

**TOWN OF HILTON HEAD ISLAND**  
**Board of Zoning Appeals**  
**Minutes of the August 27, 2018 Meeting – 1:00 p.m.**  
**Benjamin M. Racusin Council Chambers**

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

Board Members Absent: Patsy Brison (excused)

Council Members Present: David Ames, Bill Harkins

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

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

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- 1. Call to Order**
- 2. Pledge of Allegiance to the Flag**
- 3. Roll Call**
- 4. Freedom of Information Act Compliance**  
Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.
- 5. Swearing in Ceremony for Reappointed Board Members Jerry Cutrer and John White**  
Brian Hulbert, Staff Attorney, performed the swearing in ceremony for reappointed Board Members Jerry Cutrer and John White.
- 6. Welcome and Introduction to Board Procedures**  
Chairman Fingerhut welcomed the public and introduced the Board's procedures for conducting the business meeting.
- 7. Approval of Agenda**  
Chairman Fingerhut asked for a motion to approve the agenda. Vice Chairman Cutrer moved to approve. Mr. White seconded. The motion passed with a vote of 6-0-0.
- 8. Approval of the Minutes – Meeting of June 25, 2018**  
Chairman Fingerhut asked for a motion to approve the minutes of the June 25, 2018 meeting. Vice Chairman Cutrer moved to approve. Mr. Johnson seconded. The motion passed with a vote of 6-0-0.
- 9. Unfinished Business – None**
- 10. New Business**

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

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

**11. Board Business**

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

**12. Staff Report**

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

**13. Adjournment**

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

Submitted by: Teresa Haley, Secretary

Approved: September 24, 2018

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David Fingerhut, Chairman

**EXHIBIT A**

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

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STATE OF SOUTH CAROLINA  
BEAUFORT COUNTY

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

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

-----/

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



BOARD OF ZONING APPEALS BEACHWALK  
- BZA BEACHWALK TRANSCRIPT

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1 APPEARANCES OF COUNSEL:

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

3

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

6

7 AND

8

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

11

12 FOR SDC PROPERTIES INCORPORATED:

13 BARRY L. JOHNSON, ESQUIRE  
14 Johnson & Davis  
The Victoria Building  
15 Suite 300  
10 Pinckney Colony Road  
Bluffton, South Carolina 29909  
16 barry@jd-pa.com  
843.815.7121

17

18 FOR THE TOWN OF HILTON HEAD ISLAND:

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

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BOARD OF ZONING APPEALS BEACHWALK  
- BZA BEACHWALK TRANSCRIPT

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BOARD OF ZONING APPEALS BEACHWALK  
- BZA BEACHWALK TRANSCRIPT

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

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

6 MS. HALEY: Mr. Walczak?

7 MR. WALCZAK: Present.

8 MS. HALEY: Mr. Johnson?

9 MR. JOHNSON: Present.

10 MS. HALEY: Mr. Fingerhut?

11 MR. FINGERHUT: Present.

12 MS. HALEY: Mr. Cutrer?

13 MR. CUTRER: Present.

14 MS. HALEY: Mr. White?

15 MR. WHITE: Present.

16 MS. HALEY: Ms. Laudermilch?

17 MS. LAUDERMILCH: Present.

18 (INAUDIBLE)

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

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

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

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

5 Welcome to the Board of Zoning and  
6 Appeals.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

20 MR. WILLIAMS: Understood.

21 UNIDENTIFIED SPEAKER: Frowned  
22 upon.

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

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

2 (Phonetic)

3 Have a motion to approve to the  
4 agenda?

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

7 MR. FINGERHUT: Is there a second?

8 UNIDENTIFIED SPEAKER: Second that  
9 motion.

10 MR. FINGERHUT: All in favor?

11 THE BODY: I.

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

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

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

19 THE BODY: I.

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

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

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

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

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

22 MR. WILLIAMS: Reconsideration.

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

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

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

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

25 MR. FINGERHUT: Counsel, the only

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

7 MR. TAYLOR: Yes, sir.

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

12 MR. TAYLOR: No, sir.

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

18 MR. TAYLOR: Very good.

19 MR. FINGERHUT: Thank you.

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

22 MR. FINGERHUT: Yes.

23 MR. TAYLOR: -- Ms. Dixon did  
24 refer to both of those in her memo.  
25 They just simply were not made a part

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

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

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

10 MR. JOHNSON: Same.

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

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

17 MR. FINGERHUT: Thank you.

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

20 MR. FINGERHUT: Good afternoon.

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

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

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

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

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



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

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

8 MR. FINGERHUT: Yes.

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

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

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

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

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

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

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

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

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

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

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

18 MR. WILLIAMS: Correct.

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

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

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

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

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

1 therefore, it cannot be developed.

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

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

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

19 MR. CUTRER: Okay.

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

22 MR. WILLIAMS: Thank you.

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

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

1 waterside PUD.

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

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

25 MR. TAYLOR: Petitioners call as a

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

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

8 MR. FINGERHUT: Counsel?

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

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

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

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



1 MR. FINGERHUT: Yes, indeed.

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

4 MR. FINGERHUT: Certainly.

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

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

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

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

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

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

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

1 sorry. I would interpose an objection.

2 It's clearly not relevant. We

3 stipulate that the categorical

4 exemption is expired.

5 With respect to the conclusion

6 that Mr. Taylor draws thereafter which

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

8 it. I think that's the battleground

9 which really get to the question which

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

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

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

13 body would note my objection. It is --

14 it's irrelevant and it is a waste of

15 our resources but if he wants to put it

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

17 objection.

