to the meeting pre-written.)
 - xiv. Should request any member to second the motion.

- xv. If a motion fails to get a second, should state, “Since there is no second, the motion is not before the Board.”
 - xvi. If seconded, should ask the members if there is any discussion of the motion.
 - xvii. Should not allow irrelevant discussion.
 - xviii. At the conclusion of any discussion of a seconded motion, should put the question to a vote by requesting the Secretary to call the role.
 - xix. Should announce the result of the vote.
 - xx. At the conclusion, should adjourn the meeting without motion – “If there is no further business and there is no objection, the meeting will be adjourned. There being no objection, the meeting is adjourned.”
3. Act as spokesperson for the Board;
 4. Sign documents for the Board. Note, final decisions are signed by the moving member, the Chairman, and the seconding member;
 5. Act or designate a Board member to act as liaison with other governmental agencies and Town boards;
 6. Assign or delegate tasks to other Board members as may be necessary to perform the Board’s functions;
 7. Transmit reports and recommendations to Town Council;
 8. Ensure that all business is conducted in accordance with the SC Code, the LMO, and these Rules of Procedure;
 9. Cancel a scheduled Board meeting if there are no agenda items; and
 10. Perform other duties approved by the Board.

B. Vice-Chairman. A Vice-Chairman shall be elected by the Board from among the members in the same manner and for the same term as the Chairman. The Vice-Chairman shall serve as Acting Chairman in the absence of the Chairman, and, at such time, the Vice-Chairman shall have the same powers and duties as the Chairman. The Vice-Chairman shall succeed the Chairman, if the office is vacated before the term has expired, to serve the remainder of the unexpired term of the Chairman. A new Vice-Chairman shall be elected at the next regular meeting of the Board. In the absence of both the Chairman and Vice-Chairman, an acting Chairman shall be elected by the members present at a meeting of the Board.

Section 3. Secretary—Appointment and Duties.

During the July meeting of each year, a member of the Town’s Community Development Department shall be appointed by the Board to independently act as the Secretary of the Board. The Secretary will not be eligible to vote or to otherwise participate or deliberate in the proceedings of the Board. The Secretary shall:

1. Publish and post notices of all meetings of the Board;
2. As delegated by the Chairman, prepare meeting agendas;
3. Distribute to each Board member in advance of each meeting--the agenda, prior meeting draft minutes for approval, and all written submissions by staff and applicants on each agenda item, and other relevant materials;
4. Record the proceedings of meetings on audio tape and prepare written minutes of meetings

for approval by the Board at its next regular meeting, recording in the written minutes the attendance of members at each meeting, the attendance of Council members, the attendance of staff, and a detailed summary of all discussions during each meeting;

5. Maintain the Board's notices, correspondence, reports and forms as public records for a period of time consistent with the records retention schedule of the Town of Hilton Head Island;
6. Assist in the preparation and forwarding of all reports and recommendations of the Board; and
7. Maintain each final decision of the Board as a permanent record as required by the SC Code.

Section 4. Staff Board Coordinator.

The Community Development Director shall appoint a member of Staff to assist the Chairman and the Secretary in Board coordination, including:

1. Ensuring all postponed agenda items are rescheduled;
2. Ensuring public notices are accurately written for publication;
3. Ensuring the minutes accurately reflect the actions taken in the meeting;
4. Coordinating with pertinent staff on submittal of agenda items to the Secretary for distribution to the Board;
5. Scheduling mandatory training sessions for the Board;
6. Ensuring the Board's Rules of Procedure remain updated;
7. Attending all Board meetings and resolving any questions or requests by the Board; and
8. Assisting the Secretary in the efficient running of the public meetings.

Article V **Meetings and Quorum**

Section 1. Regular and Special Meetings.

A. Meeting Schedule. An annual schedule of regular meetings and work sessions of the Board shall be adopted, published and posted at the Town Government Center in late Fall of each year for the next calendar year. Unless rescheduled by a vote of the Board, meetings shall be held at the time and place stated in notices. Meetings shall be open to the public.

B. Regular Meetings. Regular Meetings of the Board shall be held on the fourth Monday of each month or such other date as determined by the Chairman or with input from Staff. Notification of all Applications for Appeal, Variance and Special Exception scheduled and any other matters for consideration at each regular meeting of the Board will be in accord with the public notice requirements of the SC Code as implemented by the Town's LMO.

C. Special Meetings. Special Meetings of the board may be called at any time by the Chairman or requested by the Staff. At least forty eight (48) hours public notice shall be provided for any Special Meeting of the board including the time, place and particular agenda item(s) scheduled for consideration consistent with the notice requirements of the SC Code as implemented by the

Town's LMO.

