

TOWN OF HILTON HEAD ISLAND
Board of Zoning Appeals
Minutes of the March 26, 2018 2:30 p.m. Regular Meeting
Benjamin M. Racusin Council Chambers

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

Board Members Absent: None

Council Members Present: David Ames, Kim Likins, Mayor Bennett

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

1. Call to Order

2. Pledge of Allegiance to the Flag

3. Roll Call

4. Freedom of Information Act Compliance

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

5. Welcome and Introduction to Board Procedures

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

6. Approval of Agenda

Chairman Fingerhut asked for a motion to approve the agenda. Mr. Walczak moved to approve. Mr. White seconded. The motion passed with a vote of 5-0-0.

7. Approval of the Minutes – Meeting of January 22, 2018

Chairman Fingerhut asked for a motion to approve the minutes of the January 22, 2018 meeting. Vice Chairman Cutrer moved to approve. Ms. Laudermilch seconded. The motion passed with a vote of 5-0-0.

8. Unfinished Business – None

9. New Business

APL-00439-2018 – Request for Appeal from Tamara Becker and Ronda Carper on behalf of the Bradley Circle Community. The appellants are appealing staff's determination, dated February 8, 2018, which states that the structures proposed for 28 Bradley Circle and 3 Whelk Street are vested to a height of 75' above the base flood elevation (BFE).

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.

10. Board Business – None

11. Staff Report

- a) Waiver Report – The Waiver Report was included in the Board’s packet. Ms. Ladd gave an update regarding the April meeting.

12. Adjournment

Mr. Johnson moved to adjourn. Ms. Laudermilch seconded. The meeting was adjourned at 4:48 p.m.

Submitted by: Teresa Haley, Secretary

Approved: June 25, 2018

David Fingerhut, Chairman

EXHIBIT A

HILTON HEAD ISLAND TOWN OF HILTON HEAD ISLAND BZA MEETING
Case No. 1

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HILTON HEAD ISLAND
THE STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

TOWN OF HILTON HEAD ISLAND
BOARD OF ZONING APPEALS MEETING
March 26, 2018

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The the following transcript was
transcribed from audio file provided by The Town
of Hilton Head, South Carolina by Charles T.
Nussbaum.



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I N D E X

BOARD MEMBERS PRESENT:

Chairman David Fingerhut
Vice Chairman Jerry Cutrer
Charles Walczak
Robert Johnson
John White
Lisa Laudermilch

TOWN STAFF PRESENT:

Theresa Haley
Nicole Dixon
Brian Hulbert, Esquire
Teri Lewis
Taylor Ladd
Shawn Colin

PAGE

CERTIFICATE ----- 129



1 CHAIRMAN FINGERHUT: I'm going to
2 call the meeting to order. Welcome to
3 the Board of Zoning Appeals. We're
4 going to start our meeting with the
5 Pledge of Allegiance.

6 (Whereupon, Pledge of Allegiance
7 was recited.)

8 CHAIRMAN FINGERHUT: Thank you.
9 Teresa, will you please call the role?

10 MS. HALEY: Mr. Walczak?

11 MR. WALCZAK: Present.

12 MS. HALEY: Mr. Fingerhut?

13 CHAIRMAN FINGERHUT: Present.

14 MS. HALEY: Mr. Cutrer?

15 VICE CHAIRMAN CUTRER: Present.

16 MS. HALEY: Mr. White?

17 MR. WHITE: Present.

18 MS. HALEY: Ms. Laudermilch?

19 MS. LAUDERMILCH: Present.

20 MS. HALEY: Mr. Johnson is
21 expected.

22 CHAIRMAN FINGERHUT: Thank you.
23 Are we in compliance with the Freedom
24 of Information Law?

25 MS. HALEY: Yes, sir, we are.



1 CHAIRMAN FINGERHUT: Thank you.
2 Welcome everybody, again, to the Board
3 of Zoning Appeals. Special welcome to
4 Councilman Ames. Thank you for coming.

5 Today we have one matter on our
6 agenda. It is an appeal. In an
7 appeal, most importantly, there's no
8 public comment. We will hear first
9 from the appellant, who will have 20
10 minutes to present their arguments.
11 After that, will have -- we'll hear
12 from the Town, will have 20 minutes to
13 give their arguments. After that,
14 there's five minutes rebuttal, which
15 can be adjusted or extended, as needed.
16 After that, the Board will discuss the
17 appeal that we've heard. A motion will
18 be made, hopefully, and we'll have a
19 decision.

20 May I have a motion for approval
21 of the agenda?

22 MR. WALCZAK: So moved.

23 CHAIRMAN FINGERHUT: Second?

24 MR. WHITE: Second.

25 CHAIRMAN FINGERHUT: All in favor?



1 (All Aye.)

2 CHAIRMAN FINGERHUT: Can I have a
3 motion for approval of the minutes from
4 our January 22nd meeting?

5 VICE CHAIRMAN CUTRER: Move for
6 approval as written.

7 CHAIRMAN FINGERHUT: Second.

8 MS. LAUDERMILCH: Second.

9 CHAIRMAN FINGERHUT: All in favor?

10 (All Aye.)

11 CHAIRMAN FINGERHUT: There's no
12 unfinished business. Anything before
13 new business? Mr. Cutrer?

14 VICE CHAIRMAN CUTRER: Chairman, I
15 move that the Board of Zoning Appeals
16 go into executive session for a few
17 moments to obtain legal advice from
18 town counsel on certain issues relating
19 to the matter before us today.

20 CHAIRMAN FINGERHUT: We have a
21 motion for executive session. Is there
22 a second?

23 MR. White: I'll second.

24 CHAIRMAN FINGERHUT: All in favor,
25 please say aye.



1 (All Aye.)

2 CHAIRMAN FINGERHUT: We'll step
3 into executive session for a brief
4 adjournment and be back.

5 (Brief recess for executive
6 session.)

7 CHAIRMAN FINGERHUT: Thank you.
8 We're back in session. No action was
9 taken during executive session.

10 Next item on our agenda is new
11 business, Appeal No. 00439-2018. The
12 appeal from Tamara Becker and Ronda --
13 excuse me -- Carper.

14 Appellants, please come up.
15 Please state your name for the record,
16 note your appearance, and sign in if
17 there is a sheet there.

18 MS. BECKER: There's not a sheet
19 here, but, hello, I'm Tamara Becker.

20 MS. CARPER: And I'm Ronda Carper.

21 MS. BECKER: And if you're ready,
22 we'll get started.

23 CHAIRMAN FINGERHUT: We are, thank
24 you.

25 MS. BECKER: Thank you. So



1 Ronda -- we have a -- can you hear me
2 if I stand over here and not in front
3 of -- because that's really tall and I
4 need to see my papers. Is that -- or
5 should I move?

6 CHAIRMAN FINGERHUT: Maybe move by
7 the microphone. I can hear you, but
8 everybody in the room a not be able to.

9 MS. BECKER: All right. So I'll
10 just bring my little TV dinner tray and
11 we'll move over here.

12 CHAIRMAN FINGERHUT: Thank you.

13 MS. BECKER: You're welcome. So
14 Ronda Carper and I are here today
15 appealing an official decision of
16 Ms. Lewis and I don't know if Mr.
17 Laughlin is here, but one of the things
18 we'd like is for him to identify his --
19 who his clients are. He's not here.
20 This is -- do we know who
21 Mr. Laughlin's actual clients are?

22 CHAIRMAN FINGERHUT: This is your
23 appeal.

24 MS. BECKER: Yes.

25 CHAIRMAN FINGERHUT: And you



1 really can't pose questions to the
2 panel.

3 MS. BECKER: Yeah, okay.

4 CHAIRMAN FINGERHUT: And, you
5 know, so we're not questioning
6 witnesses, so I would ask that you just
7 present your arguments and legal issues
8 and what you'd like us to look at,
9 please.

10 MS. BECKER: Okay. So we believe
11 that the Official has made an erroneous
12 decision as stated in official letter.
13 Ms. Lewis and the Town of Hilton Head
14 had no clarity as to the proper legal
15 height restriction for the mentioned
16 properties of 28 Bradley Circle and 3
17 Whelk Street, formerly known as Bradley
18 Circle lots 1 and 2.

19 Also, by the way, also known as
20 lot 1, yet Ms. Lewis chose to write a
21 letter in response to Mr. Laughlin's
22 letter on behalf of his clients, that
23 based on the erroneous reading of one
24 attachment and the variance package
25 presented to the BZA on March 28, 2016



1 for two variances, neither of which had
2 to do with height.

3 Giving the client, the developer,
4 and the former owners, whoever it is at
5 this point, a vested right to build to
6 a height that was already reduced
7 through an ordinance amendment. In
8 fact, during a pending ordinance
9 period. That ordinance came about
10 because of an outcry of the residents
11 on Bradley Circle and folks who had
12 seen or heard of a house, a 75-foot
13 building, single family home.

14 A towering mini hotel disguised as
15 a single family home was affecting the
16 neighborhood, what it looked like. And
17 so, for public safety reasons, for the
18 public health and general welfare, the
19 Town of Hilton Head -- and I thank them
20 all -- listened to us carefully and
21 they put through an ordinance -- and
22 we'll get to that in a second -- to
23 reduce the height from 75 feet to a
24 maximum of 45 feet.

25 Actually, went a little bit



1 further and through the help of the
2 Council and Mayor and the Community
3 Development Office, we were able to
4 return Bradley Circle to an RM-8 zoning
5 district instead of the Resort
6 Development District that was
7 mistakenly included in the 2014 LMO
8 change.

9 It's interesting that I recently
10 read that -- in all of that I've read,
11 that the general population has to know
12 as much as our government, and that's a
13 real tall order, but regardless of
14 that, let me let you know some things
15 about myself. I'm a wife, I'm a
16 mother, a grandmother, a daughter of
17 the American Revolution, a proud Texan
18 who has made Hilton Head Island her
19 permanent home with my husband and
20 family.

21 My degrees are in psychology and
22 counseling, with an emphasis in
23 addictions and criminal behavior. And
24 I've taught first grade through college
25 level masters courses, but I'm not a



1 lawyer, so if I say anything that may
2 not be exactly worded like your -- a
3 lawyer would typically say, I apologize
4 and I ask for your forgiveness and
5 please accept who I am as I stand
6 before you.

7 So we found that there's a
8 substantial and a sufficient -- there's
9 substantial and sufficient south care
10 law -- South Carolina law that needs
11 to -- that we need to address regarding
12 the issues at 28 Bradley Circle, 3
13 Whelk Street. And those of you who
14 have followed the saga know that that's
15 why we're here. Mr. Laughlin, in his
16 letter -- Mr. Laughlin wrote in his
17 letter to Ms. Lewis and said that when
18 she wrote to Radu Chindris, who is the
19 developer on August 23rd, telling him
20 that he needed to have a decision by a
21 court or some determination made
22 because there's a settlement agreement,
23 was right.

24 She was right to do that. If an
25 interpretation -- if there is a known



1 restrictive covenant, as there was in
2 this case, Ms. Lewis made the right
3 decision in asking for that
4 interpretation. It doesn't impact
5 whether or not a building permit
6 ultimately gets given, but part of the
7 requirements by law is that she needs
8 to ask for there to be a specific
9 release between the parties who have
10 come to a settlement agreement and
11 restrictive covenants.

12 The settlement agreement that I
13 mentioned makes no mention of height
14 whatsoever. Mr. Laughlin, in this
15 letter, goes on and he says that when
16 the variances were approved, Bradley
17 Circle was a resident -- Resort
18 Development District; however, the Town
19 of Hilton Head rezoned the big --
20 Bradley Circle neighborhood back to
21 RM-8 in October 2017 and nothing on
22 Bradley Circle -- 28 Bradley Circle or
23 2 Whelk Street had been done.

24 There was no financial
25 expenditure. No permit. Only an at --



1 contemplated use, and in the late
2 Francis properties versus City of
3 Charleston, there is no right height
4 in -- there's no right to height so the
5 South Carolina case law in Daniels
6 versus City of Gooseneck and South
7 Carolina State Act 6-29-1560. So
8 moreover, the maximum height of all
9 single family homes in Hilton Head was
10 changed and that was by ordinance.

11 I'm going to skip some stuff
12 because I know I don't have a lot of
13 time and I may have to go back to it.
14 Mr. Laughlin, on page 3 of his letter,
15 he says that the delays that have
16 occurred have cost his clients --
17 has -- they've suffered and have caused
18 them substantial economic loss. I just
19 want to point out, because this is
20 important, that there has been no
21 economic loss. We all know it's
22 important for his clients to try and
23 find and demonstrate some sort of
24 economic investment in the properties
25 in order to bolster their claim, vested



1 rights.

2 As we know historically, there are
3 three ways to claim vested rights and
4 most have to do with having invested
5 money in reliance of the government act
6 and there are varying degrees of
7 reliance to the concept, but here,
8 there has been none. In fact, on the
9 BZA hearing, was March 28th of 2016,
10 and after that hearing, there was a
11 lawsuit that was filed with the Circuit
12 Court by a neighbor, DST. They are the
13 owners of 3 Urchin Circle and they
14 challenge the BZA decision at that
15 point on a number of grounds.

16 Settlement -- they went into
17 settlement, it was dismissed, and they
18 went into settlement, so April 27,
19 2017, they were in that process. It
20 was all ultimately signed in July of
21 2017 and then Mr. Chindris purchased
22 the property on May 6th -- 10th, 2016.
23 He had the lot surveyed April 17th of
24 2017 and he demoed the house on May 21,
25 2017 without a permit.



1 Transcon then -- Mr. Chindris,
2 Transcon, his business, they owned the
3 house. Then on July 17, 2014 -- 2017,
4 he sold to Monte Development for -- one
5 of the lots for \$600,000 without having
6 done a thing. And then on July 14th,
7 he sold -- or it's June 14th, he sold
8 to Bradley Beach Partners, LLC for
9 \$600,000 without having done a thing.

10 So you can see that there --
11 Mr. Laughlin's Conjecture, that there
12 was a substantial loss and that they
13 were losing money because of these
14 delays is not accurate. He's not
15 losing money and no money has been
16 invested. Mr. Chindris purchased
17 property for \$535,000 and that by the
18 time we get to July 14, 2017, he's
19 already made \$665,000 on the property
20 without lifting a finger.