18 MR. FINGERHUT: Thank you.

19 MR. TAYLOR: Mr. Chairman, I would

20 like to note for the record that we

21 couldn't even get opposing counsel to

22 agree to the two steps -- Judge Dukes

23 two steps prior to coming in here, so

24 certainly there's no been no consent

25 offered or turned down by the

1 categorical exemption.

2 MR. FINGERHUT: I agree, counsel.

3 Your objection is noted but overruled.

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

11 MR. CUTRER: 41 minutes now.

12 MR. FINGERHUT: Counsel?

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

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

19 EXAMINATION

20 BY MR. TAYLOR:

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

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

25 Q And Curtis, can you tell the members of

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

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

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

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

13 A That is true.

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

18 A I did.

19 Q Did you help draft that ordinance?

20 A I did.

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

25 MR. ALFORD: Interposing an

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

11 MR. FINGERHUT: Counsel?

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

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

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

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

6 MR. ALFORD: Thank you.

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

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

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



1 time that you actually move forward.

2 (Phonetic)

3 BY MR. TAYLOR:

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

12 A I am.

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

15 A Yes.

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

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

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

4 MR. ALFORD: Objection, leading.

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

9 BY MR. TAYLOR:

10 Q For several -- that was poorly worded.

11 A One of which was Parcel E.

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

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

16 A Yes.

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

19 A Yes and so stated on the final page.

20 Q Very good.

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

23 MR. FINGERHUT: Counsel?

24 MR. JOHNSON: None, Mr. Chairman.

25 MR. ALFORD: No, sir.

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

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

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

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

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

20 MR. CUTRER: Within a certain  
21 period?

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

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

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

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

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

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

25 MR. COLTRANE: Well our hearts --

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

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

13 MR. CUTRER: Okay.

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

16 MR. COLTRANE: Okay.

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

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

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

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

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

11 MR. FINGERHUT: Okay. Thank you.

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

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

17 MR. FINGERHUT: Absolutely. No  
18 objection.

19 MR. TAYLOR: Thank you.

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

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

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

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

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

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

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

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

25 MR. TAYLOR: I do.



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

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

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

21 MR. WILLIAMS: I agree and --

22 MR. CUTRER: -- and moved on.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 witness, testified as follows:

2 EXAMINATION

3 BY MR. TAYLOR:

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

6 A Sure. Teresa Lewis.

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

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

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

13 A I have.

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

18 It's called a subpoena to Teri Lewis.

19 Do you see that in front of you?

20 A I do.

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

24 A I did.

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

1 it?

2 A I did.

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

6 A I did.

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

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

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

25 A I did.



1 Q Were there any?

2 A I did not find any.

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

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

15 A I did.

16 Q And did you find any?

17 A Did not.

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

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

3 A I did.

4 Q Okay. And did you find any?

5 A I did not.

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

17 A For projects other than this one?

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

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

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

23 A As far as I can tell.

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

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

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

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

9 A Yes.

10 Q Okay.

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

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

15 MR. ALFORD: No, sir.

16 MR. JOHNSON: No.

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

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

25 MR. FINGERHUT: It's part of the

1 record, isn't it?

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

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

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

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

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

1 that --

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

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

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

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

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

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

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

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

21 EXAMINATION

22 BY MR. ALFORD:

23 Q Ms. Lewis, you got a subpoena.

24 A Okay.

25 Q That asked you questions about similar

1 circumstances?

2 A Yes.

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

5 A That's correct.

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

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

15 MR. FINGERHUT: Thank you.

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

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

22 EXAMINATION

23 BY MR. TAYLOR:

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

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

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

10 A That's correct.

11 Q That's what you were looking for?

12 A That is right.

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

18 A That's correct.

19 MR. TAYLOR: Nothing further.

20 MR. FINGERHUT: Thank you.

21 Please, Mr. Cutrer.

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

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

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

3 MR. WILLIAMS: Okay.

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

13 MR. WILLIAMS: Correct.

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

19 MR. WILLIAMS: Right.

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

22 MR. WILLIAMS: Correct.

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



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

3 MR. WILLIAMS: Correct.

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

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

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

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

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

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

15 MR. CUTRER: Okay.

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

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

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

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

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

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

12 MR. CUTRER: Okay.

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

24 MR. CUTRER: Thank you.

25 MR. WILLIAMS: Does that make

1 sense?

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

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

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

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

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

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

5 I think we've covered most  
6 everything that we see is the issues  
7 here. It's a question of  
8 interpretation and -- package, City of  
9 Myrtle Beach against -- Corporation.  
10 The South Carolina Courts have  
11 consistently held that when construing  
12 a statute its words must be given their  
13 plain and ordinary meaning without --  
14 subtle or enforce construction to limit  
15 or expand the statute's operations.  
16 It seems that us at the Town staff  
17 is interpreting the average density  
18 provision in a manner that limits it so  
19 it doesn't apply to this particular  
20 PD-2 development.

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

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

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

16 Questions? (Phonetic)

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

19 MR. WILLIAMS: Thank you.

20 MR. FINGERHUT: Yes, sir.

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

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

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

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

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

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



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

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

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

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

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

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

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

13 MR. CUTRER: Just like that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 feet."

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

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

1 that hotel from 50 units to 94 units.