D. Cancellation of Meetings. Whenever there is no business scheduled for any Regular or Special Meeting of the Board, the Chairman or Staff may cancel such Regular Meeting by giving notice to all members of the Board, as well as the public, no less than twenty-four (24) hours prior, whenever possible, to the time set for any such Regular Meeting.

Section 2. Quorum.

A majority of the Board shall constitute a quorum for the conduct of business. The Secretary will notify the Chairman in the event projected absences will result in the lack of a quorum. If a quorum is established, then a member leaves, the quorum is no longer present. In the absence of a quorum, no further business requiring a vote shall be transacted and any such business shall be postponed to the next meeting.

Section 3. Conflict of Interest

At a minimum, South Carolina law regarding conflicts of interest [S. C. Code Ann. § 8-13-10, *et seq.*, (Supp. 1994)] shall control Board members' actions. In addition, any member of the Board who believes that he or she has or may have a conflict of interest of any nature on any matter before the Board shall, prior to the case at the Regular or Special Meeting at which such matter may be heard or considered by the Board:

1. Prepare a written Potential Conflict of Interest Form describing the matter requiring action or decisions and the nature of his/her potential conflict of interest with respect to the action or decision;
2. File the Potential Conflict of Interest Form with the Secretary; and,
3. Provide a copy of the Potential Conflict of Interest Form to the Chairman.

Upon receipt of a Potential Conflict of Interest Form from any member of the Board, as required in section II (J)(A), *supra.*, the Chairman shall cause the Potential Conflict of Interest form to be recorded in the minutes and shall require that the member filing such Potential Conflict of Interest Form be excused from any votes, deliberations, and any other actions on the matter on which the potential conflict of interest or conflict of interest exists.

Any Board member so disqualified shall leave the dais while the disqualifying matter is being considered and refrain from deliberating or voting on the question.

Article VI **Meeting Administration, Public Comment,** **Notices, Fees, Voting Supplemental Submissions/Briefs**

Section 1. Media Notices.

The Secretary shall give the notice required by statute or ordinance for all meetings of the Board as per Section 16-2-102.E of the LMO. All Board meetings shall be open to the public and all requirements of the South Carolina Freedom of Information Act [S. C. Code Ann. § 30-4-10, *et seq.* (Supp. 1994)] shall be complied with in the conduct of meetings.

Section 2. Agenda (Order of Business)

A written agenda shall be furnished by the Secretary to each member of the Board and media. An agenda may be changed at the related meeting by a majority vote of the members present. Public Hearing items should be so noted with each pertinent item. Generally, the agenda should contain:

1. Call to Order;
2. Roll Call;
3. Freedom of Information Act Compliance;
4. Use of Cellular Telephones or Other Electronic Sound Emitting Devices Prohibited;
5. Review of Meeting Protocol as described within, including Citizen Participation;
6. Approval of Agenda;
7. Approval of Minutes of Previous Meeting
8. Old Business;
9. New Business;
10. Board Business;
11. Staff Reports;
12. Adjournment.

Section 3. Minutes.

A. Meetings. Minutes of meetings is governed by the Code of South Carolina (30-4-70 through 30-4-90). Minutes of each Board meeting shall be recorded by the Secretary and approved at the next available meeting after their preparation. Final approved Minutes shall be available on microfilm for previous years, and may be posted on the Town's Web site for public information.

B. Minimum Contents of Minutes.

1. Kind of meeting (regular or special).
2. Name of the organization.
3. Date and place of the meeting.
4. Presence of the Chairman and Secretary or the names of substitutes.
5. Presence of a quorum.
6. Names of all Board members, Council members, and Staff.
7. Time the meeting was called to order.
8. Whether the minutes of the previous meeting were approved or corrected.
9. All adopted and defeated motions and grounds (facts and conclusions). Withdrawn motions need not be recorded.
10. Name of the maker of the motion and the seconding member.

11. Summary of all presentations and discussions.
12. Motions, including proposed findings and conclusions, must be recorded verbatim.
13. Record the vote of each member upon each question, or, if absent or failing to vote, indicating that fact.
14. The adjournment and the time of adjournment.

C. Lack of Quorum. If there is lack of a quorum of the Board, minutes may be recorded but shall include a statement in the header of each page indicating that a quorum was not present and the minutes are not official. Such minutes shall not be approved by the Board at a later meeting. (There are different quorums, depending on the agenda item.)

Section 4. Public Comment.