21 It also brings me to a point --
22 and I'm going to be jumping around a
23 little bit because I'm really concerned
24 I'm going to run out of time. I didn't
25 know there was a time limit. So I'm



1 going to jump around a little bit and
2 hopefully get to everything and I'm
3 going to go back and answer as many
4 questions for you as I can because I
5 have a book of information that I've
6 read. There is multiple laws and
7 regulations that we need to be focused
8 on here.

9 For instance, in the -- and it's
10 written in the staff report and I'll
11 get to it. On background, the
12 applicant, Dr. Craig, Dr. Frederick
13 Craig and Ms. Shirley Dorsey, purchased
14 this proper -- or Dr. Craig actually
15 purchased it in 1998. Interestingly,
16 and oddly, we should play the lotto.
17 It's six -- so he paid \$665,000 for the
18 property. If you'd like -- he paid
19 \$665,000 for the property, that
20 property is right here -- and I don't
21 know why you can't see it. Maybe
22 someone can do this for me.

23 And that property was lot 1 and
24 lot 1-A, and when the map comes up,
25 you'll see that what we're talking



1 about as Bradley Circle, 18 Bradley
2 Circle, 3 Whelk Street, lot 1 and 2,
3 was actually lot 1. And that was
4 street side of the marsh. Lot 1-A is
5 on the ocean side. So there were two
6 lots, but one was on the marsh side and
7 one was on the ocean side. And that's
8 the configuration when in 1998 when
9 they bought -- it's upside down but
10 that's okay. I can change it, right?

11 CHAIRMAN FINGERHUT: Yes.

12 MS. BECKER: That better for you?
13 Should be. When they purchased the --
14 when Dr. Craig purchased the property,
15 there was one house on it on lot 1 up
16 at front. In 2003, as noted in
17 Ms. Dixon's report -- and I have the
18 records for you, it's an interesting
19 situation. Dr. Craig and Ms. Dorsey
20 re-platted it and made -- created the
21 subdivision of five lots.

22 They took lot -- and we're going
23 to talk about just this portion up here
24 because that's the part of the property
25 that we're -- is lot 1 and lot 2,



1 that's a matter of interest at this
2 point. And when they developed the --
3 when they created, themselves, this
4 subdivision, they created five lots,
5 and of the five lots, three were flag
6 lots that exist -- that house that you
7 see that was existing from the day that
8 miss -- Dr. Craig bought it.

9 So when the B -- when the BZA got
10 this application, there was something
11 that was omitted that was very
12 important, right, because you all know
13 that you cannot grant a variance for
14 hardship that's of your own making.
15 This is Dr. Craig's property.
16 Dr. Craig was the applicant when they
17 came before you on March 28th of 2016.
18 This was his design, he and Ms.
19 Shirley, that their -- Dorsey, this was
20 their design.

21 Five lots, putting that home
22 straddling lot 1 and lot 2 that was --
23 that were the subject of the variances.
24 So they created the situation.
25 Moreover, when you hear some of the



1 discussions, and I'm sure you've all
2 read the packet, they talked about flag
3 lots or homes one behind the other, not
4 being common in the area. Well, they
5 created three of them themselves.

6 So they want relief and that
7 variance application. That variance
8 application should never have been
9 brought before this Board. There was a
10 material omission and with an
11 immaterial omission, there is no
12 variance, it has to be stricken. This
13 was of their own -- this hardship that
14 they asked for relief from was of their
15 own making.

16 So that's important, right? So
17 that's really important because it
18 gives Council the opportunity -- it
19 gives this Board the opportunity to
20 rescind those variances from the --
21 right out the gate. So that's a little
22 background on the property. There's a
23 lot more that I could go into but I
24 think I might be short on time, but I
25 can answer questions. But I want to



1 make sure that you understand that this
2 entire create -- situation was created
3 by the applicants themselves.

4 Okay. Good. So we've got that.
5 I've got so much and I'm just -- you
6 know, I could probably -- this is like
7 teaching a class that I've never taught
8 before and only having a month to
9 prepare in a field that I'm not
10 familiar with so bear with me, please.

11 So Ms. Lewis writes a letter and
12 she states that there is a diagram, a
13 document in the letter in the variance
14 packet that she uses to make a decision
15 of that -- the height for these two
16 properties is vested for 75 feet and --
17 I don't know if you have that -- or I
18 have one. Ms. Lewis, could you -- am I
19 allowed to ask questions or no? Am I
20 not?

21 CHAIRMAN FINGERHUT: You can ask
22 Ms. Lewis for --

23 MS. BECKER: I can ask Ms. Lewis
24 questions?

25 CHAIRMAN FINGERHUT: -- pieces --



1 if you need pieces of paper, things
2 that are in the --

3 MS. BECKER: Okay. Thank you.

4 CHAIRMAN FINGERHUT: In your
5 appeal, she certainly --

6 MS. BECKER: Perfect.

7 CHAIRMAN FINGERHUT: -- be happy
8 to, if she has it.

9 MS. BECKER: That will help. I
10 don't know if you have it, I have one.
11 Do you have the -- okay. And I should
12 also say, while we're waiting for her,
13 that over the course of the last few
14 years, in fact, from the time of 2014
15 when I bought my property and started
16 building, I worked with all these
17 folks.

18 CHAIRMAN FINGERHUT: Ms. Lewis.

19 MS. BECKER: And they're good
20 people. Is this the one that you used?

21 CHAIRMAN FINGERHUT: Thank you.

22 MS. BECKER: You used Attachment
23 H, because when we discussed this, I
24 believe you had said that you used
25 Attachment G? There we go. So this is



1 the attachment that Ms. Lewis uses when
2 she's looking for clarity. How to come
3 to -- how to come to an assessment of
4 whether or not there is a vested right
5 to 75 feet.

6 So in this -- in a variance
7 application, all right -- and we're
8 going to just start from the beginning.
9 I hope I don't run out of time. We're
10 just going to start from the beginning.
11 In a variance application -- and you
12 know where variance application, we can
13 find them -- we can find information
14 from the information on the website,
15 the Hilton Head Town website, Appendix
16 D-19 of the LMO, the variance
17 application itself. Variance
18 procedures, 16-2-102, and before the
19 Board of Zoning Appeals because you
20 guys know about -- about variances.

21 An application for variance under
22 16-105 explains what a variance
23 application is. The completed forms
24 and -- that are necessary and the
25 supporting documents, fees, et cetera.



1 In 102, which is the reviews --
2 standard review procedures in
3 102(1)(a), these procedures shall apply
4 to all applications unless expressly
5 exempted, and I don't believe there
6 were any exemptions here.

7 So under 16-2-103, there's some
8 procedures, and under those procedures,
9 you're welcome to have a preconference.
10 102 -- 16-2-102(3)(b), the pre --
11 application conference is not required,
12 but it's recommended and it's
13 encouraged. One of the things that you
14 need to bring to that preconference
15 when you come to me is you need to
16 bring a conceptual site plan.

17 And their pre-application process,
18 the goal there is to meet with staff
19 is -- is someone who's designing
20 something -- to meet with staff and
21 have staff go over some of the problems
22 that might be there, make some
23 suggestions, look to see how the LMO is
24 going to work for them, and to find out
25 what they can do. And then staff is



1 kind enough that they write a report
2 for you and they give that to you.

3 Is that me?

4 CHAIRMAN FINGERHUT: 20 minutes.

5 It's okay, just try to be mindful of
6 the time and perhaps wind down.

7 MS. BECKER: So let me -- so let
8 me -- here's what I'm going to tell
9 you, that in my book, I have law after
10 law and rule after rule. I'm going to
11 give you the summary, and if I have to
12 go back and pull out the laws, I want
13 you to know that everything I'm about
14 to say is not because I made it up,
15 it's not because it's what I wish it
16 were, it's not because I would hope
17 that you will believe me, it's because
18 every single solitary thing I say is
19 going to be based on a law that is
20 either South Carolina law or Hilton
21 Head law or it's a law, because vested
22 rights is such a broad area of land
23 use, that I've read from Washington DC
24 to Maine to Florida and everywhere in
25 between.



1 Here are some facts, okay?
2 Without pulling the laws out so I can
3 go through, here are some facts. We
4 don't have a site plan, okay? A site
5 plan, according to the definitions in
6 16-1 -- 16-10-101 of our law
7 requires -- requires that you have a --
8 a detailed engineering plan to scale
9 and that scale is repeated -- in all
10 those places where I told you you can
11 find out about variances, that scale is
12 repeatedly mentioned to be 1 inch to 30
13 feet, so that's one thing that you
14 need -- that's a definition by law.

15 And if you go to our Code, you'll
16 see that some of the things that are in
17 there are some great stuff. There are
18 specific words that are highlighted and
19 they're defined and then the Official
20 has the opportunity under
21 interpretations, and it's all by code,
22 okay, so I'm going to skip through the
23 code so that I can focus on how
24 I've given you the information, but I
25 can refer to it if you want specifics.



1 So under interpretations, there
2 are definitions and then you have
3 certain words that have been defined in
4 the Code. Then there are -- the
5 Official has the opportunity, too, if
6 the words aren't there, everything else
7 is to be common every day use. And if
8 it's not common every day use, she also
9 can refer to a number of different -- a
10 planner's guide, a number of different
11 books that I'm sure are specific to
12 land use, but you can also use things
13 as simple as the Oxford dictionary or
14 the Miriam Webster dictionary to find
15 your definitions and codes.

16 So site plan is defined as a
17 detailed engineering planned to scale
18 that reasonably shows what you are --
19 what you're building, what you're
20 doing. So we look for a site plan that
21 has a scale of 1 inch to 30 feet with
22 detailed engineering. This is the
23 picture that Ms. Lewis used to make the
24 decision that was 75 feet.

25 First of all, it's not to scale.



1 There's a few things I want to point --
2 it has -- and it didn't -- and
3 moreover -- okay. Let's just jump
4 around. Moreover, in the state code,
5 you also have to have a site specific
6 development plan. So what they throw
7 in there has to be site specific.

8 So you have to make sure that that
9 plan that you're presenting for your
10 variance is for that particular
11 property. Let's just look at this one.
12 And my husband was going to present
13 this and I'm going to take his spot and
14 I'm going to do it. I don't see a
15 detail engineering plan and the
16 engineering plan has specifics, it has
17 data, it tells you exactly what it is
18 that you want to build and how you're
19 going to build it.

20 Furthermore, I don't see a sale of
21 1 inch to 30 feet. In fact, the scale
22 that it refers to here is 316 inches
23 equals 1 foot. And by any manipulation
24 of measure with -- if you look at this
25 plan, it does not reflect the property



1 of 28 Bradley Circle or 3 Whelk Street.
2 In fact, if you measured it out from
3 the property line to property line,
4 which, by the way, property line that
5 you will see on -- it's my right so it
6 must your left, that's not their
7 property line, that's Whelk Street.

8 So the actual property line is 8
9 feet -- or 15 feet closer to the
10 buildings. But be that as it may, I'm
11 going to list a whole bunch of problems
12 for you. It doesn't have -- that's not
13 an engineer -- detailed engineering
14 plan because I'm sure Mr. Walczak can
15 tell us. There's no specifications on
16 there. There's no data on there.
17 There's no information that's going to
18 guide you in building.

19 It is not to scale. It is also --
20 and if we pulled it over a little bit,
21 you might be able to see it a little
22 bit more clearly. Had lots of copies
23 but I'm not going to pull them out, but
24 you can see over here, it says that
25 this particular drawing is for 22



1 Bradley Circle. It's dated July
2 15th -- 16th, 2015. It is not a site
3 specific development plan. It doesn't
4 exist. So this is one document --

5 CHAIRMAN FINGERHUT: May I ask you
6 a question?

7 MS. BECKER: Sure. Please.

8 CHAIRMAN FINGERHUT: Okay. First,
9 you must be mindful of the time because
10 we're well over --

11 MS. BECKER: I am.

12 CHAIRMAN FINGERHUT: -- 20
13 minutes, but I have a question.

14 MS. BECKER: Yes, sir.

15 CHAIRMAN FINGERHUT: I have a
16 question.

17 MS. BECKER: Yes, sir.

18 CHAIRMAN FINGERHUT: Is it your
19 argument then that because there was no
20 site specific plan, that there is no
21 vested right? Is that what you're
22 saying?

23 MS. BECKER: I'm going to say that
24 we have a number of things. We have --
25 there was material --



1 CHAIRMAN FINGERHUT: Well, let me
2 just --

3 MS. BECKER: Yes, sir.

4 CHAIRMAN FINGERHUT: -- stop you
5 just for my question.

6 MS. BECKER: Yes, sir.

7 CHAIRMAN FINGERHUT: Is that --
8 are you arguing that, because if --

9 MS. BECKER: Yes, sir.

10 CHAIRMAN FINGERHUT: -- you're
11 not, that's fine, too, but I'm --

12 MS. BECKER: Yes, sir, I am.

13 CHAIRMAN FINGERHUT: -- torn.

14 MS. BECKER: Yes, sir.

15 CHAIRMAN FINGERHUT: So that's --

16 MS. BECKER: That is one of our
17 arguments.

18 CHAIRMAN FINGERHUT: Okay. So
19 that's why.

20 MS. BECKER: That's why I'm going
21 there.

22 CHAIRMAN FINGERHUT: I would ask
23 that you quickly sum up --

24 MS. BECKER: Well.

25 CHAIRMAN FINGERHUT: -- for the



1 others, you're --

2 MS. BECKER: Okay.

3 CHAIRMAN FINGERHUT: -- going to
4 have to because --

5 MS. BECKER: Here's the -- here's
6 the real important part. So we don't
7 have -- in fact, in the -- in the
8 narrative in the staff report and in
9 the -- in the narrative and in the
10 staff report, in the transcripts, never
11 ever is this be piece of prop -- this
12 picture -- this is said to be something
13 that is shown as something that cannot
14 be built.

15 This is not what he's looking to
16 build. It doesn't fit the criteria of
17 a site plan. That first picture that
18 Ms. Lewis showed us, that particular
19 picture, however, does say that it is a
20 proposed home for Bradley Circle. It
21 might -- but it doesn't show a height
22 either. Nowhere on any document,
23 nowhere in the discussion, nowhere in
24 the narrative, nowhere in the
25 transcript will you find any reference



1 to height at all. Okay.