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

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

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

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

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

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

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

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

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

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

1 official's determination.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The zoning classification of

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

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

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



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

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

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

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

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

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

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

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

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

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

19 MR. JOHNSON: Argument.

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

25 MR. JOHNSON: Yes, sir.

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

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

8 MR. CUTRER: Sure.

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

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

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

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

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

13 MR. CUTRER: The density.

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

25 MR. CUTRER: Okay.

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

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

9 MR. JOHNSON: Yes, sir.

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

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

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

4 MR. JOHNSON: Yes, sir.

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

7 MR. JOHNSON: Yes, sir.

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

10 MR. JOHNSON: Right.

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

16 MR. JOHNSON: Right.

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

25 MR. JOHNSON: Yes, sir. I

1 understand your question I think but --

2 MR. CUTRER: One exhibit over here

3 I'd like you to have a comparable

4 exhibit.

5 MR. JOHNSON: Yes, sir. There

6 will not be a comparable exhibit

7 because the definition of difference is

8 contained in Subsection 102B1 because

9 under that subsection we don't have to

10 consider the potential impacts on the

11 whole property. We only have to

12 consider what the code says in

13 Subsection 102B1 is essentially

14 comparing like uses within a mixed use

15 development, which this is. You don't

16 compare the whole thing so you don't

17 come up with a comparable counter table

18 on the other side. You do come up with

19 one slice of it and that slice is what

20 is the LMO today calls a nonresidential

21 component which says, at least under

22 the base of zoning we cannot exceed

23 8,000 square feet per acre and we've

24 got a hair over one acre and we meet

25 that but how we relate to the PD-2



1 overlay?

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

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

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

23 MR. JOHNSON: Yes, sir.

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

1 B mysteriously vanished. D is the

2 Waterside right-of-way, right?

3 MR. JOHNSON: I think that's

4 right.

5 MR. CUTRER: What we've said

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

7 F is the Spinnaker development which

8 includes 5,000 some odd square feet and

9 then E is the subject parcel, so

10 there's really only four.

11 MR. JOHNSON: Yes, sir.

12 MR. CUTRER: But we have three

13 uses within all of this property.

14 We have residential. We have

15 hotel and we have nonresidential, so am

16 I understanding you correctly that if

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

18 moment that the Spinnaker Welcome

19 Center is built. If we take the

20 nonresidential -- well, let's start

21 with the hotel.

22 MR. JOHNSON: Yes, sir.

23 MR. CUTRER: If we take the

24 density of the hotel, 9 -- even though

25 94 units were apparently permitted I

1 believe 91 was built.

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

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

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

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

1 MR. CUTRER: Okay.

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

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

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

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

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

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

10 MR. CUTRER: Oh.

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

15 They have some activity spaces there.

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

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

1 use in the classic nonresidential

2 sense.

3 MR. CUTRER: Okay.

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

5 the hotel staying -- where you come in

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

7 got a restaurant in there is anything

8 other than part of the hotel.

9 In fact, the early definitions of

10 the hotel or lodging facility in the

11 original development standards

12 ordinance and the earlier iterations of

13 the LMO required you to have those

14 facilities as part of something like

15 that.

16 MR. CUTRER: Okay. I hope some of

17 my colleagues will have some questions,

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

19 the third question from the Judge --

20 MR. JOHNSON: Yes.

21 MR. CUTRER: Questions -- the

22 answer to questions 1 and 2 have

23 established that, yes, Parcel E is in

24 the Overlay District and is the subject

25 property subject to the PD-2 Overlay

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

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

1 MR. CUTRER: Right.

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

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

12 MR. JOHNSON: Yes, sir.

13 MR. CUTRER: And your argument is?

14 MR. JOHNSON: Same thing.

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

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

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



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

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

8 MR. JOHNSON: Yes, sir.

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

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

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

1 excuse me, 8,000 square feet per acre

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

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

4 MR. CUTRER: Thank you.

5 MR. FINGERHUT: Other questions

6 for Mr. Johnson by members of the

7 Board? I have a few.

8 MR. JOHNSON: Yes, sir.

9 MR. FINGERHUT: SDC Properties

10 Inc. owns Parcel E, is that correct?

11 MR. JOHNSON: Yes.

12 MR. FINGERHUT: Does that entity

13 have any relationship to the owner of

14 Parcel F?

15 MR. JOHNSON: Parcel F is -- any

16 relationship, the answer is probably,

17 yes, but it's not as direct a

18 relationship as you might have

19 contemplated.

20 MR. FINGERHUT: Fair enough. Does

21 the S stand for Spinnaker?

22 MR. JOHNSON: SD --

23 MR. FINGERHUT: Does the S stand

24 for Spinnaker though or is for Steve,

25 something like that?

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

6 MR. FINGERHUT: Fair enough.

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

13 MR. FINGERHUT: Correct, the  
14 development.

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

18 MR. FINGERHUT: Yeah.

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

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

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

1 MR. FINGERHUT: Okay. So --

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

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

16 MR. JOHNSON: Right.

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

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

1 for a group of investors and was

2 flagged as a Super 8 Motel --

3 MR. FINGERHUT: Right.

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

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

6 builder, as well, and how it migrated

7 to Beachwalk I don't really know.

8 But, case law is clear that where

9 a rezoning has the effect of

10 confiscating the economic utility

11 that's a regulatory taking. That would

12 be zoning here. (Phonetic)

13 MR. FINGERHUT: Okay. So now,

14 let's see, Parcel E was not developed

15 but I don't think there's any

16 disagreement that it could have been

17 developed during the categorical

18 exemption, would that be correct?

19 MR. JOHNSON: It could have been

20 developed any time over the last couple

21 hundred years.

22 MR. FINGERHUT: Well, but

23 certainly during the categorical

24 exemption?