In the case of a Variance or Special Exception application, at the conclusion of presentations by Staff and the Applicant, the Chairman will open the public hearing. The Chairman may set a time limit for all public comments and may determine the order of the comments. The Chairman will recognize citizens to comment and request that they sign up to speak at the podium. Each person will have the opportunity to speak for three (3) minutes. At the conclusion of the public comment, the Chairman will close the public hearing. Staff and/or the Applicant may request that the Chairman allow additional clarification after the public comments. Public comment is not permitted in a case involving an appeal from an Administrator decision, except in cases where the Appellant is not the Property Owner. In that case, the Property Owner or their Agent may be permitted to provide comments.

Section 5. Submission Deadline for Regular Meetings.

The deadline for the filing of a complete Application with narrative for Variance or Special Exception or Request for Appeal shall be thirty (30) calendar days prior to any Regular Meeting of the Board. Any submission or brief containing any citation to an opinion of a court must include a complete copy of the cited opinion.

Section 6. Meeting Protocol.

The Chairman will review the protocol at the start of each meeting. The meeting protocol includes further information about the following: speaker sign-up sheet, length of time for speakers, the order of presentation, and the opening and closing of a public hearing. The speaker sign-up sheet will be placed at the podium for speakers to sign when they come up to speak.

Section 7. Filing of Application, Fees and Notice.

All Applications and Appeals scheduled for review by the Board shall be filed by the interested property owner(s) or by a property owner aggrieved by an Administrator's decision, or by a representative with a written certification of authority by such property owner. All Applications and Appeals shall satisfy all fees and notice requirements in accord with the provisions outlined in the LMO. In any case where the owner of record of the real property affected by any Application for

Special Exception or Application for Variance, or his/her certified representative, is not the Applicant, the Applicant shall serve notice of the Application to the contiguous owner(s) of record within the time frames and as described in the LMO. Such notice shall include the time and place of the Board meeting at which the Application shall be heard.

Section 8. Motions and Final Decisions.

A Motion by a Board member is the procedure leading to a final decision by the Board when the Motion is seconded by another Board member and adopted by a vote of a quorum of the Board. A Motion is to be made to describe the proposed decision with findings and conclusions to support the Motion. If the Motion is seconded and adopted by the Board, the final decision, contained in a Notice of Action, must be in writing and be permanently filed in the office of the Board as a public record. The final decision must include findings and conclusions and be delivered to parties of interest by certified mail.

Section 9. Voting.

1. A Board member must be present at the beginning of each case to be permitted to discuss and vote on the case. If a Board member that was absent at the beginning of the hearing establishes requisite knowledge of the case, the member may be permitted to discuss and vote on the case by a majority vote of the Board.
2. All members of the Board, including the Chairman, shall be voting members, and shall be entitled to vote on any issue before the Board unless disqualified by law.
3. For Appeals from Administrator's decision, a majority vote of the entire Board shall be necessary, thus requiring at least 4 affirmative votes to pass a motion.
4. A simple majority of a quorum shall be required to conduct all other Board business including a decision on an Application for Variance or Special Exception.

Section 10. Supplemental Submissions/Briefs.

Any supplemental written submission or legal brief must be delivered [One (1) hard copy or one (1) copy sent via e-mail] to the Secretary of the Board no later than 8:00am four business days before the public meeting day in order for the Secretary to distribute such submission to each Board member by the close of business that day. Town Staff, or the opposing party, has two business days after receipt of the supplemental submission to respond in writing. This excludes any business days when the Town is closed. The Board reserves the right to require or permit later written submissions or briefs and/or proposed findings of fact and conclusions of law to be submitted by the Appellant, Applicant for Variance or Special Exception, or Town Staff. Any submission or brief containing any citation to an opinion of a court must include a complete copy of the cited opinion. Any written or oral information sent directly to any Board member shall be disregarded and promptly turned over to the Chairman through the Secretary of the Board.

Section 11. Communication Among Board Members or With an Outside Party.

- A. There shall be no communication in writing, orally, or by e-mail by any Board member with any

other Board member or any outside party regarding the substance of any matter before the Board that is or may be brought to a vote other than during a public meeting.

- B. Once a decision has been rendered by the BZA, there shall be no further discussions by any Board member with staff, applicants or their attorneys or representatives. Any such communications regarding a decision should be made to the Town Attorney.
- C. Communication with staff or outside parties to communicate procedural matters or general positions or opinions of the BZA will be at the discretion of the Chairman or by an affirmative vote of the majority of the Board members. The Chairman or his designee will be responsible for all such written/verbal communications with anyone other than the remainder of the Board members and Staff.
- D. Board members should refrain from discussing an upcoming agenda item with the Applicant, his Attorney, or his Agent, either through written or verbal communication. Board members should refrain from discussing an upcoming agenda item with Staff either through written or verbal communication, except to clarify facts or request additional information. All discussion of the item should take place in the public meeting. This is to avoid the appearance of improper ex parte communications.