2 All you hear is -- and
3 furthermore, there are photos that
4 they've provided. There are a number
5 of photos that were provided. I hope
6 you have all seen these. There is one
7 photo that was provided that is
8 anything above 45 feet, meanwhile,
9 throughout the dialog, there is
10 constant reference to we want to be in
11 harmony with the neighborhood, we want
12 to be like the other homes in the
13 neighborhood, and of our 15 homes, we
14 don't have one home that is above 45
15 feet.

16 So there is no thing -- if he
17 wants to be in harmony, he is below 45
18 feet. He doesn't present anything in
19 his variance package that proves
20 otherwise. Meanwhile, also another
21 that's awfully important is that we
22 were under a pending ordinance at that
23 particular time.

24 The town, from as early as October
25 28th, I believe it was, 2015 through



1 the LMO Committee, which is a
2 subcommittee of the Planning Commission
3 and Ms. Lewis sits on it along with a
4 number of other people in the room,
5 brought forward the 2016 LMO amendments
6 first set. In that first set, with an
7 amendment to lower the height of the
8 single family homes in resort
9 development areas such as Bradley
10 Circle, due to the outcry, whatever the
11 reason was, so much I could say, but
12 the fact of the matter is, we were
13 under a pending ordinance because it
14 was brought forward as early as 2018.

15 What was happening for months
16 ahead of time, repeatedly in the
17 documents, it says that Ms. Dixon was
18 speaking in that preconference with Mr.
19 Radu Chindris who was there with a site
20 plan and she should have been telling
21 him, hey, we've got height things going
22 on. It was well known and established
23 when you get to March 16th, we've gone
24 already through a number of meetings
25 and public hearings and have taken



1 several votes, always unanimously
2 voting those ord -- those amendments
3 that amendment package of which
4 changing the height to 45 feet was part
5 of.

6 There was a constant unanimous
7 vote and no change. On March 16th,
8 2016, well before this meeting and
9 during the whole time that the staff
10 was having conversations with
11 Mr. Chindris, everyone knew that the
12 height was on its way down. On March
13 16th, the Planning Commission, in a
14 vote of 7-0-0, recommended it to Town
15 Council, and there is the Sherman
16 versus -- really, I mean, there is case
17 law after case law and if I can't talk
18 about the case law, then that's a -- a
19 little bit of a problem for my case.

20 But we have case after case where
21 it would be utterly ridiculous if there
22 was a pending ordinance --

23 CHAIRMAN FINGERHUT: Ms. Becker?

24 MS. BECKER: Do you know the law?

25 CHAIRMAN FINGERHUT: It is in your



1 submission.

2 MS. BECKER: It is.

3 CHAIRMAN FINGERHUT: We saw that.

4 MS. BECKER: There's more.

5 CHAIRMAN FINGERHUT: I think --

6 MS. BECKER: I have probably 20
7 cases that --

8 CHAIRMAN FINGERHUT: Perhaps so.

9 MS. BECKER -- say the exact same
10 thing.

11 CHAIRMAN FINGERHUT: Perhaps so,
12 but I think at this point, I'd like to
13 open it to questions from the panel, if
14 they have questions for you. You've
15 run out of time about 10 minutes ago.

16 MS. BECKER: I know. I know. I
17 do apologize for that, but --

18 CHAIRMAN FINGERHUT: That's okay.

19 MS. BECKER -- this is a big case
20 and one of the things that I need to
21 emphasize to you is that there is law
22 after law after law, there is ordinance
23 after ordinance after ordinance. We
24 have misrepresentations. We have
25 omissions. We don't have a variance



1 because we don't have a site plan. We
2 also have a situation where it doesn't
3 make a difference because we're under a
4 pending ordinance at that point because
5 the Town has resolved to change the
6 height and that's a well known Supreme
7 Court case and it has been upheld and
8 upheld and restated many times over.
9 So it doesn't have 75 feet.

10 CHAIRMAN FINGERHUT: Thank you.
11 Please stay there for a moment. Please
12 stay there for a moment. You'll still
13 be able to --

14 MS. BECKER: I'm so sorry --

15 CHAIRMAN FINGERHUT: That's okay.

16 MS. BECKER: I just have so much
17 to tell you.

18 CHAIRMAN FINGERHUT: You'll still
19 be able to tell us more when you answer
20 the questions we're about to ask.

21 MS. BECKER: I would love to do
22 that.

23 CHAIRMAN FINGERHUT: Any questions
24 from the panel?

25 MR. JOHNSON: Actually to Teri, is



1 there an accepted and approved site
2 plan?

3 MS. LEWIS: Teri Lewis, LMO
4 Official, for the record. Yes, as part
5 of the variance that was submitted for
6 28 Bradley Circle, there was a site
7 plan that was submitted. This isn't
8 it, but there was a site plan that
9 showed the layout of the lots that was
10 submitted for the variance. It showed
11 where they wanted the -- what the
12 variance was for was for a variance to
13 setbacks, buffers, and setback angles.

14 This document was included to show
15 the effect of setback angles, but there
16 was a site plan that was submitted to
17 show the effect of the setbacks and the
18 buffers, the encroachments on the
19 setbacks and the buffers.

20 MR. JOHNSON: Teri, I'm -- I'm
21 sorry. Was there any discussion
22 regarding height?

23 MS. LEWIS: There was no
24 discussion regarding height during that
25 because they weren't requesting a



1 variance for height, they were
2 requesting a variance for setback
3 angles, setbacks, and buffers.

4 MR. JOHNSON: And when did you
5 receive that?

6 MS. LEWIS: That was in, I
7 believe, 20 -- 2016, was when that
8 variance went forward.

9 MR. JOHNSON: And that's when you
10 received the site plan?

11 MS. LEWIS: Yes. It was part of
12 the variance -- the variance submittal.

13 MR. JOHNSON: Okay.

14 MS. LAUDERMILCH: My question's
15 somewhat related, but in that
16 discussion hearing for the variance,
17 there was specific reference made to
18 the fact that a flat reconfiguration
19 would be required because of the
20 positioning of the house -- houses and
21 the lots and that nothing could move
22 forward in a development perspective
23 until that plat was approved by the
24 Town. Was that received and approved?

25 MS. LEWIS: Yes. I believe that



1 we've received that and stamped that.

2 Yes.

3 MS. LAUDERMILCH: And what format
4 is that in? Is that an engineering
5 drawing, no?

6 MS. LEWIS: It's a plat with -- we
7 have a specific list in the LMO of
8 requirements that plats have to meet,
9 and so it had all of those elements.
10 It was to scale. It had the surveyor's
11 information on there. It was stamped
12 and sealed by a registered surveyor.

13 MS. LAUDERMILCH: Okay. So that
14 contained all of the required elements?

15 MS. LEWIS: Yes.

16 MS. LAUDERMILCH: Okay. Thank
17 you.

18 MS. LEWIS: You're welcome.

19 CHAIRMAN FINGERHUT: Any questions
20 for Ms. Becker? Any questions for
21 Ms. Becker?

22 MS. BECKER: May I follow up on
23 the site plan?

24 CHAIRMAN FINGERHUT: One moment.

25 MS. BECKER: Yes, sir.



1 CHAIRMAN FINGERHUT: Just --

2 VICE CHAIRMAN CUTRER: Chairman, I
3 have a question or two questions,
4 actually.

5 CHAIRMAN FINGERHUT: Please.

6 VICE CHAIRMAN CUTRER: Could we go
7 back to the Exhibit G that you just had
8 up on the screen?

9 MS. BECKER: Is that right for
10 you?

11 VICE CHAIRMAN CUTRER: Yeah. I'm
12 sorry. I had -- I can't read that and
13 I didn't turn around quickly enough.

14 MS. BECKER: That's fine.

15 VICE CHAIRMAN CUTRER: But you, I
16 believe, made some reference to the
17 fact that this actually references a
18 different address, could you point that
19 out to me on that?

20 MS. BECKER: Absolutely. Over
21 here along the side, you can see there,
22 it says lot 22, Bradley Circle.

23 VICE CHAIRMAN CUTRER: Okay. It's
24 written vertically?

25 MS. BECKER: Yes, sir.



1 VICE CHAIRMAN CUTRER: I don't
2 read vertical very well, thank you,
3 but --

4 MS. BECKER: That's okay. And
5 listen, in terms of site plan and the
6 documents that were provided, and I
7 have a whole variance packet.

8 VICE CHAIRMAN CUTRER: Now, you
9 answered my question. Now I've got
10 another one.

11 MS. BECKER: Oh, okay.

12 VICE CHAIRMAN CUTRER: And I want
13 you to speak to me in bullet points.

14 MS. BECKER: Yes, sir.

15 VICE CHAIRMAN CUTRER: Bullet
16 points and not elaboration.

17 MS. BECKER: Okay.

18 VICE CHAIRMAN CUTRER: Okay?

19 MS. BECKER: I will do my very
20 best.

21 VICE CHAIRMAN CUTRER: Your
22 contention is that there are no vested
23 rights in this property relative to
24 height because there was no site plan
25 because of the pending ordinance, were



1 there any other bullet points that is
2 the basis for your argument that there
3 aren't vested rights?

4 MS. BECKER: Right to our
5 conclusion, how does that work out?
6 Yes.

7 MR. JOHNSON: Just a brief note, I
8 think we need the -- this needs to be
9 called exterior elevation or -- not a
10 site plan. Some -- that needs to be
11 corrected.

12 VICE CHAIRMAN CUTRER: Not done
13 with my question yet.

14 MR. JOHNSON: I'm sorry. We call
15 this a site plan, it's not a site plan.

16 VICE CHAIRMAN CUTRER: No, I
17 didn't say.

18 MS. BECKER: Correct. Thank you.
19 There is another picture (inaudible)
20 Bradley Circle elevation, but it's a
21 crayon drawing and it also has no
22 height. It's not a detailed
23 engineering plan and the only reference
24 on there in terms of dimension is
25 across the bottom and I think it's some



1 type of coordinate.

2 To answer your question with
3 regard to -- so we talked about the
4 hardship, the fact that the applicants
5 themselves created their own hardship
6 and therefore, they should -- and that
7 is a well known and repeated fact that
8 an applicant cannot create their own
9 hardship and get a variance. And it
10 actually happened twice.

11 VICE CHAIRMAN CUTRER: Okay.
12 That's your point. What's the next
13 one?

14 MS. BECKER: Okay. That there is
15 no site plan. That there was nowhere,
16 any discussion that -- regard to
17 height, that there was no evidence at
18 all for the officials to rely on and
19 that the burden of proof rests with the
20 applicant, and there's nothing here to
21 prove that there is anything.

22 VICE CHAIRMAN CUTRER: Okay. No
23 reference to height. What's next? I
24 don't mean to push with --

25 MS. BECKER: Yes, sir. And that



1 we have a pending ordinance.

2 VICE CHAIRMAN CUTRER: Okay. All
3 right.

4 MS. BECKER: Yes, sir.

5 VICE CHAIRMAN CUTRER: So your
6 four main points are no sight plan,
7 pending ordinance, self-imposed
8 hardship, and no reference to height?

9 MS. BECKER: Yes, sir.

10 VICE CHAIRMAN CUTRER: Okay.
11 Thank you very much.

12 MS. BECKER: You're welcome. And,
13 by the way, thank you for your -- both
14 you and doctor -- Mr. Fingerhut had
15 great questions the day of the hearing.
16 Unfortunately, you didn't get great
17 answers.

18 CHAIRMAN FINGERHUT: Any other
19 questions for Ms. Becker?

20 MS. BECKER: Thank you.

21 CHAIRMAN FINGERHUT: Thank you
22 very much. After Ms. Lewis goes,
23 you'll have some rebuttal time.

24 MS. BECKER: Thank you.

25 CHAIRMAN FINGERHUT: Ms. Lewis?



1 MS. LEWIS: Good afternoon. So
2 what I'd like to go through with you is
3 just a brief discussion of how I got to
4 the determination that I got to, then
5 I'd be happy to answer any questions
6 that the Board may have. Again, this
7 is an appeal of a determination that I
8 made related to the maximum allowable
9 height at 28 Bradley Circle and Whelk.

10 So as Ms. Becker went through, a
11 variance was sought and approved by the
12 BZA for 28 Bradley Circle, so -- and
13 it's really two properties, 28 Bradley
14 Circle and 3 Whelk Street. As part of
15 that variance, the applicant submitted
16 elevation drawings that indicated that
17 the height of the two structure -- two
18 structures would be more than 45 feet
19 above the base flood elevation, and
20 you'll see as I go through, and as you
21 saw already from what Ms. Becker
22 presented, there is actually no height
23 listed on those elevations.

24 So the variance was granted on
25 March 28, 2016, and as I stated



1 earlier, with just setbacks, buffers,
2 and setback angles. The elevation
3 drawings were submitted to illustrate
4 those setback angles that they were
5 asking for a variance from. The only
6 other place that you see -- the two
7 places where you see, again, not a
8 specific reference to a height, but
9 what you see is that they showed four
10 stories over parking in those
11 elevations and also the staff report
12 stated that they proposed to build four
13 stories over parking.

14 And at the time the variance was
15 submitted, the allowable height in the
16 Resort Development Zone -- zoning
17 district, which is what this was zoned
18 at the time, was 75 feet above base
19 flood. So there been some changes
20 since then, Ms. Becker alluded to.

21 So one -- the first change to LMO
22 that the Town sought was to change the
23 height requirement, to modify the
24 height requirement for residential
25 structures in the Resort Development



1 Zoning District and so that was brought
2 to 45 feet from 75 feet. And then
3 later -- that was done in 2016, and
4 then in 2017, this area, with the
5 exception of three parcels, was rezoned
6 from Resort Development to RM-8. RM-8
7 is what had been to prior to the LMO
8 rewrite in 2014.

9 VICE CHAIRMAN CUTRER: And RM-8
10 has a maximum --

11 MS. LEWIS: 45 feet.

12 MR. WALCZAK: If I can interject
13 just a moment. So what -- and what --
14 do you have a timeframe or date as to
15 when the building permit was issued?

16 MS. LEWIS: Yes. Well, the
17 building permits for 28 Bradley Circle,
18 we've just issued the piling permits
19 for those last week.