25 MR. JOHNSON: It could have been.

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

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

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

1 MR. JOHNSON: Right.

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

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

25 MR. FINGERHUT: Uh-huh.

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

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

7 MR. JOHNSON: This gentleman here  
8 could.

9 MR. WALCZAK: 40,000 per acre.

10 MR. FINGERHUT: I'm --

11 MR. WALCZAK: -- 43568.

12 MR. JOHNSON: 43,560.

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

16 MR. JOHNSON: By 13,000.

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

18 (All phonetic)

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

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



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

2 I have a different -- I guess a

3 different question. It's a little

4 confusing. Are you arguing that

5 the strip application for the LMO

6 supports your decision or that the

7 stripped allocation of the LMO is

8 regulatory taking?

9 MR. JOHNSON: I'm arguing that my

10 strip interpretation of the LMO

11 supports my position.

12 The appellants arguments for --

13 strict interpretation of the LMO

14 creates a regulatory taking.

15 MR. FINGERHUT: Okay, Okay.

16 MR. ROBERT JOHNSON: Can I ask a

17 question?

18 MR. FINGERHUT: Please.

19 MR. ROBERT JOHNSON: Earlier on it

20 was mentioned by one party or the other

21 that in some circumstances there was in

22 dividing up or borrowing of pieces of

23 land to get densities and room,

24 quantities, etc. I think it's

25 pertinent to the process if the

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

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

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

25 MR. ROBERT JOHNSON: So it's your

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

5 MR. JOHNSON: That is my  
6 understanding.

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

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

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

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

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

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

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

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

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

18 MR. CUTRER: Okay.

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

25 MR. CUTRER: Thank you.

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

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

6 MR. JOHNSON: Sure.

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

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

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

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

9 MR. JOHNSON: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25       I mean is that -- do we agree that



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

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

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

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

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

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

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

15       MR. CUTRER: What page is this?

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. ROBERT JOHNSON: Right.

25 MR. ALFORD: What do you call --

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

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

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

12 MR. ROBERT JOHNSON: Right.

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

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

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

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



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

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

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

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

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

1 think so.

2 MR. ALFORD: I respectfully

3 disagree. Let me try --

4 MR. FINGERHUT: Explain to me,

5 yeah.

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

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

8 section planned development may be

9 built adding density which is greater

10 than the site specific density allowed

11 by the -- provided that any such

12 concentration density is offset by an

13 area of lower density in the other

14 sections -- based on the LMO.

15 Okay, if I have approval to build,

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

17 all the land building residential I

18 can't build a commercial. I've

19 precluded myself, right? Vice versa.

20 If I -- well, space -- residential

21 density is probably the only one you

22 can -- already tells you can expand so

23 much I don't think commercial is based

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

25 footprint but you have to read them

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

9 MR. FINGERHUT: A little bit.

10 MR. ALFORD: -- application.

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

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

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

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

8 MR. ALFORD: Which they go  
9 through.

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

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

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

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

25 MR. ALFORD: For the record,

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

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

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

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

25 MR. FINGERHUT: Would you like a

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

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

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

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

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

15 MR. FINGERHUT: Back in session.

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

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

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

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

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

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

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



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

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

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

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

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

15 MR. ALFORD: Average density?

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

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

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

25 MR. ALFORD: No. Actually it says

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

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

5 MR. ALFORD: Thank you.

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

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

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

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

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

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

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

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

10 MR. ALFORD: I guess my --

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

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

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

25 MR. ALFORD: I am.

1 MR. ROBERT JOHNSON: That was pre

2 2000 --

3 MR. WILLIAMS: 2002, pre-2002.

4 MR. TAYLOR: Mr. Chairman, could

5 that be marked for the record, please?

6 MR. FINGERHUT: Absolutely. It

7 can reside in the record, correct.

8 That would be --

9 MR. WILLIAMS: No, but his

10 calculations --

11 MR. TAYLOR: And the calculations

12 both should be marked.

13 MR. ALFORD: Yeah, this in the

14 record.

15 MR. WILLIAMS: Let's mark it so

16 it's attached to the transcript.

17 MR. ROBERT JOHNSON: We need to go

18 by today's LMO and not an agreement

19 that was made pre-LMO.

20 MR. ALFORD: Yes, sir.

21 MR. ROBERT JOHNSON: You're mixing

22 those two up. You need to take that,

23 put it aside.

24 MR. ALFORD: Under today's LMO

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

1 per acre on a piece of property --

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

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

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

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

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

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

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

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

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

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

25 MR. WALCZAK: If I may.



1 MR. FINGERHUT: Please.

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

3 MR. ALFORD: Yes, sir.

4 MR. WALCZAK: A.

5 MR. ALFORD: Yes.

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

11 MR. ALFORD: Right.

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

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

1 taken, you can't mix --

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

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

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

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

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

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

23 MR. WALCZAK: Okay.

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

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

4 MR. WILLIAMS: 15.1 acres.

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

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

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

19 UNIDENTIFIED SPEAKER: What's the  
20 total?

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

25 MR. ALFORD: This in the record,

1 right, Chet?

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

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

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

9 MR. CUTRER: Nine are what?

10 MR. ALFORD: Are open space.

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

14 Parcel E is 1.608 acres.

15 Parcels A and C constitute  
16 2.6 acres.

17 Parcel B is .377 acres.

18 MR. CUTRER: B as in Bravo?

19 MR. WILLIAMS: B was taken out.

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

23 MR. WILLIAMS: And D.

24 MR. ALFORD: And D is --

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

1 MR. ALFORD: D is the --

2 MR. CUTRER: 10.735.

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

5 MR. CUTRER: Okay. .697.

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

8 MR. FINGERHUT: Point 06?

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

11 MR. CUTRER: That adds up to 15.1.

12 MR. ALFORD: Yes.

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

16 MR. ALFORD: Yes, sir.

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

19 MR. ALFORD: Yes, sir.

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

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

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

1 drove that whole property. Can't be.