Article VII

Procedures for Hearing an Application for a Variance

The following procedures shall be applicable in the presentation of a Request for a Variance.

Section 1. Presentation of the Town Staff and Applicant.

- 1. Staff shall have a maximum of twenty (20) minutes to present the facts and applicable legal principles that the Staff believes support the position of Staff with respect to the Application for a Variance. During the presentation by Staff, members of the Board of Zoning Appeals may ask such questions as they deem appropriate. At the discretion of the Chairman, Staff's time may be extended if the Staff is unable to complete the presentation due to questioning from the Board of Zoning Appeals.
- 2. The Applicant shall have a maximum of twenty (20) minutes to present the facts and applicable legal principles that the Applicant believes supports the Application for a Variance. During the presentation by the Applicant, members of the Board of Zoning Appeals may ask such questions as they deem appropriate. At the discretion of the Chairman, the Applicant's time may be extended if the Applicant is unable to complete the presentation due to questioning from the Board of Zoning Appeals.
- 3. The Staff shall have a maximum of five (5) minutes to present any desired rebuttal.
- 4. Following the presentation, the Board of Zoning Appeals may ask such additional questions of the Applicant or Staff as the members deem appropriate.
- 5. The Board may subpoena witnesses and in the case of contempt may certify such fact to the Circuit Court having jurisdiction over such matters.

Section 2. Public Comment.

- 1. The Chair will call on interested citizens and request that they come to the podium, state

their name for the record and place their name on the sign up sheet. Each person will have the opportunity to speak for three (3) minutes.

2. The Applicant and/or Town Staff shall clarify any information presented by the public before the Board makes a motion.

Section 3. Vote on Application for Variance.

1. Following the presentation by all parties as set forth above, the Board, upon a Motion duly made and seconded, shall vote on the Application for Variance.
2. The Motion shall contain, at a minimum, a finding of those facts which the member making the Motion deems material to the decision and appropriate references to the relevant criteria of the LMO.
3. Pursuant to the provisions of the LMO the Board shall approve the Application for Variance, approve the Application for Variance with conditions or modifications; or, deny the Application for Variance.
4. Following the vote, the Staff shall prepare a written Notice of Action. The written notice of action shall include decision of the Board as well as the findings of fact and conclusions of law adopted by the Board with respect to the Application for Variance.
5. The Notice of Action shall be mailed by certified letter to the Applicant and record owner of the real property affected by the Application for Variance, if different from that of the Applicant.
6. The decision of the board shall be deemed final and applicable upon mailing of the Notice of Action.
7. The certificate of mailing shall be made a part of the board's file on the Application for Variance.

Article VIII **Procedures for Hearing an Application for Special Exception**

The following procedures shall be applicable in the presentation of an Application for Special Exception:

Section 1. Presentation of the Town Staff and Applicant.

1. Staff shall have a maximum of twenty (20) minutes to present the facts and applicable legal principles that the Staff believes support the position of Staff with respect to the Application for a Special Exception. During the presentation by Staff, members of the Board of Zoning Appeals may ask such questions as they deem appropriate. At the discretion of the Chairman, Staff's time may be extended if the Staff is unable to complete the presentation due to questioning from the Board of Zoning Appeals.
2. The Applicant shall have a maximum of twenty (20) minutes to present the facts and applicable legal principles that the Applicant believes supports the Application for a Special Exception. During the presentation by the Applicant, members of the Board of Zoning Appeals may ask such questions as they deem appropriate. At the discretion of the Chairman, the Applicant's time may be extended if the Applicant is unable to complete the

presentation due to questioning from the Board of Zoning Appeals.

3. The Staff shall have a maximum of five (5) minutes to present any desired rebuttal.
4. Following the presentation, the Board of Zoning Appeals may ask such additional questions of the Applicant or the Staff as the members deem appropriate.
5. The Board may subpoena witnesses and in the case of contempt may certify such fact to the Circuit Court having jurisdiction over such matters.

Section 2. Public Comment.

1. The Chair will call on interested citizens and request that they come to the podium, state their name for the record and place their name on the sign up sheet. Each person will have the opportunity to speak for three (3) minutes.
2. The Applicant and/or Town Staff shall clarify any information presented by the public before the board makes a motion.

Section 3. Vote on Application for Special Exception.