20 MR. WALCZAK: So the building
21 permits were issued after the height
22 change?

23 MS. LEWIS: Right, but what I'm
24 going to show you through my
25 presentation is why staff believes that



1 this -- the height was vested in that
2 area. So, again, staff acknowledges
3 that the elevation drawings did not
4 specify height, but, again, as you saw
5 in those drawings, did indicate that
6 the structure would be four stories
7 over parking.

8 CHAIRMAN FINGERHUT: May I ask a
9 quick question about that? I'm sorry.
10 I hate to interrupt but I didn't want
11 to forget. Four stories over parking,
12 that's not defined anywhere, right, in
13 the LMO or anything?

14 MS. LEWIS: It's not. The LMO,
15 years ago, listed a height and a story
16 requirement, and then after several
17 architects came to us and said that
18 that was kind of hurting their
19 flexible -- their ability to be
20 flexible, we took out the story
21 requirement and just have a straight
22 height. So if you can get, you know,
23 six stories and 75 feet, four stories,
24 whatever you can get in that maximum
25 allowable height requirement.



1 CHAIRMAN FINGERHUT: Right, but
2 four stories over parking in and of
3 itself then means nothing, right, it
4 doesn't have any legal meaning, right?

5 MS. LEWIS: Not necessarily, but
6 I'm going to show you what I did to try
7 to determine what the maximum height,
8 you know, probably should have been,
9 what they were thinking when they
10 submitted these elevation drawings and
11 the setback angle.

12 MR. WHITE: Teri, I have a
13 question. In order to get a permit,
14 you have to have a site plan?

15 MS. LEWIS: So what type of permit
16 are you discussing? A variance or a
17 building permit?

18 MR. WHITE: A building permit.

19 MS. LEWIS: Building permit, yes,
20 you would submit a site plan.

21 MR. WHITE: And is there a
22 definition of what a site plan is,
23 isn't?

24 MS. LEWIS: We do. We have a
25 definition of the site plan in the Land



1 Management Ordinance, the LMO.

2 MR. WHITE: When did you get that
3 site plan?

4 MS. LEWIS: In August 2017, is
5 when they originally submitted the
6 building permits for 28 Bradley Circle
7 and 3 Whelk Street.

8 MR. WHITE: August. So in August
9 of '17, you had the site plan, the
10 material for the site plan, and when
11 did they change the ruling to -- back
12 down to 45 feet?

13 MS. LEWIS: In May of 2016.

14 MR. WHITE: Thank you.

15 MS. LEWIS: Okay. So this is just
16 showing you what we put up earlier,
17 what was labeled as Attachment H. And
18 then, again, I used two recently
19 approved structures to determine the
20 proposed height that would have been
21 indicated by the elevation drawings.
22 I'm going to show those to you.

23 So the first is for 4 Terra Bella
24 Trace. This was approved in -- on
25 January 4, 2017. The completed height



1 is 45 feet above base flood. It's
2 three stories over parking. This is
3 for 24 Bradley Circle. This was
4 approved on August 24, 2016. The
5 completed height is 52 feet and one and
6 a half inches above base flood
7 elevation and it's four stories over
8 parking.

9 So based on the approved elevation
10 drawings of the recently constructed
11 houses in the area, staff believes that
12 52 feet one and a half inches was
13 vested as part of the variance approval
14 for 28 Bradley and 3 Whelk. And I
15 realize that that's different than my
16 original determination that stated 75
17 feet.

18 In doing additional research and
19 looking at it and realizing that there
20 was no height listed on there,
21 realizing that they did show four
22 stories over parking, and, again,
23 comparing that to two recently
24 constructed homes in that area, that's
25 where I came up with the 52 feet one



1 and a half inches that would be vested
2 instead of the 75 feet.

3 MR. WALCZAK: What was permitted
4 at that time, 75; correct?

5 MS. LEWIS: Well, permitted at
6 what time?

7 MR. WALCZAK: At the time of that
8 building, those houses were just -- you
9 said in 2016?

10 MS. LEWIS: So, in 2000 -- so when
11 the first one that I showed you 4 Terra
12 Bella Trace, that one was approved
13 at -- the height was 45 feet.

14 MR. WALCZAK: Right.

15 MS. LEWIS: So the one prior to
16 that -- or the one after 24 Bradley
17 Circle, there are three homes there,
18 20, 22, and 24 Bradley Circle, those
19 were applied for when the -- for the --
20 they went through the process when the
21 area was still zoned Resort Development
22 and the maximum height was 75 feet.

23 MR. WALCZAK: Was 75, but they
24 only built to 52 feet or 51 or whatever
25 it was.



1 MS. LEWIS: Right.

2 MR. WALCZAK: So why would you say
3 that's vested, why not say 75 is
4 vested? I don't get it.

5 MS. LEWIS: Because I'm basing it
6 on knowing that the -- that those --
7 the elevation drawings do not say 75
8 feet. So I'm comparing it to the --
9 you know, something in the area that's
10 most recently completed and so that's
11 where I came up with the 52 and one and
12 a half inches.

13 MR. WALCZAK: The LMO said 75,
14 right?

15 MS. LEWIS: The LMO said 75 was
16 what was allowed for Resort
17 Development. And, again, we went
18 through two changes. So what -- what
19 I'm suggesting, what I'm -- what I have
20 determined -- not what I'm suggesting.
21 What I have determined is that based on
22 both the South Carolina State Code and
23 the LMO, and I included both of these
24 in the packet of information that went
25 to the Board of Zoning Appeals, that a



1 vested right is established upon the
2 approval of a site specific development
3 plan.

4 That comes straight, again, from
5 the State Code. And when you look at
6 that language, the State Code defines
7 site specific development plan. It
8 means a development plan submitted to a
9 local governing body by a landowner
10 describing with reasonable certainty,
11 the types and density or intensity of
12 uses for a specific property or
13 properties. The plan may be in the
14 form of, but is not limited to, the
15 following plans or approvals: Planned
16 unit development, subdivision plat,
17 preliminary or general development
18 plat, variance, conditional use or
19 special use permit plan, conditions or
20 a special use district zoning plan, or
21 other land use approval designations as
22 are used by county or municipality.

23 MR. WALCZAK: Okay. So what was
24 the approval date of that site plan?
25 It says it has to be approved and if I



1 approve -- I presume approved by?

2 MS. LEWIS: As approved by the
3 Board of Zoning Appeals as part of the
4 variance for this property.

5 MR. WALCZAK: Oh, it was?

6 MS. LEWIS: That was granted in
7 March of 2016.

8 MS. LAUDERMILCH: What was the
9 site plan referred to in the August
10 2017 timeframe?

11 MS. LEWIS: That's -- as part of
12 the development for that property, they
13 have to submit a site plan as part of
14 their building permit, and so they
15 submitted a -- as part of their
16 building permit application.

17 MS. LAUDERMILCH: But which site
18 plan is the site plan -- I mean,
19 that -- that's going to impact this
20 decision?

21 MS. LEWIS: Sure. The site plan
22 that I'm referring to is what was
23 approved as part of the variance
24 package that was submitted to the BZA
25 in March -- and approved by the BZA in



1 March 2016.

2 CHAIRMAN FINGERHUT: Okay. But is
3 it your statement then that that site
4 plan lacked the requisite specificity
5 to the extent that you had to fill in
6 the dimensions? I mean--

7 MS. LEWIS: It's not say -- it
8 does not state the height requirement
9 on there, yes.

10 CHAIRMAN FINGERHUT: When you were
11 figuring out -- when you were figuring
12 out your position on this, in other
13 words, because the information wasn't
14 in the site plan, you filled it in, we
15 you --

16 MS. LEWIS: Yes.

17 CHAIRMAN FINGERHUT: Okay. So at
18 the time the Board issued it's
19 variance, and if whether or not it
20 created a vested right would depend, in
21 essence, what it was vested because
22 what were we vesting at the time?

23 MS. LEWIS: Well, I think as part
24 of the information that was submitted
25 to the BZA, you received elevation



1 drawings to indicate the setback angles
2 and those elevation drawings show four
3 stories over parking.

4 CHAIRMAN FINGERHUT: Right. Which
5 has no legal meaning, so what were --
6 we -- I'm just trying -- is it your
7 position that the Board affirmatively
8 approved 75 feet or that that's what
9 the drawings meant?

10 MS. LEWIS: I believe that the
11 Board vested four stories over parking
12 as part of that variance.

13 VICE CHAIRMAN CUTRER: Can we see
14 the site plan?

15 MS. LEWIS: For the variance?

16 VICE CHAIRMAN CUTRER: The one
17 that we're referring to right now, yes.
18 The thing is, zoning boards don't
19 approve site plans or building permits.
20 Yes. That's what I think, which is a
21 whole different ball game. Is that --

22 MS. LEWIS: And it should be in
23 what you received. I included the
24 variance documents.

25 VICE CHAIRMAN CUTRER: Okay. It



1 is, you're right.

2 MS. LEWIS: As part of the packet.

3 MR. WALCZAK: Somewhere in the two
4 minute --

5 VICE CHAIRMAN CUTRER: It's
6 Attachment F.

7 MR. JOHNSON: Does this have a
8 surveyor stamp on it, this particular
9 one? I think you had mentioned the
10 building permit one does.

11 MS. LEWIS: This one does not.

12 MR. JOHNSON: And are there -- are
13 there accurate dimension lines on this?

14 MS. LEWIS: I believe that there
15 are. Somebody has to be specific when
16 they're applying for a variance from
17 setbacks and buffers, they have to be
18 specific because they can't -- they
19 don't want to get it wrong and then
20 have to come back later, you know, and
21 have asked for 8 feet when they really
22 needed 9 feet.

23 MR. WALCZAK: Yeah, I can see now.
24 Studying this and based on what you
25 said, I can see this as a schematic



1 site plan for the purpose of granting
2 variances. It is not a site plan as
3 interpreted, as I can tell, by state
4 law. State laws is saying, hey, you
5 know, an engineered site plan is what
6 I'm taking to mean that -- for that to
7 apply.

8 MS. LEWIS: But the state law
9 doesn't define -- for the purposes of
10 vested rights, the site -- the state
11 law does not say an engineering plan.

12 MR. WALCZAK: It doesn't say a --

13 MS. LEWIS: It says --

14 MR. WALCZAK: Schematic plan
15 for --

16 MS. LEWIS: It says a development
17 plan submitted to a local governing
18 body by a landowner describing, with
19 reasonable certainty, the types and
20 density or intensity of uses for a
21 specific property or properties.

22 MR. WALCZAK: That's the
23 definition of -- on the -- for the
24 State?

25 MS. LEWIS: Under the vesting and



1 under the vested rights section, yes.

2 MR. JOHNSON: Ms. Lewis, in the
3 LMO, I believe you said there is an
4 articulation of things that have to be
5 included in the application for site
6 development plan?

7 MS. LEWIS: Yes. I think what I
8 was talking about, I was referring to
9 Ms. Laudermilch about the plat
10 stamping, so -- but, yes, there are
11 certain things that have to be
12 submitted for site development plan.
13 But again, the site development plan
14 that was submitted, the site plan that
15 was submitted with the building permit,
16 was submitted, you know, again, as part
17 of the building permit to build a
18 structure on the site, it wasn't a
19 development plan review.

20 MR. JOHNSON: Could you refer us
21 to that section of the LMO which lists
22 the items that have to be included in a
23 site development plan application?

24 MS. LEWIS: So what the BZA needs
25 to remember, though, is they don't --



1 they did not have to go through our
2 development plan review process for
3 this. They're not -- they weren't
4 getting multifamily approved, they
5 weren't getting a commercial
6 development approved, so the site plan
7 that they submitted was simply so that
8 we could verify that the house was in
9 the right location on the property per
10 what was submitted and approved as part
11 of the variance application.

12 And so that's what staff reviewed
13 when the variance -- when the building
14 plan came in, the building permit came
15 in, and the site plan came in, Nicole
16 Dixon, since she was the one that
17 handled the variance review, the site
18 plan that was submitted with that
19 permit, to ensure that what was
20 requested for the variance was met.

21 MR. WHITE: Initially, you said
22 that you received a site plan in 2016.

23 MS. LEWIS: Well, I think there's
24 several different site plans that we're
25 thinking about.



1 MR. WHITE: That's my question.

2 MS. LEWIS: Yeah.

3 MR. WHITE: So you received a site
4 plan in 2016?

5 MS. LEWIS: As part of the
6 variance package.

7 MR. WHITE: Right. And that's
8 been -- that's the premise of your
9 vesting issue? You received another
10 one along with a permit in 2017, yes?

11 MS. LEWIS: Yes.

12 MR. WHITE: So why didn't you
13 determine that the vesting started in
14 2017?

15 MS. LEWIS: Because the way the
16 vested rights language in the State
17 Code reads is that the vesting can
18 start once --

19 MR. WHITE: Can or should?

20 MS. LEWIS: So it says, in
21 6-29-1540, a vested right established
22 by this article and in accordance with
23 the standards and procedures in the
24 land development ordinances or
25 regulations adopted pursuant to this



1 chapter, subject to the following
2 conditions and limitations.

3 It talks about a site specific
4 development plan or phased development
5 plan for which a variance, regulation,
6 or special exception is necessary does
7 not confer a vested right until the
8 variance, regulation, or special
9 exception is obtained. So, again, they
10 obtained the variance that this
11 vested -- vested right was associated
12 with.

13 VICE CHAIRMAN CUTRER: I'd like to
14 continue my line of questioning. On
15 March 28, 2016, the Board of Zoning
16 Appeals granted a variance and that
17 variance related to, I believe, setback
18 and some angles.

19 MS. LEWIS: Setbacks, buffers, and
20 setback angles; correct.

21 VICE CHAIRMAN CUTRER: And
22 apparently without, perhaps, all of us
23 realizing what we were doing, we
24 approved a site development plan by
25 that action.



1 MS. BECKER: Excuse me.

2 VICE CHAIRMAN CUTRER: Now -- I'd
3 like the opportunity to finish my
4 question. So what I'd like to know is
5 if we were approving a site development
6 plan on March 28, 2016 by the granting
7 of a variance, what were the
8 requirements to be included in that
9 plan at that time and were they met.

10 MS. LEWIS: What would have had to
11 have been submitted at that time was
12 what's required for a variance
13 application. And those requirements
14 are found in Appendix D of the LMO.