2 Those units can they really be on 1.7

3 acres?

4 MR. ROBERT JOHNSON: For

5 clarification, the nine acres is spread

6 throughout these other acreage.

7 MR. ALFORD: Clearly, when you

8 call it 'open space' it is open space

9 that is utilized by and sprinkled

10 around in the Spinnaker developments

11 there. Is that what you were asking?

12 MR. ROBERT JOHNSON: Yes. The

13 other clarification I think for some of

14 the board members is the right-of-way

15 is actually allowed to be put into that

16 acreage --

17 MR. ALFORD: It is.

18 MR. ROBERT JOHNSON: -- to increase

19 the density?

20 MR. ALFORD: That's correct.

21 That's correct.

22 MR. FINGERHUT: So, how much

23 acreage do you need for 198 units?

24 MR. ALFORD: Well, I think the way

25 the PD operates you needed -- because

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

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

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

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

10 MR. ALFORD: You'd need 13.

11 MR. FINGERHUT: 13 acres?

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

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

17 MR. ALFORD: Unless --

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

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

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

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

1 MR. TAYLOR: Yes.

2 MR. ALFORD: So you would need

3 from --

4 MR. WILLIAMS: 91 divided by 35 is

5 2.6.

6 MR. FINGERHUT: Then the only

7 other thing to add is the

8 nonresidential development, correct?

9 MR. ALFORD: So 8,000.

10 MR. FINGERHUT: Okay. And so how

11 much acreage do you need for that?

12 MR. ALFORD: One.

13 MR. WILLIAMS: Existing?

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

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

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

17 and that is on a -- that takes up

18 .65 acres. (Phonetic)

19 MR. FINGERHUT: I think that gets

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

21 point to the exercise. How do we avoid

22 that? It's all very interesting. The

23 other thing, it's really confusing but

24 how do we avoid that?

25 MR. ALFORD: Because I don't think



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. ALFORD: What section is that?

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

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

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

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

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

18 MR. WILLIAMS: Correct.

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

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

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

25 MR. FINGERHUT: With the same

1 information on it, as well?

2 MR. WILLIAMS: Yes. It's

3 attached, as well.

4 MR. FINGERHUT: Then the sheet

5 from -- the charts from 1987, is that

6 --

7 MR. ALFORD: That is in the

8 record.

9 MR. FINGERHUT: That is? Okay. I

10 didn't see it. Okay.

11 UNIDENTIFIED SPEAKER: Part of

12 Attachment H --

13 MR. TAYLOR: Mr. Chairman, I would

14 propose that be, though, as an

15 attachment just so that we don't have

16 to dig through it and that --

17 MR. FINGERHUT: That's fine.

18 Are there other questions for the

19 Town? There are, I apologize. My

20 apologies.

21 MR. CUTRER: I have one question.

22 MR. FINGERHUT: Mr. Alford, I

23 think we have one more question.

24 MR. ALFORD: I hope I have one

25 more answer.

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

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

6 MR. ALFORD: A and C.

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

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

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

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

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

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

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

10 MR. ALFORD: Yes, sir.

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

14 MR. ALFORD: Right.

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

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

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

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

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

5 MR. CUTRER: Thank you.

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

8 MS. DIXON: Good afternoon.

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

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

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

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

22 EXAMINATION

23 BY MR. CUTRER:

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



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

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

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

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

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

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

21 BY MR. CUTRER:

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

24 A Yes.

25 Q Which is what currently exists.

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

4       A    Correct.

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

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

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

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

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

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

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

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

17 A Uh-huh.

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

23 A Yes, sir.

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

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

5 A Can you break -- restate that?

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

8 Parcel E, which is proposed for  
9 development.

10 Parcel A and C, which is the hotel.

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

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

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

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

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

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

9 A Yes, sir.

10 MR. CUTRER: Thank you.

11 MR. FINGERHUT: Any other  
12 questions?

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

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

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

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

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

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

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

10 BY MR. CUTRER:

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

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

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

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

5           MR. CUTRER: I have a followup.

6 BY MR. CUTRER:

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

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

16       MR. CUTRER: Thank you.

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

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

24       MR. FINGERHUT: Thank you.

25       MR. WILLIAMS: Nine acres of open



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

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

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

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

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

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

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

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

25 In this case, regulations --

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

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

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

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

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

23 Dwelling units for residential.

24 Hotel rooms for hotel.

25 Square footage for commercial.

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

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

9 (Phonetic)

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

24 Okay.

25 And as close as I can follow what

1 Mr. Alford is arguing is they want to  
2 say here, yeah, you had to double dip  
3 because it's the PD-2 District, so if  
4 you look at the commercial density and  
5 you looked at the residential density  
6 and you looked at the nonresidential  
7 density all separate and independent.  
8 That's not what the code says though.  
9 163-106G4A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

21 MR. WHITE: 735.

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

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

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

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

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

17 MR. WILLIAMS: And there is --

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

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

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

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

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

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

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

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

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

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

15 MR. FINGERHUT: Yes, I agree.

16 EXAMINATION

17 BY MR. WILLIAMS:

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

20 A Nicole Dixon Development Review  
21 Administrator.

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

25 A Yes, sir.

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

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

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

14 A 10.735.

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

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

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

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

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

11 A Well, I --

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

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

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

18 MR. WILLIAMS: But she's --

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

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

1 objection.