1. Following the presentation by all parties as set forth above, the Board, upon a Motion duly made and seconded, shall vote on the Application for Special Exception.
2. The Motion shall contain, at a minimum, a finding of those facts which the member making the Motion deems material to the decision and appropriate references to the relevant criteria of the LMO.
3. Pursuant to the provisions of the LMO, the Board shall approve the Application for Special Exception, approve the Application for Special Exception with conditions as stated in the LMO or deny the Application for Special Exception.
4. Following the vote, the staff shall prepare a written Notice of Action. The written notice of action shall include the decision of the Board as well as the findings of fact and conclusions of law adopted by the board with respect to the Application for Special Exception.
5. The Notice of Action shall be mailed by certified letter to the Applicant and record owner of the real property affected by the Application for Special Exception, if different from that of the Applicant.
6. The decision of the board shall be deemed final and applicable upon mailing of the Notice of Action.
7. The certificate of mailing shall be made a part of the board's file on the Application for Special Exception.

Article IX **Procedures for Hearing an Appeal**

The following procedures shall be applicable in the presentation of an Appeal from a decision of any Administrator:

Section 1. Jurisdiction.

Once an appeal has been taken from any final decision of Administrator, the jurisdiction of the

Administrator, from which the appeal was taken, shall cease.

Section 2. Presentation of the ~~Town Staff and Applicant~~ and Town Staff.

1. ~~2-~~The Applicant shall have a maximum of twenty (20) minutes to present the facts and applicable legal principles that the Applicant believes supports the Application for an Appeal. During the presentation by the Applicant, members of the Board of Zoning Appeals may ask such questions as they deem appropriate. At the discretion of the Chairman, the Applicant's time may be extended if the Applicant is unable to complete the presentation due to questioning from the Board of Zoning Appeals.
2. ~~1-~~Staff shall have a maximum of twenty (20) minutes to present the facts and applicable legal principles that the Staff believes support the position of Staff with respect to the Application for an Appeal. During the presentation by Staff, members of the Board of Zoning Appeals may ask such questions as they deem appropriate. At the discretion of the Chairman, Staff's time may be extended if the Staff is unable to complete the presentation due to questioning from the Board of Zoning Appeals.
3. The Board may allow a maximum of five (5) minutes for both parties to present any desired rebuttal.
4. Following the presentation, the Board of Zoning Appeals may ask such additional questions of the Applicant or Staff as the members deem appropriate.
5. The Board may subpoena witnesses and in the case of contempt may certify such fact to the Circuit Court having jurisdiction over such matters.
6. Public comment is not permitted in a case involving an appeal from an Administrator decision, except in cases where the Appellant is not the Property Owner. In that case, the Property Owner or their Agent may be permitted to provide comments.
7. In the case of an Appeal where the Appellant is someone other than the Owner of the Property subject to the Appeal, the Chairman will call upon the Property Owner or their Agent to provide comments or a presentation. If the Property Owner or Agent is present and wishes to speak on the matter of the appeal, the Chairman will recognize them at such time in the proceedings as deemed appropriate by the Chairman. The Property Owner or their Agent will have a maximum of twenty (20) minutes to present. During this time, members of the Board of Zoning Appeals may ask such questions of the Property Owner or their Agent as they deem appropriate.

Section 3. Vote on the Appeal.

Following the presentation by all parties as set forth above, the Board, upon a Motion duly made and seconded, shall vote on the Appeal.

1. Pursuant to the provisions of Section 16-2-103.T.4.d of the LMO, the Board shall:
 - a) Affirm the action of the Administrator from which the Appeal was taken; or,
 - b) Modify the action of the Administrator from which the Appeal was taken, and to that end, the Board of Zoning Appeals shall have all of the powers of the Administrator from which the Appeal was taken, and may issue a permit, or direct that a permit be issued;

- or,
- c) Reverse the action of the Administrator from which the Appeal was taken, and to that end, the Board of Zoning Appeals shall have all of the powers of the Administrator from which the Appeal was taken, and may issue a permit, or direct that a permit be issued; or,
 - d) Remand the action of the Administrator from which the Appeal was taken for such further proceedings as the Board of Zoning Appeals may deem appropriate.
- 2. The Motion shall contain, at a minimum, a finding of those facts which the member making the Motion deems material to the decision.
 - 3. Following the Vote, the Board shall issue a written Notice of Action. The written notice of action shall include the decision as well as the findings of fact and conclusions of law adopted by the Board.
 - 4. The Notice of Action shall be mailed by certified letter to the Appellant and Record Owner of the real property affected by the Appeal, if different from that of the Appellant.
 - 5. The decision of the Board shall be deemed final and applicable upon mailing of the Notice of Action.
 - 6. The certificate of mailing shall be made a part of the board's file on the Appeal.

Article X
Procedures for a Remand

Section 1. Remand.

- 1. A member of the Board may move for a remand at any time, subject to review and determination by the Board. The motion shall specifically set forth factual and/or legal grounds that cause the record to be insufficient.
- 2. If a remand is granted, the Town and the Applicant shall obtain and present all additional information needed to render the record sufficient as detailed in the motion for the remand.