15 VICE CHAIRMAN CUTRER: Right.

16 MS. LEWIS: So it says --

17 VICE CHAIRMAN CUTRER: What page
18 are you on? I'm looking.

19 MS. LEWIS: D-24.

20 VICE CHAIRMAN CUTRER: D-24.

21 MS. LEWIS: The site plan at a
22 scale -- among other things, a site
23 plan at a scale of one inch equals 30
24 feet accurately showing the variances
25 requested, and then it talks about if



1 they're asking for a variance from
2 wetland buffer standards.

3 VICE CHAIRMAN CUTRER: Item 3 is a
4 notified certification written and
5 approved by the -- of the development
6 site owner.

7 MS. LEWIS: Right. A narrative,
8 proposed notice. Yes, they're required
9 to submit -- for a variance, they're
10 required to submit an application, the
11 site plan, an owner's consent, unless
12 they're the owner of the property, a
13 narrative both dealing -- both
14 detailing the variance that they want
15 and how they meet the criteria -- those
16 four criteria that you have to meet for
17 a variance -- any other documentation
18 that they want to submit and then a
19 copy of the mailed notice that they
20 have to send to people within 350 feet.

21 VICE CHAIRMAN CUTRER: All right.
22 So you've articulated the things that
23 had to be submitted?

24 MS. LEWIS: That's correct.

25 VICE CHAIRMAN CUTRER: And is it



1 your position that all of those were,
2 in fact, in place on March 28, 2016
3 when the BZA considered the variance?

4 MS. LEWIS: Yes. That wouldn't
5 have --

6 VICE CHAIRMAN CUTRER: That's all
7 I'm asking.

8 MS. LEWIS: Okay. Yes.

9 VICE CHAIRMAN CUTRER: All right.
10 Now, one other question and I'll
11 concede to somebody else. You read a
12 statement that vested right is
13 established upon the approval of a site
14 development plan and another part of
15 the vested right concept is that the
16 governing body has to be taking action
17 or proposing to take action to change
18 something.

19 So what I need to ask you as LMO
20 Official, what is your contention of
21 when the period of vested rights
22 begins? Was the announcement or the
23 action by the LMO Committee enough to
24 trigger vested rights or was it the
25 hearing and public hearing and



1 recommendation by the Planning
2 Commission, which took place on March
3 16, 2016 or was it the first reading of
4 the LMO ordinance changes by the Town
5 Council?

6 So we have LMO Committee, we have
7 Planning Commission, and we have Town
8 Council action, which of those three
9 events starts the period at which one
10 could claim a vested right?

11 MS. LEWIS: Well, I don't think in
12 that case, I don't believe that we're
13 talking about vested rights. In that
14 case and those instances that you read,
15 we're talking about pending ordinance.

16 VICE CHAIRMAN CUTRER: I'm sorry.
17 I'm sorry. Pending ordinance.

18 MS. LEWIS: Okay. I just want to
19 make sure we're talking about the same.

20 VICE CHAIRMAN CUTRER: I stand
21 corrected. Let me rephrase that.

22 MS. LEWIS: Okay.

23 VICE CHAIRMAN CUTRER: Which of
24 those three events triggers the pending
25 ordinance consideration, in your



1 opinion?

2 MS. LEWIS: So none for the change
3 where the height went from 75 feet to
4 45 feet in the RD Zoning District,
5 because Town Council did not invoke
6 pending ordinance at that time. When
7 the properties were being rezoned from
8 RD to RM-8, Town Council invoked
9 pending ordinance doctrine and stated
10 that any new plans that came in had to
11 meet the -- what was being proposed,
12 what would have been allowed in the
13 RM-8 Zoning District.

14 VICE CHAIRMAN CUTRER: That was
15 subsequent to the May --

16 MS. LEWIS: Yes.

17 VICE CHAIRMAN CUTRER: -- 3rd, I
18 believe it is, 2016 first reading. So
19 that's when pending ordinance
20 triggered?

21 MS. LEWIS: Yes. Pending
22 ordinance was not invoked for the first
23 change.

24 VICE CHAIRMAN CUTRER: Okay. If
25 there was no pending ordinance until



1 sometime after May of 2016, then how in
2 March of 2016 when the BZA took action
3 to grant the variance could pending
4 ordinance be applied to grant of -- or
5 to create a vested right?

6 MS. LEWIS: The pending ordinance
7 wasn't applied to create the vested
8 right. Staff's position is that the
9 vested right was created by the
10 approval of the variance for this
11 property and everything that was
12 included in that variance package.

13 Staff does not believe that
14 pending ordinance came into play at all
15 wit this, that -- that that -- staff
16 doesn't -- doesn't have the position
17 that the pending ordinance has anything
18 to do with the vested rights.

19 VICE CHAIRMAN CUTRER: Okay. All
20 right. Thank you. She clarified it
21 for my satisfaction.

22 MR. HULBERT: Okay. I just want
23 to make sure everybody understands that
24 pending ordinance is a doctrine of law
25 that is invoked by the government. Joe



1 Citizen can't invoke pending ordinance,
2 it's got to be the Council that invokes
3 that pending ordinance. That's why I
4 said the Town's position is between the
5 first read and second read, if it's
6 specifically invoked, and that's the
7 only time it can occur.

8 So just because someone says
9 there's pending ordinance, doesn't mean
10 that's true. And what Teri said is
11 actually correct, when they change the
12 density there between the first and
13 second reading right during the motion
14 approving the ordinance for the first
15 reading, we specifically invoked
16 pending ordinance and said that the
17 Town was not to grant any permits in
18 violation of the ordinance that was
19 pending at that time, and that's what
20 invoked it.

21 CHAIRMAN FINGERHUT: Okay. So
22 what was the date of that pending
23 ordinance?

24 MR. HULBERT: That --

25 CHAIRMAN FINGERHUT: The date?



1 MR. HULBERT: Well, that was for a
2 different issue, that wasn't for the
3 height, and I can't tell you when it
4 was. It was last year some time when
5 they changed the density. I couldn't
6 give you the date exactly.

7 CHAIRMAN FINGERHUT: I think she
8 said it was May '16?

9 MS. LEWIS: That's for the height.

10 MR. HULBERT: But there was no
11 pending ordinance --

12 MS. LEWIS: For the height.

13 MR. HULBERT -- invoked for the
14 height change is what we want to make
15 clear.

16 MR. JOHNSON: All right. When did
17 the height change?

18 MR. HULBERT: The height change
19 occurred in 2017, I believe, right?

20 MS. LEWIS: No. The height
21 changed -- the height changed is the
22 May 2016 change.

23 MR. HULBERT: Okay. But during
24 that time, just because staff drafted
25 an ordinance and took it to the LMO



1 Committee and then to the Planning
2 Commission and then to the Town
3 Council, doesn't mean that pending
4 ordinance doctrine was invoked. There
5 was an ordinance pending, but it went
6 through the process, but the Town
7 Council never invoked pending ordinance
8 doctrine that meant that we want that
9 ordinance to apply to any permits or
10 any development during that period.

11 Everybody understand the
12 difference?

13 CHAIRMAN FINGERHUT: Absolutely.
14 Ms. Lewis, one question. Is it your
15 position that the granting of the
16 variance is what made the -- made this
17 a site specific development plan at the
18 time we granted the variance?

19 MS. LEWIS: Yes. Staff's position
20 is that the granting of the variance
21 established vested rights for the site
22 specific development plan, which
23 included those various documents that
24 were included as part of the BZA
25 package, and part of that is because if



1 you look at it, it says, describes with
2 reasonable certainty, the types and
3 density or intensity of uses.

4 CHAIRMAN FINGERHUT: Right. But
5 it's because you indicated earlier that
6 it lacks certain dimensions, like
7 height, and so that required some
8 interpretation on your part even later.
9 So when I -- again, I just want to --
10 so you're saying it's the variance
11 itself, the granting of the variance
12 itself is what in essence made this,
13 qualify this as a site specific
14 development plan? I'm just trying --
15 frankly, trying to pin you down.

16 What makes it a site specific
17 development plan because you indicated
18 that it didn't really qualify because
19 it was missing things, but it was in
20 our granting of the variance or is it
21 something else that made it that?

22 MS. LEWIS: Well, I don't -- I
23 don't believe that I said that I didn't
24 think that it qualified. I definitely
25 said that it didn't state that it was



1 for 75 feet, but I believe by showing
2 the -- by showing the building, showing
3 the building elevations at four story
4 over parking, talking about the four
5 story over parking in the staff report,
6 that that met -- part of what this
7 requires is described with reasonable
8 certainty, the types and density or
9 intensity of uses for specific property
10 or properties.

11 So, again, while it didn't say 75
12 feet, and staff did have to make some
13 interpretation as to what that height
14 would be, it definitely showed four
15 stories over parking versus three
16 stories over parking.

17 CHAIRMAN FINGERHUT: Okay. So
18 you're saying -- so, again, your
19 interpretation, you felt this had
20 reasonable -- enough reasonable
21 certainty to be considered a site
22 specific plan?

23 MS. LEWIS: Yes.

24 CHAIRMAN FINGERHUT: So, all
25 right. So then when, I guess, we'll --



1 yes, and then when we -- when this
2 comes back to us, when we discuss it, I
3 guess then sitting in your shoes, that
4 it's our reasonable certainty.

5 MS. LEWIS: Absolutely.

6 CHAIRMAN FINGERHUT: Right. Okay.
7 That's what --

8 VICE CHAIRMAN CUTRER: One more
9 question, if I might Mr. Chairman.
10 Teri, in your letter to
11 Mr. Laughlin dated February 8, 2018,
12 which is the basis of all of this.

13 MS. LEWIS: Yes.

14 VICE CHAIRMAN CUTRER: Toward the
15 end you write, since the site plan
16 associated with variance is vested with
17 a maximum height of 75 feet above base
18 flood elevation, and I believe your
19 testimony today is that it's now 52
20 feet one and a half inches?

21 MS. LEWIS: Yes. And that's why I
22 said at the beginning of my
23 presentation, that that was an error on
24 my part, that it should not have.

25 VICE CHAIRMAN CUTRER: All right.



1 So we should scratch out 75 feet and
2 write 52?

3 MS. LEWIS: And one and a half
4 inches.

5 VICE CHAIRMAN CUTRER: And has
6 that been communicated in writing to
7 the parties or?

8 MS. LEWIS: It has not.

9 VICE CHAIRMAN CUTRER: Okay. No
10 further questions.

11 CHAIRMAN FINGERHUT: Any other
12 questions for Ms. Lewis?

13 MR. JOHNSON: The variance
14 request, do they not have to describe
15 verbally what they're requesting in a
16 written format?

17 MS. LEWIS: They do. They submit
18 a narrative. The applicant will submit
19 a narrative. They describe the
20 variances that they would -- that
21 they're hoping to obtain from the Board
22 of Zoning Appeals and then there --
23 they also go through the four criteria
24 and state why they believe that they
25 meet those.



1 MR. JOHNSON: And in that
2 descriptive outlay for the variance, do
3 they refer to the architecture, do they
4 refer to the height of the building?

5 MS. LEWIS: They never refer to
6 the height. I've reviewed that several
7 times, reviewed both our staff report
8 and reviewed the information that was
9 submitted by the applicant to see if
10 there was any mention of height. The
11 only thing that we have are we have the
12 elevation drawings and then we also
13 have a reference in the staff report to
14 four stories over parking.

15 MR. JOHNSON: But they never said
16 the variance we're coming in for is for
17 a height variance?

18 MS. LEWIS: No. They -- they were
19 not -- they did not apply for a
20 variance from height. And, again, if
21 they were not asking for a variance
22 from the setback angles, they probably
23 wouldn't have even submitted the
24 elevation drawings because those
25 wouldn't have been pertinent to the



1 variance.

2 But because they were asking for a
3 variance to the setback angles, they
4 needed to show that to show why if they
5 didn't get a variance for the setback
6 angles, it would change, you know, the
7 height and dimensions of the structure
8 that they were proposing to build.

9 MR. JOHNSON: Thank you.

10 MS. LEWIS: You're welcome.

11 VICE CHAIRMAN CUTRER: I have one
12 more, please. Why wouldn't they ask
13 for a variance for the height if it was
14 already permitted in the LMO?

15 MS. LEWIS: They didn't ask for a
16 variance for the height.

17 VICE CHAIRMAN CUTRER: Right. But
18 then the permitted height -- let me
19 understand. Again, I think I asked
20 this already, but it was 75 feet at
21 that time?

22 MS. LEWIS: Yes. At the time that
23 they applied for their variance, the
24 property was zoned Resort Development
25 and the maximum allowable height was



1 75 feet.

2 VICE CHAIRMAN CUTRER: And then it
3 changed to 45 feet.

4 MS. LEWIS: It did, after they
5 have obtained the variance.

6 VICE CHAIRMAN CUTRER: After they
7 obtained the variance for side yard
8 setbacks and things?

9 MS. LEWIS: For setbacks, buffers,
10 and setback angles.

11 VICE CHAIRMAN CUTRER: Right. It
12 changed in May of 2016?

13 MS. LEWIS: That's correct.

14 VICE CHAIRMAN CUTRER: So after
15 2016, if you wanted to develop anything
16 in there, you'd have to follow the 45
17 foot rule?

18 MS. LEWIS: Absolutely. If you
19 weren't -- if you weren't already
20 vested.

21 VICE CHAIRMAN CUTRER: And to
22 me -- it would seem to me -- Well,
23 that's why I asked before, when was the
24 building permit or when was an
25 application made for a building permit



1 for this development?

2 MS. LEWIS: In August of 2017.

3 VICE CHAIRMAN CUTRER: A year and
4 a half later?

5 MS. LEWIS: Yes.

6 VICE CHAIRMAN CUTRER: Okay.
7 Thank you.

8 CHAIRMAN FINGERHUT: Any other
9 questions for Ms. Lewis? Thank you,
10 Ms. Lewis.

11 MS. LEWIS: You're welcome.

12 CHAIRMAN FINGERHUT: Ms. Becker,
13 you have some brief --

14 VICE CHAIRMAN CUTRER: Can I pose
15 a question?

16 CHAIRMAN FINGERHUT: One moment.

17 VICE CHAIRMAN CUTRER: I'd like to
18 pose a question to our legal counsel.
19 The appellant's here raised four
20 issues. No site plan, pending
21 ordinance, self-imposed hardship, and
22 no reference to height. I'd like to
23 address the third one. I believe the
24 argument was that in the original
25 variance application which this Board



1 considered on March 28, 2016, that
2 there was, in effect, a self-imposed
3 hardship and so to some degree the --
4 she would argue that the decision by
5 the BZA was inappropriate, but that was
6 information we didn't have.