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

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

8 It's --

9 MR. ALFORD: Thank you.

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

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

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

25 MR. ROBERT JOHNSON: Mr. Williams,

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

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

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



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

6 MR. WILLIAMS: About the law.

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

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

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

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

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

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

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

24 MR. CUTRER: Mr. Williams?

25 MR. WILLIAMS: Yes.

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

4 MR. WILLIAMS: Right.

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

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

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

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

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

3 MR. CUTRER: Okay.

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

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

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

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

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

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

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

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

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

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

1 B and B.

2 So you have 2.6 acres currently  
3 being used by a vacant hotel and the  
4 hotel allows 35 rooms per acre. 2.6  
5 times 35 is 91 units and that's what's  
6 there.

7 This property could be redeveloped  
8 with another new 91 torn down and  
9 redeveloped with 91 hotel units.

10 If the owner chose to do  
11 residential, 2.6 acres times 16 to the  
12 acre it would allow them 41  
13 residential units.

14 If they choose to do or chose to  
15 do nonresidential, i.e. commercial, 2.6  
16 acres times 8,000 square feet would  
17 allow 20,800 square feet of  
18 nonresidential and if they chose to do  
19 a B and B, ten units or ten rooms to  
20 the acre would give them 26 B and B  
21 units and so your client's property  
22 could be redeveloped with 91 hotel  
23 units or 41 residential units or  
24 20,800 square feet of residential --  
25 pardon me nonresidential or 26 B and B

1 units.

2 Those are all the rights which  
3 your clients have. If Parcel E is  
4 developed as proposed, how is your  
5 client prejudiced in any of these  
6 development opportunities?

7 How are you injured?

8 And please tell me an answer other  
9 than we'd like to see the Town code --

10 MR. WILLIAMS: Section 16-3-106G4,  
11 the standards for impervious -- open  
12 space within a PD-2 Overlay District  
13 shall -- satisfied the district as a  
14 whole but do not have to be satisfied  
15 with a site specific basis within  
16 mutual phases of planned development.

17 I don't know if our site is  
18 conforming. I don't know if the other  
19 sites are conforming with respect to  
20 the pervious coverage and open space,  
21 so it's a question that I can't answer  
22 right now because often in the abstract  
23 while you can put 91 hotel rooms on a  
24 piece of property you can't meet the  
25 development standards in order to allow

1 you to maximize your property, so I

2 can't answer that.

3 MR. CUTRER: But your client owns

4 2.6 acres on which it sits a derelict

5 hotel. All they've got is 2.6 acres.

6 That's all they can develop.

7 So whatever the pervious or

8 impervious or the wetlands or all these

9 other things that have setbacks and

10 buffers and all these things that

11 impact the actual development of

12 acreage, your clients owns 2.6 acres

13 which can be zoned or is zoned for 91

14 hotel units, 41 residential units,

15 20,800 square feet of nonresidential or

16 26 B and B units.

17 If Parcel E is developed, how is

18 your client's prejudiced from doing any

19 of those things within the setback and

20 impervious, pervious --

21 MR. WILLIAMS: The overall average

22 density for PD-2 --

23 MR. CUTRER: That's not my

24 question.

25 MR. WILLIAMS: Well but it's



1 Germain to the --

2 MR. CUTRER: My question I asked  
3 is -- Parcels A and C?

4 MR. WILLIAMS: It's Germain to the  
5 explanation. It's Germain to the  
6 explanation.

7 When you look at the average  
8 density requirements you're already  
9 over the average density required for  
10 15.1 acres.

11 If you further exacerbate that by  
12 adding yet more density and going  
13 further over the RD average density  
14 limitations I don't know what the Town  
15 staff's response is going to be when we  
16 come back, at some point, and want to  
17 redevelop and they say, well, we  
18 discussed -- it's already over. You've  
19 got to look at the average. It's  
20 already over and, gosh, you know, you  
21 can't put 90 units there.

22 MR. CUTRER: You know, my  
23 understanding is this property has been  
24 viewed as an eye sore and a real  
25 problem within the Town and I would

1 submit that if your clients came back  
2 with any kind of reasonable development  
3 plan to get rid of that empty property  
4 right now which has caused a lot of  
5 social problems within the community,  
6 my guess is the Town would be pretty  
7 receptive to that.

8 MR. WILLIAMS: And that may well  
9 be.

10 MR. CUTRER: So in the absence of  
11 any evidentiary material presented to  
12 this Board that your client is going to  
13 be harmed by the development of Parcel  
14 E, we've heard the testimony. You  
15 know, I've asked the question to you,  
16 Mr. Johnson, Mr. Alford, Ms. Dixon and  
17 I've gotten, what's the impact? None.  
18 None. None and --

19 MR. WILLIAMS: And I don't know  
20 because --

21 MR. CUTRER: So, in the absence of  
22 any evidentiary material at this  
23 hearing I don't see how your client has  
24 standing for this appeal.

25 MR. WILLIAMS: And you're entitled

1 to your opinion. And the people that  
2 said you had standing, we've standing  
3 and I think we do have standing and I  
4 think --

5 MR. CUTRER: All right.

6 MR. FINGERHUT: Ms. Dixon, are you  
7 ready for -- to answer the question,  
8 the math questions on Monday afternoon  
9 at 4:58?