Article XI
Motions

Section 1. Motion for a Reconsideration.

- 1. The Board may reconsider any decision made under Section 16-2-103.E.3.d, 16-2-103.S.3.d or 16-2-103.T.4.d of the Land Management Ordinance.
- 2. Any party aggrieved by a decision of the Board, if they desire to do so, is required to file any Petition for Reconsideration by delivering the same to the Administrator within ten (10) days from the date of hearing. "Delivered" as referenced in this section, means actual delivery.
- 3. The Petition for Reconsideration shall be in writing and shall state with particularity the points alleged to have been overlooked or misinterpreted the Board.

4. The Petition for Reconsideration shall be presented to the Board at the next regular scheduled meeting following the filing of the Petition for Reconsideration after compliance with the public notice requirements for a Board Public Meeting per the LMO.
5. Motions:
 - a. A Motion to Grant the Petition for Reconsideration may only be made by a member of the Board who voted on the prevailing side in the original vote.
 - b. The effect of the granting of a Motion for Reconsideration shall be that the Board will review the entire matter as if no previous vote had been taken.
 - c. A Motion to Deny the Petition for Reconsideration may be made by any member of the Board. The effect of a vote denying a Petition for Reconsideration is that the vote shall be considered to be the Board's final action on the matter. A Notice of Action shall be delivered to the Applicant following such vote.
6. Successive Petitions for Reconsideration are prohibited. No matter that has been reconsidered may be reconsidered a second time. The Board may not reconsider a denial of a Petition for Reconsideration.

Section 2. Motion to Dismiss.

Any interested party to a matter pending before the BZA may file a Motion to Dismiss the pending matter. The purpose of a Motion to Dismiss is to seek dismissal of the matter prior to the hearing on the merits of the pending matter.

1. A Motion to Dismiss may assert matters relating to procedure or jurisdiction including:
 - a. Failure to comply with requirements of the LMO,
 - b. Lack of jurisdiction,
 - c. Standing,
 - d. Other matters not relating to the merits of the matter.
2. A Motion to Dismiss shall be in writing, and be filed and served in accordance with Article VI, Section 10, Supplemental Submissions/Briefs.
3. A Motion to Dismiss may be supported by briefs of the law, affidavits or other matters pertinent to the Motion.
4. Any interested party may file briefs and other materials in response to the Motion, in accordance with Article VI, Section 10, Supplemental Submissions/Briefs.
5. The Motion to Dismiss will be normally heard at the same meeting as the related appeal; however, the Chairman or Vice Chairman, in the absence of the Chairman, upon request, in his sole discretion, may permit the motion to be heard at an earlier meeting.

Section 3. Motion for Postponement.

The Town, the Applicant or a Member of the Board may request a postponement of an application at any time, subject to the review and determination of the Board.

The Chairman or Vice Chairman, in the absence of the Chairman, may for good cause grant one postponement request for a period of up to three months from the original hearing date. Any subsequent postponement requests shall be discussed and voted on by the Board

A Motion for Postponement shall be in writing, stating the reasons for the requested postponement, and be filed and served in accordance with Article VI, Section 10, Supplemental Submissions/Briefs.

Section 4. Motion for Withdrawal of Application.

The applicant may request a withdrawal of an application prior to the ruling. A Motion for Withdrawal of the Application shall be in writing, stating the reasons for the requested withdrawal, and be filed and served in accordance with Article VI, Section 10, Supplemental Submissions/Briefs.

The Board shall have the opportunity to discuss the reasons for the application being withdrawn; unless the project has been abandoned. In the absence of the applicant, if the withdrawal is questioned by the Board, the case will be postponed to the next meeting.

Article XII **Miscellaneous**

Section 1. Executive Session.

If a member determines after reviewing the applicable cases that they would benefit from the advice of legal counsel in Executive Session they shall contact the Chairman or his designee. The Chairman will determine if an Executive Session is warranted. If the Chairman decides that the membership would benefit from an Executive Session, they will inform the Board's Secretary of the request. The Chairman's decision can be overridden by a majority vote of the Board taken at a regular or special meeting of the BZA.

Executive Session is a meeting at which the proceedings are secret. A member can be punished under disciplinary procedure if he violates the secrecy of an executive session. Anyone else permitted to be present is honor-bound not to divulge anything that occurred.

Permitted reasons should include:

1. Personnel reasons
2. Contracts
3. Legal advice relating to pending, threatened or potential claim
4. Discussion regarding development of security personnel
5. Investigative proceedings regarding allegations of criminal misconduct
6. Economic development (specific criteria in FOIA)
7. Legal advice relating to procedural, conflict of interest, or general issues unrelated to a specific matter before the Board.