7 MR. HULBERT: I would submit to
8 you that issue is --

9 VICE CHAIRMAN CUTRER: Let me
10 finish. Subsequent to the BZA's
11 action, some of the parties filed a
12 lawsuit to have the BZA decision
13 overturned. Subsequent to that, that
14 lawsuit was dismissed or withdrawn. So
15 my question to you as our counsel is:
16 Is that an argument that should be
17 considered at all by this Board?

18 MR. HULBERT: That might -- I
19 would submit to you that that's not an
20 issue before the BZA. You had your
21 appeal with the issues laid out in the
22 appeal and the time for that appeal was
23 back immediately after the variance
24 during the time period, during that,
25 and it wasn't appealed at that time.



1 VICE CHAIRMAN CUTRER: Okay. So
2 in my list of arguments here, I should
3 write not applicable next to that one?

4 MR. HULBERT: I would say that --

5 VICE CHAIRMAN CUTRER: Thank you.

6 CHAIRMAN FINGERHUT: Thank you.

7 Ms. Becker?

8 MS. BECKER: Thank you. So --

9 CHAIRMAN FINGERHUT: Just please
10 be mindful of the time. It's a five
11 minute.

12 MS. BECKER: I've got a bunch of
13 things I need to clear up, and with all
14 due respect, Sherman versus Reeves, in
15 terms of a legal pending zoning
16 ordinance, does not require -- the
17 pending ordinance doctrine does not
18 require Town to invoke it, it exists.

19 And if you read the law, the
20 Supreme Court law, and I believe I left
21 you with one particular case and it was
22 very similar. Their cases are of case
23 after case, a very similar situation,
24 but an ordinance is legally pending
25 when the governing body has resolved to



1 consider a particular scheme of
2 rezoning, that's when it's legally
3 pending and has advertised to the
4 public its intention to hold the public
5 hearing on rezoning.

6 And, in fact, in a number of
7 cases, AJ Aberman versus -- I know I'm
8 going to waste my time with all that
9 stuff, but I'm going to tell you that
10 as part of that decision, which was --
11 is also consistent with another South
12 Carolina State District Court, Covenant
13 Media versus the City of North
14 Charleston, South Carolina, they all
15 refer back to a statement that it's
16 clear -- is clear.

17 Similar conditions throughout all
18 of these cases that I have before me,
19 and they all refer back to this
20 particular statement. I'm going to
21 read it because it's important because
22 we just got information that's
23 incorrect and the reason I need time is
24 because I have a lot of stuff I need to
25 correct. It would be utterly



1 illogical -- the Supreme Court refers
2 to in their cases from Illinois.

3 The Supreme Court of South
4 Carolina, it would be utterly illogical
5 to hold, that after a zoning commission
6 had prepared a comprehensive zoning
7 ordinance or an amended -- amendment
8 thereto which was on file and open to
9 the public inspection and then upon
10 which public hearings had been held,
11 which is all true in this case and we
12 have the time line to demonstrate that
13 and it's in -- I have it.

14 Which public hearings have been
15 held and while the ordinance was under
16 consideration, any person could, by
17 merely filling an application, compel
18 the municipality to issue a permit --
19 and since we are a variance and a
20 variance essentially gives you a
21 permanent, right? Because you're going
22 to approve it and it's going to get
23 vested and you're going to get a
24 permit.

25 A permit which would allow him to



1 establish a use which he either knew or
2 could have known would be forbidden by
3 the proposed ordinance, and by so
4 doing, nullify the entire work of the
5 municipality and endeavoring to carry
6 out the purpose for which the zoning
7 law was enacted. In the case before
8 us, it must be assumed that the
9 ordinance prohibited the use of the
10 premises in which -- so it goes on to
11 talk about -- but the fact of the
12 matter is, it's illogical that if a
13 Planning Commission has voted to
14 recommend to the Council, it has, in
15 fact, already started, it's pending.

16 There's case after case where it
17 says it can't be merely conjecture. It
18 can't be something that's referred
19 around and we're talking about it, but
20 it has to be -- having taken votes and
21 has to be referred to -- in fact, it's
22 not even necessarily required that it's
23 referred to the Council at that point,
24 but votes have been taken and that
25 public hearings have been taken. As we



1 all know, every hearing here in Hilton
2 Head that's a public commission or
3 committee, is a public hearing.

4 But moreover, it's in writing and
5 you have the documentation before you.
6 I submitted it with the application,
7 that there was a Planning Commission
8 and on March 16th, there was a public
9 hearing with the 2016 amendments,
10 including the height change was
11 changed. So Mr. -- it was not 75 feet
12 at that time because we were under a
13 pending ordinance and it was 45 feet.

14 This hearing for the BZA was not
15 until March 28th, a full 12 days later.
16 So that clarifies that and if you want
17 the references, I've got plenty of them
18 for you. So Ms. Lewis did a really
19 good job trying to explain to you how
20 she came up with something. We have to
21 deal with the law, so instead of
22 standing here and coming up with how
23 she interpreted it and conjecture,
24 there's plenty of law, there's
25 statutes.



1 I read to you how there are a
2 number of places where you can find
3 what's required for a variance, and one
4 of the things that's required for a
5 variance package that you receive so
6 that you as the governing body can make
7 a decision, one of the things that is
8 required is a site plan. And by the
9 LMO rules, the site plan requires that
10 you have an engineered, detailed
11 engineering plan to scale.

12 Nothing that you have seen is an
13 engineering plan to scale. The best
14 you can come up with, right -- The best
15 you're going to come up with, maybe, is
16 this, and it's not an engineering plan
17 as we've already pointed out, and that
18 says 49 to 49 feet is all he's got.
19 And when you measure it -- that same
20 measure, if you want to try to come up
21 with an interpretation, you can come up
22 with this interpretation.

23 The same three and a half inches
24 across, thereabouts, 49 feet is the
25 same that you see here. So at best, if



1 we want to give a vested height to the
2 applicant, we have to rely on what
3 shows an actual dimension, even though
4 it's not an engineered plan. It's 49
5 feet across and it's the same thing
6 out.

7 So if he wants to be vested for 49
8 feet, I'm fine with that. Our entire
9 neighborhood is fine with that. He's
10 49 feet, not from BFE, but from the
11 ground, and that was what he proposed,
12 Bradley Circle elevation proposed.
13 It's labeled correctly, it's dated
14 somewhat within the timeframe that we
15 would have been dealing with, and that
16 is the only dimension.

17 And you can have four stories over
18 garage. He says throughout his
19 narrative and all of these things that
20 you guys correctly asked, that he
21 wanted to be in harmony with the
22 neighborhood. His photo showed homes
23 that he wanted to be consistent with.
24 All of those homes are 45 feet, so by
25 his words, by his actions in terms of



1 drawing this, by a pending ordinance,
2 by the fact that it was a
3 self-inflicted hardship that got us to
4 where we are, where we never should be,
5 he does not have a vested right.

6 And I appreciate you reminding me,
7 so much in my mind, and I appreciate
8 it. I probably have forgotten 75
9 percent of what I needed to say to you,
10 but, in fact, there is a settlement
11 agreement and a settlement agreement
12 was taken by DST to the Circuit Court
13 and dismissed. But from that, it
14 wasn't dismissed and forgotten, a
15 settlement agreement and restrictive
16 covenants were put into place and
17 recorded as a public document. There's
18 plenty of things that this staff could
19 have depended on that are public
20 documents, legally written codes of law
21 in that settlement agreement, right?

22 Couple of things, Number two says
23 that there is a limited use and that he
24 can only rent these buildings, the two
25 buildings can -- two homes can be



1 built, and he can only rent them in a
2 Resort Development Zone, so that's
3 interesting in and of itself. How are
4 we going to get out of that one, right?
5 Can't get out of that one. And on
6 number five, it's a restrictive -- it's
7 construction restrictions.

8 The word itself tells you what
9 number five is. That's where she -- it
10 talks about the applicable LMO and I
11 have a definition of applicable and
12 applicable means the existing law, and
13 that's by South Carolina State case
14 law. So number five says that you're
15 restricted as to your height, you're
16 restricted.

17 Restricted only means one thing,
18 the settlement agreement was to the
19 benefit of DST and the adjacent
20 properties. It was something that the
21 defendants were giving to the
22 plaintiff, to DST, to the adjacent
23 properties, to restrict their use of
24 that property as much as possible. And
25 under number five, under the applicable



1 law, it says that it's a restrictive
2 structure that can be built.

3 So restrictive means it's limited.
4 It's to -- it's changed, you have to
5 stay with underneath -- and also, in
6 South Carolina, in Hilton Head Island,
7 you have to stay with it. If there's a
8 controversy, it's the most restrictive
9 use of the language. The most
10 restrictive use of the language is to
11 be used. So I don't --

12 CHAIRMAN FINGERHUT: Ms. Becker?

13 MS. BECKER: I know.

14 CHAIRMAN FINGERHUT: I need --

15 MS. BECKER: I know.

16 CHAIRMAN FINGERHUT: We're five
17 minutes past that so I need to you sum
18 up.

19 MS. BECKER: And you guys asked
20 her a lot of questions and I need to
21 ask you to please ask me those
22 questions because I could have answered
23 every one of them. So if you could
24 please -- let me stop talking. Ask me
25 as many questions as you can, please.



1 CHAIRMAN FINGERHUT: Are there any
2 questions for Ms. Becker?

3 You've answered all of our
4 questions.

5 MS. BECKER: I have so much more I
6 could tell you and I so wish I could.
7 Thank you.

8 CHAIRMAN FINGERHUT: Thank you.
9 That closes the argument section
10 of this appeal. Discussion?
11 Mr. White?

12 MR. WHITE: Mr. Chairman, I
13 thought your raised an interesting
14 point, that the premise of our March
15 2016 approval turned into question.
16 That being if, in fact, there was a
17 self-inflicted hardship for the -- the
18 essence of the variance. What I'm
19 hearing from Counsel is it doesn't
20 matter because we can't go back.

21 CHAIRMAN FINGERHUT: Correct.
22 That's my understanding as well. That
23 is -- that's happened, it hasn't been
24 altered. It's actually been litigated,
25 then settled, and that is -- the



1 variance, it stands.

2 MR. WHITE: Okay.

3 MS. BECKER: I know that it's
4 closed and I'm going to ask for
5 forgiveness for just one moment,
6 please. There actually is case law.
7 You can reverse it.

8 CHAIRMAN FINGERHUT: Thank you.
9 Thank you for your comment. So
10 that's -- we've heard advice from our
11 Counsel on that.

12 Any other comment from anybody?

13 MS. LAUDERMILCH: I'd like, if we
14 can still get it, clarification or
15 information on what the date of when
16 the Town Council meeting would have
17 been published, you know, prior to the
18 meeting, but the agenda and the
19 publication of the meeting putting the
20 public on record that this height issue
21 was going to be considered, which would
22 have occurred prior to the April 2016
23 decision. Do you know where I'm going?

24 CHAIRMAN FINGERHUT: The decision
25 was in March 2016.



1 MS. LAUDERMILCH: Right. But
2 there was a council meeting, if I'm
3 correct, in April. It changed the
4 height.

5 CHAIRMAN FINGERHUT: That was May.

6 VICE CHAIRMAN CUTRER: May -- May
7 3rd, 2016.

8 MS. LAUDERMILCH: So I'm asking
9 what the publication date for that
10 meeting was. That's what I'm asking.

11 CHAIRMAN FINGERHUT: Would you
12 know?

13 MR. HULBERT: That required two
14 readings. There was two dates. The
15 first date is probably the one that has
16 it.

17 MS. LAUDERMILCH: This first one
18 is what I'm -- yeah, looking for.

19 MR. HULBERT: I wrote down May
20 2016.

21 VICE CHAIRMAN CUTRER: I think
22 it's May 3rd, 2016. I can't read.

23 MS. LAUDERMILCH: But was that a
24 meeting date or a publication date?

25 VICE CHAIRMAN CUTRER: Meeting



1 date.

2 MS. LAUDERMILCH: See, I'm
3 asking --

4 CHAIRMAN FINGERHUT: Publication
5 would be two weeks before.

6 MS. LAUDERMILCH: Two weeks.
7 Okay.

8 VICE CHAIRMAN CUTRER: Either May
9 3rd or May 8th. I can't read my
10 writing.

11 MR. HULBERT: We have all these
12 dates floating around. It seems to me
13 it's important to nail them down so we
14 can see exactly what happened when so
15 that we can determine whether or not
16 the --

17 MS. BECKER: I have the official
18 document from the Town if you want to
19 read it.

20 CHAIRMAN FINGERHUT: Ms. Lewis?

21 MS. LEWIS: I believe the first
22 reading -- as Brian -- as Mr. Hulbert
23 said, there are two readings required
24 to adopt a change to the LMO. First
25 reading, I believe, was on May 3rd.



1 Second reading was on May 17th.

2 VICE CHAIRMAN CUTRER: May?

3 MS. LEWIS: 17th.

4 MS. LAUDERMILCH: I was asking for
5 the publication date for the May 3rd
6 meeting. Well, again, I mean, it
7 sounds like subject to interpretation
8 again, but that Sherman Reeves does
9 speak to when the public is put on
10 notice that there is a change being
11 considered, so that's why now I'm just
12 asking, what was the publication date?

13 MR. HULBERT: Two weeks prior.

14 MS. LAUDERMILCH: Or whenever the
15 public was put on notice, that's my
16 question.

17 MR. HULBERT: That would have
18 occurred at the Planning Commission.

19 VICE CHAIRMAN CUTRER: March 6,
20 2016.

21 MR. HULBERT: So that was prior to
22 this Board's granting of the variance.

23 VICE CHAIRMAN CUTRER: We met
24 March 28th.

25 MR. HULBERT: So therefore, it was



1 already in place, that 75 was gone by
2 the wayside.