10 MS. DIXON: What I will say is  
11 that I incorrectly spoke earlier in  
12 that the development is not complaint  
13 with the RD standards as it exists  
14 today because it's -- Spinnaker  
15 Development was developed under  
16 previous regulations and it was in  
17 conformance with those regulations, so  
18 the site is not nonconforming based on  
19 the plans that it was approved under.

20 Going forward and the way I  
21 reviewed the DPR when it came in for  
22 Parcel E we are looking at as the base  
23 zoning district of RD standards and  
24 insuring clients with those standards,  
25 so, it was mentioned, you know, the

1 Beachwalk Property owners wanted to  
2 come if for redevelopment we would look  
3 at for compliance with the RD  
4 standards. (Phonetic)

5 MR. CUTRER: Ms. Dixon, if I'm an  
6 apartment developer and I buy ten acres  
7 of land in Hilton Head zoned 16 to the  
8 acre, I can build 160 units on it.

9 MS. DIXON: Uh-huh.

10 MR. CUTRER: -- if I build  
11 160-unit apartment project and  
12 five years later the Town changes that  
13 whole zoning district to eight units to  
14 the acre I've got more units existing  
15 that are allowed under the current  
16 zoning.

17 MS. DIXON: Then we'd look at it  
18 as a legally conforming structure.

19 MR. CUTRER: Legally nonconforming  
20 structure. So your argument here is  
21 that Parcel F, which has either 10.735  
22 or 11.42 acres, if you count  
23 right-of-way is a legally nonconforming  
24 structure?

25 MS. DIXON: A legally

1 nonconforming structure, based on  
2 density standards, so if they were to  
3 come in and add on more units to the  
4 Spinnaker Development we would not  
5 allow that, we would not permit that  
6 because it's currently nonconforming.  
7 They're wishing to add on -- they're  
8 wishing to develop a vacant parcel and  
9 so that's why when I reviewed the DPR I  
10 looked at the resort development  
11 district standards and insured  
12 compliance with those standards.

13 MR. CUTRER: Thank you.

14 BY MR. WILLIAMS:

15 Q Nicole, you just testified that when  
16 the Spinnaker project came in for approval that  
17 it was conforming to the code at that time?

18 A I'm assuming it was conforming to the  
19 code at that time or the covenant plan or the  
20 master plan that was approved.

21 Q So now I thought you had made a factual  
22 statement that it was in conformance with the  
23 code at the time.

24 A It was in conformance with the approved  
25 conceptual plan and had committee authority --

1 Q You're talking about the master plan,  
2 the Waterside community master plan?

3 A Yes.

4 Q Okay. So -- and I agree that the  
5 200 units were allowed, at that point. Was it  
6 in conformance with the RD District at the time?

7 A I don't know that there was an RD  
8 District at the time. I don't know what the  
9 zoning was at the time. The current base zoning  
10 is RD and it is not in conformance with the  
11 current standards. It was not instructed under  
12 the current standards. (Phonetic)

13 Q All right. So let's talk about average  
14 densities and let's talk about the definition of  
15 density that was -- 16-10-102.B.1 and let's  
16 pretend that this is one tract of 15.1 acres.

17 A Uh-huh.

18 Q And I want to build 198 residential  
19 units and 5,262 square feet commercial space on  
20 -- how do I need to -- how do I subdivide that  
21 out? How much acreage do I need to subdivide  
22 out of the 15.1?

23 A Well, I think you said earlier, it was  
24 like 12, 12 or 13 acres.

25 Q Okay. And so then after that's done I

1 want to build 91 hotel rooms, how much do I have  
2 to subdivide out of the parcel to do that?

3 A The 2.61 --

4 MR. JOHNSON: Objection, calls for  
5 speculation.

6 MS. DIXON: But you're talking  
7 about developing a new -- so you're  
8 talking the proposed development and  
9 then at that point the average density  
10 would comply.

11 BY MR. WILLIAMS:

12 Q So, when does the average density no  
13 longer come into play?

14 A Well, I mean the way staff looked at it  
15 was that this was a previously developed  
16 property, previously developed master plan  
17 community.

18 Q But Parcel E is not developed, is it?

19 A No.

20 Q So it wasn't fully developed?

21 A And staff does not think that we can  
22 determine that the lot is unbuildable.

23 Q So --

24 A It meets -- standards.

25 Q All right. So let's look at LMO

1 Section 16-3-106.G.4.A, where in the code does  
2 it say this section is applicable only to  
3 previously approved PD-2 plans that are  
4 substantially completed?

5 A It does not say it in black and white  
6 and the discussion that I had with an LMO  
7 official and Town attorney on interpretation of  
8 whether that section applies to an already built  
9 PD-2.

10 Q So --

11 A So we obviously disagree and that's why  
12 we're here.

13 Q Correct. So and correct me if I'm  
14 wrong, this is really the only issue in dispute,  
15 at this point, isn't it?

16 A Correct.

17 Q So, Parcel E is in the PD-2 Overlay  
18 District and it's subject to the P-D2 overlay  
19 regulations but not to this PD-2 Overlay  
20 District.

21 What is it that separates this  
22 particular section out from the rest of the PD-2  
23 regulations that makes it inapplicable to this  
24 situation when everything else having to do with  
25 the PD-2 regulations is applicable?



1 A Well, I explained earlier that staff  
2 looks at this section as being pertinent to a  
3 new PD-2 coming out.

4 When this was originally approved this  
5 was not approved under these regulations, so, we  
6 don't think because the allotted density that  
7 was assigned during the conceptual plan -- just  
8 because it was not built to those standards or  
9 to that density we don't think that they've lost  
10 all rights to build out there.