Entering and Adjourning an Executive Session:

1. A motion to close the current meeting and go into executive session is made and passed by a majority vote;
2. Chairman must announce the specific purpose of the executive session;
3. No formal action may be taken in executive session except to:
 - a. Adjourn
 - b. Return to public session

The Board can request attendance by non-members as they deem appropriate.

Section 2. Recess.

A recess shall be declared as deemed appropriate by the Chairman or by majority vote of the members present at the meeting. No discussion of the agenda item shall be conducted by Board members during the recess.

**For the Board of Zoning Appeals
Town of Hilton Head Island, South Carolina**

Date of Approval: Month, Day Year

By: _____
David Fingerhut
Chairman

Attachment for Reference

TYPES OF MOTIONS

Main Motion	A main motion is defined as a proposal that certain action is taken or an opinion be expressed by the group. The words to use are: "I Move."
Secondary Motions	A secondary motion is one which can be made <i>while</i> the main motion is on the floor and <i>before</i> it has been decided. Secondary motions are divided into three classes which relate to their use in parliamentary procedure. Those classes are: <ul style="list-style-type: none"> ○ Subsidiary motions ○ Privileged motions ○ Incidental motions
Subsidiary Motions	Subsidiary motions relate directly to the motion on the floor. They may change the words, send it to a committee, delay it, etc. They are designed to expedite business by disposing of the pending motion other than by adopting or rejecting it. <i>Subsidiary motions are the class of motions most frequently used in meetings.</i> These motions have rank (order of precedence of motions) among themselves. A motion of higher rank can be made while a motion of lower rank is on the floor. The lower rank motion "yields" to the higher rank motion. (Motion to postpone has higher rank than the motion to commit and takes precedence. If motion to postpone is adopted, the main motion and the motion to commit are postponed until the next meeting.)
Privileged Motions	Privileged motions are motions of an emergency nature, such as to recess or adjourn. They do not relate to the motion on the floor but to the welfare of the group. They are of high rank and must be handled before any other business that may be pending.
Incidental Motion	Incidental motions are procedural. They deal with process, such as enforcing proper procedure, correcting errors, verifying votes, etc. When introduced, they must be decided before business can resume.
Amending Motion	General consent can be used with amendments to motions if the Chairman feels the group will accept the amendment. "If there is no objection, the motion is so amended." <i>Restate the motion.</i>
Motions Commit	Have precedence over the motion to amend. More than one motion can be on the floor but only one question. All pending motions must relate to the main motion on the floor. No new business may be introduced.
Point of Order	Motion used if a board member feels the Chairman is failing to operate within the rules.

Restorative Motions or Motions that Bring Back a Question

Restorative Motion	Allows a group to change its mind. <ul style="list-style-type: none"> ○ They are a separate category because of their contradiction to the
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	<p>parliamentary rule that once a question has been decided it cannot be brought up again at the same meeting.</p> <ul style="list-style-type: none"> ○ Within limits, members have the right to rethink a situation if they feel their decision has been made too quickly or without enough information. ○ The two most commonly used restorative motions are: <i>Rescind</i> and <i>Reconsider</i>.
Rescind	<p>Rescind is the motion to use to quash or nullify a previously adopted motion. It may strike out an entire motion, resolution, bylaw, etc.</p> <ul style="list-style-type: none"> ○ Rescind is <i>not in order</i> when any action has already been taken as a result of the vote, such as any kind of contract when the other party has been notified. ○ It must be seconded. ○ It requires a <i>two-thirds</i> vote unless <i>notice has been given</i> at the previous meeting, either verbally or in writing. If notice has been given, the motion requires only a <i>majority</i> vote.
Reconsider	<p>Reconsider is the motion which allows a group to reconsider the vote on a motion. It enables a majority of the members, within a limited time, to bring back a motion for further consideration after it has been acted upon. Its purpose is to prevent hasty or ill-advised action.</p> <ul style="list-style-type: none"> ○ Reconsider has special rules to prevent its abuse by a disgruntled minority, since it allows a question already decided to be brought up again. ○ Rules limit who can make the motion. It can only be made by someone who voted on the prevailing (winning) side. ○ It has a time limit. It must be made on the same day that the vote to be reconsidered was taken. ○ It requires a second. ○ It may be debated and it opens up the motion to which it is applied to debate. ○ It requires only a majority vote. ○ It may be made and seconded while other business is pending because of its time limit. However, it is not debated and voted on until the business on the floor is completed. ○ All action that might come out of the original motion is stopped at the time that reconsider is made and seconded. This is the main value of the motion, and it should be made as quickly as the situation calling for it is recognized.
Amend a Motion	<p>Change the wording to make it clearer, more complete, or more acceptable before the motion is voted upon. The amendment must be germane to the motion on the floor to be in order. Adoption of the amendment does not adopt the motion. If the group votes “no” on the amendment, the motion is on the floor in its original wording.</p>
Amend an Amendment	<p>First amendment is called the primary and the amendment to the amendment is the secondary amendment. Only two amendments may be pending at any time. First vote on the amendment to the amendment (secondary), then vote on the original amendment (primary), then vote on the main motion. Amendments require a majority vote.</p>
Friendly	<p>Change in wording to enhance the original motion – can be changed by general</p>