3 CHAIRMAN FINGERHUT: It was
4 proposed.

5 VICE CHAIRMAN CUTRER: Was
6 considered.

7 MR. HULBERT: Well, yes. So, in
8 essence, then this Board did not
9 make -- didn't vest that height because
10 at that point in time, at the time of
11 the meeting, was 45 feet.

12 VICE CHAIRMAN CUTRER: Well, it
13 wasn't, it was -- when this Board met
14 on March 28, 2016, the height
15 restriction in RD Zoning was 75 feet.
16 It was 75 feet, okay? On March 16,
17 eight -- or 12 days before the BZA met,
18 the Planning Commission had held a
19 public hearing and made a -- by 7-0
20 vote, voted to recommend to the Town
21 Council, approval of certain changes to
22 the LMO that included lowering the
23 height.

24 So on March 28, 2016 when the BZA
25 met and made -- and made a decision on



1 the variance, the height restriction
2 was 75 feet, but the Town was
3 considering a change. It didn't make
4 that change until May 17th at the
5 second reading of the ordinance.

6 MR. HULBERT: As I understand the
7 argument here, it's -- first went into
8 public domain, let's call it.

9 VICE CHAIRMAN CUTRER: Well, the
10 Supreme Court case says an ordinance is
11 legally pending when the governing body
12 has resolved to consider a particular
13 scheme of rezoning and as advertised to
14 the public its intent. The LMO
15 Committee is not the governing body.
16 The Planning Commission is not the
17 governing body. The Town Council is
18 the governing body, and our Counsel has
19 advised us that there wasn't any
20 pending ordinance consideration until
21 the time that Town Council acted, I
22 believe.

23 MR. HULBERT: That didn't even
24 vote yet.

25 VICE CHAIRMAN CUTRER: But is it



1 necessary.

2 MR. HULBERT: We always
3 affirmatively invoke any ordinance --

4 CHAIRMAN FINGERHUT: See that's --
5 I appreciate the answer, but that's not
6 exactly what Jerry's asking, he's
7 saying is it legally required, not that
8 this Town Council would normally do it,
9 what's legally required in the South
10 Carolina law and --

11 MR. HULBERT: The Town believes it
12 is legally required.

13 CHAIRMAN FINGERHUT: Right. But
14 from the case that we're discussing, it
15 doesn't at least appear obvious to us
16 that that is the case.

17 MS. BECKER: It doesn't say it
18 anywhere in --

19 CHAIRMAN FINGERHUT: Please do not
20 do that.

21 MR. HULBERT: Keep in mind that
22 that's a 1972 or whatever --

23 CHAIRMAN FINGERHUT: '79.

24 MR. HULBERT: '79 case, that the
25 law has changed and now public hearings



1 can occur either Council or Planning
2 Commission and the Town has elected to
3 let public hearings occur, in most
4 cases, at the Planning Commission.
5 Town Council also determines when a law
6 takes effect. They will say when they
7 adopt the ordinance, when it takes
8 effect.

9 It may be upon adoption. It may
10 be at a future date, like our plastic
11 bag ban we just adopted, that takes
12 effect eight months later, and with
13 conditions that if the other bodies
14 adopt the ordinance, all right. So
15 Town Council determined it took effect
16 on the date it was adopted, when they
17 passed that ordinance. They didn't
18 invoke or intend to invoke.

19 There is no evidence that they
20 intended to invoke the pending
21 ordinance doctrine in that case. That
22 was never conveyed to staff or any
23 committee. We weren't directed not to
24 accept or approve any permits or
25 applications during that time, contrary



1 to that ordinance.

2 Now, when it came to the density
3 issue for that neighborhood, they did
4 intentionally invoke the pending
5 ordinance doctrine between the first
6 reading and the second reading.

7 MR. WALCZAK: So you're saying the
8 pending ordinance doctrine must be
9 invoked by the Town?

10 MR. HULBERT: That's our
11 interpretation, our understanding of
12 the law. By determination of Town
13 Council telling us that they want the
14 Town not to prove any permits contrary
15 to that. Because, again, the
16 government determines whether or not to
17 grant a permit or not. We can grant
18 one while under the existing laws or
19 not.

20 The Town chose to make an
21 interpretation in that case and you
22 have to determine -- Terri's place as
23 far as did that give specific notice as
24 to the height requirements in there or
25 just the setbacks, that's what it



1 really boils down to. Did you have
2 enough notice there that it applied,
3 and if that's not relevant because
4 everybody presumed that the 75 foot was
5 there so they didn't ask for a variance
6 for an ordinance that was already in
7 effect.

8 And remember, they applied for
9 that variance, what 30 or 45 days
10 before that, before any public notice
11 went out as far as height discussion.

12 CHAIRMAN FINGERHUT: Brian, are
13 you explaining or advocating?

14 MR. HULBERT: I'm not advocating
15 at all. I'm telling you --

16 CHAIRMAN FINGERHUT: Feels like
17 you're advocating.

18 MR. HULBERT: You guys have to
19 decide. It's a tough issue. It's not
20 clear at all.

21 CHAIRMAN FINGERHUT: Agreed.
22 Agreed. Thank you.

23 MR. WALCZAK: When did the 45 foot
24 become official?

25 MR. HULBERT: Official? It would



1 have been May --

2 CHAIRMAN FINGERHUT: May 17th.

3 VICE CHAIRMAN CUTRER: May 17,
4 2016, second reading of the ordinance.

5 MR. WALCZAK: May 17th?

6 MR. HULBERT: Yes. And as you
7 were told, he applied over a year
8 later, but the question is: What
9 vested on that date that that ordinance
10 passed, that's what's before you.

11 CHAIRMAN FINGERHUT: Agreed.

12 VICE CHAIRMAN CUTRER: All right.

13 CHAIRMAN FINGERHUT: Do you have
14 another?

15 VICE CHAIRMAN CUTRER: I do. I'm
16 still torn by this. Mr. Hulbert,
17 you've told us that subsequent to the
18 Reeves versus -- was it Sherman? To
19 the 1979 Supreme Court case, the law
20 has changed and governing bodies i.e.,
21 Town Councils, can delegate another
22 body to hold a public hearing and at
23 Hilton Head Island, the Town has
24 delegated that responsibility to the
25 Planning Commission; correct?



1 MR. HULBERT: That's correct.

2 VICE CHAIRMAN CUTRER: Okay. So
3 the hearing of the Planning Commission
4 on the proposed ordinance was March 16,
5 2016, 12 days before the BZA heard the
6 variance request. So there was -- the
7 governing body, through its appointed
8 agent, the Planning Commission, had
9 resolved to consider a public -- a
10 particular scheme of rezoning. I think
11 that's a fact based on what you've told
12 us.

13 MR. HULBERT: Well, I can't say
14 that the governing body has resolved to
15 consider that. I can tell you that it
16 came through the process for a change.
17 Now where that originated at the
18 direction of Council or at staff, I
19 can't tell you, Staff will have to
20 answer that.

21 VICE CHAIRMAN CUTRER: Well, it
22 doesn't say that -- it says, as
23 advertised to the public it's intent to
24 hold public hearings, so through
25 delegation by the Town Council to the



1 Planning Commission, the Planning
2 Commission held, not only declared its
3 intent to, but, in fact, held a public
4 hearing on March 16, 2016.

5 The BZA, on March 28th, 12 days
6 later, grants this variance, which we
7 thought was about setbacks and buffers
8 and angles.

9 MR. HULBERT: That's all they
10 asked for, keep that in mind.

11 VICE CHAIRMAN CUTRER: And that's
12 all they asked for. But as my
13 colleague has pointed out, they didn't
14 have to ask for a variance from 75 feet
15 because that was what was in place in
16 the LMO at the time. Now, on May 17, a
17 month later, two months later, the Town
18 Council has the second reading of the
19 ordinance to adopt these changes, and
20 so they, in fact, became law.

21 But because -- I just want to make
22 sure I'm clear. I'm -- you know,
23 you're our -- giving us legal advice
24 here. It's your contention -- let me
25 make sure I'm correct, that because the



1 Town Council did not invoke the pending
2 ordinance doctrine at its action on May
3 17, therefore, the fact that the
4 Planning Commission had held the public
5 hearing, that the pending ordinance
6 doctrine did not apply, and therefore,
7 there was no -- that's an invalid
8 argument against this case?

9 MR. HULBERT: I don't believe that
10 pending ordinance doctrine applies in
11 this case because there is no evidence
12 that the Town intended for pending
13 ordinance doctrine to be invoked and to
14 apply.

15 VICE CHAIRMAN CUTRER: Thank you.

16 MR. HULBERT: Okay.

17 CHAIRMAN FINGERHUT: Thanks,
18 Brian. In addition to the pending
19 ordinance doctrine, anybody have any
20 thoughts about whether a site specific
21 development plan was ever presented for
22 this variance?

23 MR. WALCZAK: No. It probably was
24 (inaudible) it was over a year and a
25 half.



1 CHAIRMAN FINGERHUT: Okay. So
2 without a -- your mic -- site specific
3 development plan, under State Law,
4 there's no vested right.

5 MR. WALCZAK: Right.

6 MS. LAUDERMILCH: Right. Yeah, I
7 don't think we can infer that the
8 variance with the site plan was
9 relative to the height because height
10 was never addressed.

11 VICE CHAIRMAN CUTRER: And the
12 fact that the building permit was
13 applied for in August of 2017, like I
14 said, almost a year and a half later
15 than the 45 foot plan came into being.
16 Supposed they waited till 2020 to do
17 it? I mean, where's the limitation
18 on -- I mean, they can still get a
19 building permit five, six years later?

20 They waited it -- in other words,
21 they knew that this was going to be
22 changing so if height was an issue, why
23 didn't they make the building permit
24 application prior to the change. They
25 knew it was pending, but they waited a



1 year and a half later to make their
2 building permit application.

3 CHAIRMAN FINGERHUT: Right.
4 Right. Other comments? Does anybody
5 have a motion, keeping in mind that if
6 we're going to affirm, we have Findings
7 of Fact, Conclusions of Law of the LMO
8 Official. If we're going to modify or
9 reverse, we have to have our own
10 Findings of Fact and Conclusions of
11 Law.

12 So does anybody have any thoughts
13 about that?

14 MR. JOHNSON: One of my thoughts
15 is that the Town Official came up and
16 said that they made an error and they
17 themselves said it probably should have
18 been 52 foot one inch and a half. I
19 think that should be taken into
20 consideration.

21 CHAIRMAN FINGERHUT: How so, if
22 you don't mind flushing that out. How
23 so?

24 MR. JOHNSON: Well, I think there
25 was some assumptions made that were not



1 based on facts and those assumptions
2 were not accurate. I mean, I can read
3 drawings and I can tell you that the
4 height of this is not, in fact, 75
5 feet. It is approximately 46 feet and
6 a half.

7 CHAIRMAN FINGERHUT: If you could
8 keep --

9 MR. JOHNSON: Okay. Take the one
10 inch -- okay. 13.28 and you take a
11 three and a half inch, approximately,
12 and multiply it by 13.288, you come up
13 with 46.5 feet.

14 VICE CHAIRMAN CUTRER: 13.288
15 being the height of the floor?

16 MR. JOHNSON: It being 1 inch
17 equals.

18 CHAIRMAN FINGERHUT: Scale.

19 MR. JOHNSON: The scale of the
20 drawing.

21 MR. WALCZAK: Somebody calculated
22 that.

23 MR. JOHNSON: And I don't know who
24 put that on there.

25 MR. WALCZAK: 13 feet, somebody



1 calculated that based on the drawing
2 that they -- was submitted.

3 MR. JOHNSON: But if you take the
4 49 feet on the bottom there and take a
5 little piece of paper and put a hash
6 mark on each end and turn it upright,
7 it's 49 -- it's less than 49 feet.
8 It's evidenced by the three and a half
9 inch ruler and the previous -- do you
10 have your -- by the way, that -- that
11 five stories ends up being 9.3 feet
12 from floor to floor, which is
13 actually -- you can accomplish that.
14 You can do that.

15 Now, I think we've gotten lost in
16 the weeds, so to speak, over these
17 dates and things, but I think the
18 Official made the wrong interpretation
19 and admittedly, to her credit, came
20 back today and say -- said it really
21 isn't 75 feet tall and I think that the
22 year and a half time that passed to
23 submit the drawings, there were new
24 codes and new regulations.

25 And you go by the current codes



1 and regulations. Whether it says it's
2 been vested or not, you go by the
3 current codes and regulations.

4 VICE CHAIRMAN CUTRER: Bob, your
5 argument would be that there was not a
6 site specific development plan at the
7 time of the BZA action?

8 MR. JOHNSON: It was not complete
9 enough to be considered complete enough
10 to be considered site specific.

11 VICE CHAIRMAN CUTRER: All right.

12 CHAIRMAN FINGERHUT: Mr. Cutrer?

13 VICE CHAIRMAN CUTRER: I guess I
14 do have one question before I make a
15 motion and that is, what appears to be
16 at dispute right now is whether the
17 maximum height is 52 feet 2 inches or
18 45 feet.

19 CHAIRMAN FINGERHUT: Just my -- I
20 mean, if you're asking my own view is
21 that it is so indeterminate that it's
22 not for us to guess.

23 VICE CHAIRMAN CUTRER: And I know.
24 Our LMO Official has told us that her
25 determination, based on her letter, is



1 that 52 feet one and a half inches is
2 the now applicable height. All right.
3 So 52 feet one and a half inches. The
4 LMO now requires 45 feet max.

5 So I guess the question is, can
6 this body, if it were to reverse the
7 determination by the LMO Official, set
8 a height limitation somewhere in
9 between?

10 CHAIRMAN FINGERHUT: We stand in
11 the shoes of the LMO Official and so we
12 know --

13 VICE CHAIRMAN CUTRER: Wait a
14 minute.

15 CHAIRMAN FINGERHUT: We stand in
16 the shoes of the LMO Official and my
17 understanding is that you can make that
18 determination here. I don't know that
19 we would want to, but we certainly can.
20 I believe we --

21 VICE CHAIRMAN CUTRER: But what we
22 just heard, from our more professional
23 colleagues than me in this area, is
24 that this thing could get built at 49
25 feet.



1 MR. WALCZAK: We can change the
2 LMO, right?

3 CHAIRMAN FINGERHUT: No. We don't
4 change, we enforce the LMO.

5 MR. WALCZAK: That's what I'm
6 saying, so we -- how could we approve a
7 51 foot or 49 foot or whatever if it
8 says 45?

9 VICE CHAIRMAN CUTRER: I think
10 what's --

11 CHAIRMAN FINGERHUT: We would have
12 to find that it vested at the higher
13 level in order to do that.

14 MR. JOHNSON: I think the request
15 for appeal is what we're here for --

16 CHAIRMAN FINGERHUT: Yes.

17 MR. JOHNSON: -- today and that is
18 saying that we do or we don't believe
19 that the 75 feet is vested, is that --

20 CHAIRMAN FINGERHUT: Not exactly,
21 no.

22 MR. JOHNSON: Okay.

23 CHAIRMAN FINGERHUT: No, we could
24 affirm.

25 MR. JOHNSON: Correct me.



1 CHAIRMAN FINGERHUT: Okay. We
2 could affirm based on the Findings of
3 Fact Conclusions of Law, we could
4 modify the decision, or we can reverse
5 it and we stand in the shoes of the LMO
6 Official on that.

7 VICE CHAIRMAN CUTRER: And I think
8 our Counsel was wanting to tell us
9 something. I'm sorry?

10 MR. HULBERT: I think the Chairman
11 just nailed it.

12 CHAIRMAN FINGERHUT: Thank you.

13 VICE CHAIRMAN CUTRER: Name it
14 again so everybody --

15 CHAIRMAN FINGERHUT: He says I got
16 it right.

17 VICE CHAIRMAN CUTRER: And say
18 what you said again.

19 CHAIRMAN FINGERHUT: Oh, Sorry.
20 We can -- we can affirm based on the
21 Findings of Fact, the Conclusions of
22 Law of Ms. Lewis. We can modify, in
23 essence, standing in her shoes and
24 change parts of the decision. We can
25 completely reverse it and say something



1 else.

2 VICE CHAIRMAN CUTRER: Okay. Mr.
3 Chairman, I am prepared to offer a
4 motion to modify the height restriction
5 to 49 feet. The appellants have listed
6 several items in their argument. The
7 first is that there was no detail site
8 plan. Second is that there was a
9 pending ordinance applicable. Third
10 was that there was a self-imposed
11 hardship by the original owners. The
12 fourth was there was no reference to
13 height, and then the fifth, actually,
14 it came up later, was that there was
15 this settlement agreement that had been
16 reached by the parties.

17 We've been advised by our Counsel
18 that the pending ordinance doctrine
19 does not apply here. We've been
20 advised by our Counsel that the
21 self-imposed hardship that was -- might
22 have been considered in the original
23 March 28, 2016 BZA deliberations is not
24 applicable here. The height was not
25 referenced in the application but --



1 for the variance, but as has been
2 pointed out, there was really no need
3 to because the building height was
4 going to be substantially less than
5 what was permitted under the then
6 zoning.

7 And that the settlement agreement,
8 the Town was not a party to, we've been
9 advised that that's not something for
10 us to consider.

11 So I move to modify the finding of
12 the LMO Official and set the maximum
13 height of these buildings at 49 feet.

14 CHAIRMAN FINGERHUT: May I ask a
15 question? Is that because -- first, is
16 that 49 feet above the flood elevation
17 of 49 feet total?

18 VICE CHAIRMAN CUTRER: I ask one
19 of my architectural colleagues here to
20 clarify that point for me.

21 MR. WALCZAK: I think -- I think
22 you were making the -- that goes above
23 flood; correct?

24 MS. LEWIS: Above base flood
25 elevation.



1 MR. WALCZAK: Base flood. Base
2 flood being at that location 15 or 14?

3 MS. LEWIS: 14 feet, I believe.

4 MR. WALCZAK: 14.

5 MR. JOHNSON: Does that work?

6 MR. WALCZAK: That works. That's
7 the original --

8 CHAIRMAN FINGERHUT: So 49 feet
9 above base flood elevation.

10 VICE CHAIRMAN CUTRER: Above base
11 flood elevation.

12 MR. WALCZAK: That's not what this
13 drawing shows.

14 CHAIRMAN FINGERHUT: No. This
15 drawing shows 49 feet.

16 MR. WALCZAK: Above ground.

17 MR. JOHNSON: Above slab.

18 VICE CHAIRMAN CUTRER: Well, what
19 do we need to get there?

20 CHAIRMAN FINGERHUT: Just a
21 motion. It depends on where we want to
22 go. I just want to clarify what we're
23 saying.

24 MR. WALCZAK: Can I offer an
25 amendment?



1 VICE CHAIRMAN CUTRER: I think my
2 motion and I'm -- do we need a second
3 before we amend?

4 MR. HULBERT: Yes.

5 MR. WALCZAK: Yes.

6 CHAIRMAN FINGERHUT: Second.

7 VICE CHAIRMAN CUTRER: Just
8 because it's been made and seconded
9 doesn't mean we have to pass it.

10 MR. WALCZAK: No. Now we have
11 to -- we now can discuss it.

12 CHAIRMAN FINGERHUT: Right.

13 MR. WALCZAK: Which we've already
14 done. All right. I'd like to amend
15 the motion, if I may, by just changing
16 the number from 49 to 45, keeping it
17 consistent with the present LMO
18 ordinance.

19 VICE CHAIRMAN CUTRER: I second
20 that motion.

21 CHAIRMAN FINGERHUT: So 45 above
22 base elevation.

23 MR. WALCZAK: 45 above base flood
24 elevation.

25 MR. JOHNSON: Can I get a



1 clarification of that, is that the way
2 the LMO reads? It is base flood
3 elevation? Thank you.

4 CHAIRMAN FINGERHUT: Actually, I
5 think I have to offer -- I have to
6 offer an amendment then because I think
7 it's missing some things.

8 MR. WALCZAK: Well, whatever --
9 what did I miss?

10 CHAIRMAN FINGERHUT: Okay.

11 VICE CHAIRMAN CUTRER: Why don't
12 we vote on that amendment and then you
13 amend it again?

14 MR. WALCZAK: Yeah, why don't you
15 amend the amendment?

16 MR. HULBERT: You can discuss it
17 before you vote on it.

18 CHAIRMAN FINGERHUT: Let's --
19 yeah.

20 VICE CHAIRMAN CUTRER: All right.
21 You've moved and seconded.

22 MR. WALCZAK: Okay.

23 VICE CHAIRMAN CUTRER: I've
24 seconded a motion to amend my motion to
25 45 feet above base flood elevation.



1 Let's vote on that.

2 CHAIRMAN FINGERHUT: Let's further
3 discuss before we vote on that. Okay?
4 If we're going to do that, and I think
5 that's appropriate, actually, but if
6 we're going to do that, I think we need
7 to make a finding about it -- thank
8 you -- we need to make a finding about
9 vested rights and if -- what's vested,
10 if anything.

11 If there is no site specific
12 elevation, we need to make a Finding of
13 Fact that we're finding that there
14 wasn't one -- excuse me, no site
15 specific -- I don't have my glasses on,
16 pardon me -- development plan and we
17 need to then make a Finding of Fact to
18 that.

19 If we're going to apply the
20 current LMO, we've got to give reasons
21 why we're doing that, and I think that
22 it's -- we can't just reverse and leave
23 it to some future court, I suspect, to
24 look at what we've done and figure out
25 what we were thinking.



1 MR. WALCZAK: You're the lawyer so
2 come up with what parts.

3 CHAIRMAN FINGERHUT: So for that,
4 I would propose that the motion be
5 further amended to add the Finding of
6 Fact that we find that there was no
7 site specific development plan pursuant
8 to South Carolina law submitted.
9 Conclusion of law as a result of no
10 site specific development plan, there
11 was no vested right to build as
12 requested.

13 MR. WALCZAK: Very good.

14 MR. HULBERT: The variance for the
15 setbacks would still be in place,
16 right?

17 CHAIRMAN FINGERHUT: Pardon?

18 MR. HULBERT: The variance for the
19 setbacks --

20 CHAIRMAN FINGERHUT: Yeah, we
21 couldn't affect that even if we wanted
22 to, but we're not trying to, no.

23 MR. WALCZAK: No, we're not doing
24 that.

25 So does your amendment need a



1 second?

2 CHAIRMAN FINGERHUT: It does.

3 MR. WALCZAK: Fine. Second his
4 amendment to the amendment or whatever
5 it is.

6 CHAIRMAN FINGERHUT: Okay. It's
7 messy, but I think we're there.

8 MR. WALCZAK: Yeah.

9 CHAIRMAN FINGERHUT: So we have a
10 motion, we have a second -- actually,
11 we have an amended motion, we have a
12 further amended motion, everything's
13 been seconded. We're going to -- any
14 further comment on the subsequent
15 amended motion?

16 VICE CHAIRMAN CUTRER: Second
17 amendment, which is no vested right.
18 Call the question.

19 MR. JOHNSON: Do we need to be
20 specific about that vested right being
21 the height versus the setbacks?

22 CHAIRMAN FINGERHUT: Through --
23 no, I think it's the vested right we're
24 talking about and what's the subject of
25 the appeal.



1 MR. JOHNSON: Okay.

2 CHAIRMAN FINGERHUT: So now we're
3 talking about height. Setbacks are no
4 longer an issue so that's fine.

5 MR. JOHNSON: It's clear.

6 CHAIRMAN FINGERHUT: Relatively
7 speaking.

8 VICE CHAIRMAN CUTRER: Can I
9 restate where I think we are?

10 CHAIRMAN FINGERHUT: Please.

11 VICE CHAIRMAN CUTRER: This is
12 what you get when you have a finance
13 guy make motions. I believe that we
14 have a motion pending to modify the LMO
15 Official's finding to a height of 45 --
16 from 52 feet 2 inches to 45 feet above
17 the ground.

18 Then we have the first amendment,
19 which was to modify that motion --
20 amend that motion to 45 feet above the
21 base flood elevation, and then we have
22 a second amendment to modify the motion
23 to have a determination that there is
24 no vested right in 75 feet or just no
25 vested right?



1 CHAIRMAN FINGERHUT: No vested
2 right because there was no site
3 specific development plan.

4 VICE CHAIRMAN CUTRER: Got it.

5 MR. HULBERT: So I recommend you
6 vote on the second amendment first,
7 then the first amendment then the
8 motion as amended.

9 CHAIRMAN FINGERHUT: Okay. All
10 right.

11 Teresa, could you please call the
12 roll on the -- this is on the second
13 amended motion.

14 MR. WALCZAK: The second amended.

15 MS. HALEY: Mr. Walczak?

16 MR. WALCZAK: I am in favor of the
17 second amendment.

18 MS. HALEY: Mr. Johnson?

19 MR. JOHNSON: Favor of the second
20 amendment.

21 MS. HALEY: Mr. Fingerhut?

22 CHAIRMAN FINGERHUT: For the
23 second amendment.

24 MS. HALEY: Mr. Cutrer?

25 VICE CHAIRMAN CUTRER: For the



1 second amendment.

2 MS. HALEY: Mr. White?

3 MR. WHITE: For the second
4 amendment.

5 MS. HALEY: Ms. Laudermilch?

6 MS. LAUDERMILCH: For the second
7 amendment.

8 CHAIRMAN FINGERHUT: Now we're
9 going to call the roll on the first
10 amendment to the motion.

11 MS. HALEY: Mr. Walczak?

12 MR. WALCZAK: I'm in favor of the
13 first amendment also, thank you.

14 MS. HALEY: Mr. Johnson?

15 MR. JOHNSON: For the first
16 amendment.

17 MS. HALEY: Mr. Fingerhut?

18 CHAIRMAN FINGERHUT: For the first
19 amendment.

20 MS. HALEY: Mr. Cutrer?

21 VICE CHAIRMAN CUTRER: For the
22 first amendment.

23 MS. HALEY: Mr. White?

24 MR. WHITE: For the first
25 amendment.



1 MS. HALEY: Ms. Laudermilch?

2 MS. LAUDERMILCH: For the first
3 amendment.

4 CHAIRMAN FINGERHUT: Now on the
5 motion itself, please.

6 VICE CHAIRMAN CUTRER: The amended
7 motion.

8 MS. HALEY: Mr. Walczak?

9 MR. WALCZAK: I'm in favor of the
10 primary motion with -- as amended. For
11 the motion as amended.

12 MS. HALEY: Mr. Fingerhut?

13 CHAIRMAN FINGERHUT: For the
14 motion as amended.

15 MS. HALEY: Mr. Cutrer?

16 VICE CHAIRMAN CUTRER: For the
17 motion as amended.

18 MS. HALEY: Mr. White?

19 MR. WHITE: For the motion.

20 MS. HALEY: Ms. Laudermilch?

21 MS. LAUDERMILCH: For the motion.

22 CHAIRMAN FINGERHUT: Thank you
23 very much. That concludes our hearing
24 of this appeal.

25 I don't believe we have any Board



1 business. Any staff reports?

2 MS. LADD: Good afternoon, for the
3 record, I'm Taylor Ladd, Senior
4 Planner. Last week, you were provided
5 with a waiver report which had two
6 waiver items. I'm happy to answer any
7 questions or provide --

8 CHAIRMAN FINGERHUT: Apparently no
9 questions, but thank you very much.

10 MS. LADD: Sure thing. To date
11 and the deadline for the variance --
12 for the BZA meeting in April was on
13 Friday. We did receive one
14 application. There's a possibility it
15 will be withdrawn and I will keep you
16 posted, at which point, April's meeting
17 will be cancelled if it's withdrawn.

18 CHAIRMAN FINGERHUT: Thank you
19 very much.

20 MS. LADD: I'll let you know.

21 CHAIRMAN FINGERHUT: Thank you.

22 MS. LADD: Sure.

23 CHAIRMAN FINGERHUT: May I have a
24 motion for adjournment?

25 MR. JOHNSON: So moved.



1 MS. LAUDERMILCH: Second.

2 CHAIRMAN FINGERHUT: We are
3 adjourned. Thank you.

4 (RECORDING ENDED.)

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C E R T I F I C A T E

SOUTH CAROLINA :
BEAUFORT COUNTY:

I, Charles T. Nussbaum, Jr., do hereby
certify that the foregoing transcription was
transcribed by me, to the best of my ability,
from an audio file provided by Teresa Haley,
with The Town of Hilton Head Island.

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

Charles T. Nussbaum, Jr.
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Hilton Head, South Carolina



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