Amendments	consent.
Hostile Amendments	Gives a different meaning to a motion and may defeat the intent of the main motion.
To Commit or Refer a Motion	Sends the question to a small group (committee) to be studied and put into proper form for the group to consider. Motion includes specific directions as to where the question ought to go (what committee). Motion can be applied to any main motion with any amendments that may be pending. It must be seconded, it can be debated, and requires a majority vote.
Postpone	Delays action on a question until later in the same meeting or until the next meeting. <i>A motion cannot be postponed further than the next regular meeting.</i> Can be applied to all main motions, it must be seconded, it can be debated, it can be amended (as to time of the postponement), it requires a majority vote. Motion is called up automatically when the time to which it was postponed arrives (place under Unfinished Business on agenda of next meeting).
Limit Debate	Motion to exercise special control over debate – reducing the number and length of speeches allowed. Used with any motion, must be seconded, is not debatable, can be amended (but only as to the length of speeches or when the vote will be taken), requires 2/3 vote, vote must be taken by show of hands or a rising vote in a large group. (Need a timekeeper and timer if speeches have a time limit.)
Previous Question	The motion used to cut off debate and to bring the group to an immediate vote on the pending motion. (Call the question for an immediate vote). Previous question can be ruled out of order if the motion is debatable and has not received debate. Motion requires 2/3 vote (by show of hands or standing vote). Not debatable.
Postpone Indefinitely	Lowest-ranked subsidiary motion is used to kill a main motion. It avoids a direct vote on the question on the floor. Shouldn't be used.
Lay on the Table	Highest-ranked subsidiary motion. Cannot be amended or debated. It is out of order when used to "kill or avoid dealing with a measure". Was designed as a courtesy motion to allow a group to set aside a question for something more important, such as arrival of a speaker.
Withdraw a Motion	Permission to withdraw a motion allows a member who realizes he has made a hasty or ill-advised motion to withdraw it with the consent of the group. This device saves time in disposing of the motion. The presiding officer usually handles the request by use of general consent.
Dilatory Tactics	A dilatory tactic is the misuse of parliamentary procedure to deliberately delay or prevent action in a meeting. It is the duty of the presiding officer to prevent a dissident minority from misusing legitimate forms of motions to obstruct business. Such motions should be ruled out of order or those members engaged in such game playing should not be recognized.

TYPES OF VOTES

Majority Vote	<ul style="list-style-type: none"> • More than half of the votes cast. • The minority has the right to be heard, but once a decision has been reached by a majority of the members present and voting, the minority must then respect and abide by the decision.
Silence is Consent	Those members who do not vote, agree to go along with the decision of the majority by their silence.
Two-thirds Vote	A two-thirds vote is necessary whenever you are limiting or taking away the rights of members or whenever you are changing something that has already been decided. A two-thirds vote has at least twice as many votes on the winning side as on the losing side. A show of hands should be taken for <i>all</i> motions requiring a <i>two-thirds vote</i> . If a motion requires a two-thirds vote, the Chairman should inform the group of that.
General Consent	<p>Is an informal agreement of the group, the method in which action is taken without a formal vote or on occasion without a motion. The Chairman initiates the procedure to expedite business. Usually done to approve and correct the minutes.</p> <ul style="list-style-type: none"> • The presiding officer always pauses after asking if there is any objection. If there is <i>any</i> objection, the matter is put to a vote in the usual way. • A member may object because he feels it is important to have a formal vote and dispel any suspicion of railroading.
Tie Vote	Is a <i>lost</i> vote because a majority was not obtained. The <i>Chairman is not compelled to break a tie</i> . While the Chairman has a right to vote as a member, it is recommended he not vote unless the vote is by ballot. He may also vote in cases where the vote would change the result. The Chairman should appear impartial.



TOWN OF HILTON HEAD ISLAND

Community Development Department

TO: Board of Zoning Appeals
FROM: Taylor Ladd, *Senior Planner*
DATE: September 17, 2018
SUBJECT: Substitutions of Nonconformities for Redevelopment

The 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.

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 been no Substitutions of Nonconformities for Redevelopment granted by staff since the August 27, 2018 BZA meeting.