11 As long as they can meet the current  
12 regulations that's the way we reviewed the plan  
13 when it came in.

14 Q So, what you do is for this you ignore  
15 those sections of the code?

16 MR. ALFORD: Object to the form.

17 THE WITNESS: I didn't say that I  
18 ignored it.

19 I said I discussed with the LMO  
20 official and we decided and interpreted  
21 that section to apply to new plans  
22 coming in where you would average out  
23 density, apply certain areas to a  
24 certain space, take density from out of  
25 those areas, reserve it and use it in

1 other areas of the PD-2 and we assume  
2 that was all done when it was  
3 originally -- this was tract was  
4 identified as commercial space.

5 BY MR. WILLIAMS:

6 Q Under the master plan that's no longer  
7 in effect?

8 A Right but it did not say that it was  
9 not built by 2014 density --

10 Q Correct. But doesn't the categorical  
11 exemption say that they do have to comply to all  
12 the current code requirements?

13 A Right. And they complied with the RD  
14 standards which is within the property zoning.

15 Q So, is this section part of the current  
16 code requirements?

17 A It is.

18 Q Okay. But it doesn't have to comply  
19 with the PD-2 notwithstanding the fact of a  
20 categorical exemption as it says it does?

21 A This is a decision staff made.

22 Q They've made an interpretation we think  
23 they're wrong about that and I don't know that I  
24 have anything further.

25 MR. FINGERHUT: Any further

1 questions for Ms. Dixon?

2 MR. TAYLOR: No further questions

3 for Ms. Dixon but I would like to have

4 a minute on the stand if I could.

5 MR. WILLIAMS: No further

6 questions.

7 MR. FINGERHUT: Anybody else have

8 any questions for Ms. Dixon?

9 MR. ALFORD: No.

10 MR. FINGERHUT: Thank you.

11 Anything else on rebuttal?

12 MR. WILLIAMS: We just want to

13 address -- issues but one of the things

14 that I would like to address is I think

15 at least once, maybe several times Mr.

16 Alford has ascribed to our client's --

17 well, they've all got density here.

18 If you follow our argument, there

19 is no density but one, so I don't know

20 where he gets these ideas and I don't

21 know why he's throwing them out there

22 but, you know, all our client wants

23 everybody to do is play by the rules

24 that everybody else has to play by.

25 We think the Town staff has made

1 an incorrect interpretation.

2 As far as the figures go -- where  
3 is the page that you put up that you  
4 marked -- the section that's -- the  
5 paragraph that's -- footnote 12. This  
6 deals with they exceed the average  
7 density.

8 Footnote 12 as you correctly  
9 pointed out, Chairman Fingerhut, Ms.  
10 Dixon testified in the November 2016  
11 hearing that this, in fact, was the  
12 case.

13 It's include -- the portions from  
14 the transcript are attached to our  
15 memorandum on demand at Exhibit D and  
16 if you don't mind, Mr. Fingerhut, your  
17 question was; 'You would stipulate to  
18 the math?

19 I'm sorry, I didn't hear that.

20 You're saying the theory is  
21 incorrect but the math is correct is  
22 what you're saying?

23 Ms. Dixon, if you're going to look  
24 at the entire PD-2 and based on your  
25 density and current LMO but use of what

1 is existing out there right now then  
2 Chet has demonstrated in his math that  
3 they would not be allowed to do what  
4 they're proposing.

5 And Mr. Fingerhut; So, you're  
6 concurring that the math is correct?

7 Ms. Dixon, I concur that the math  
8 is correct but I don't interpret the  
9 LMO that way.'

10 So, for some reason or another,  
11 again, I don't think it's been  
12 adequately explained the Town staff to  
13 say yes, it's in the PD-2 Overlay  
14 District, yes it's subject to the  
15 regulations but, no, it's not subject  
16 to all the regulations and they just  
17 believe it should not be interpreted  
18 that way.

19 The law is that when there's  
20 nothing that's ambiguous, there's no  
21 interpretation to be had. You apply  
22 the -- attached and in this case that  
23 means you get the average density.  
24 When you look at the average density  
25 you used it all up for this PD-2s and

1 that's an unfortunate state of affairs  
2 for the property owner but they could  
3 have done something about that several  
4 years ago and they chose not to.

5 Questions?

6 MR. FINGERHUT: Any questions?

7 No. Thank you.

8 MR. TAYLOR: Mr. Fingerhut, may I  
9 have just a couple of minutes?

10 MR. FINGERHUT: Sure.

11 MR. TAYLOR: Board of Zoning  
12 Members, I want to talk about not the  
13 specifics of this case but what we've  
14 seen today and what y'all's job is.

15 I've had the fortunate ability to  
16 practice law in the courts of our state  
17 for more than 34 years and I know a  
18 number of judges very well and when you  
19 talk to them outside the courtroom  
20 they'll tell you, one of the hardest  
21 things they have to do is to keep their  
22 mouth shut and listen and let the  
23 lawyers try their case sometimes  
24 because sometimes they want to come  
25 over -- and they'll ask questions and

1 they want to try to guide the people  
2 into something they're thinking already  
3 but they don't do it because the  
4 judge's job and your job, today, is to  
5 give the parties in this case a fair  
6 hearing.

7 Both sides come before the BZA in  
8 order to achieve a fair hearing and you  
9 all are acting as independent impartial  
10 finders of whether or not this process  
11 was adequately voted. This community  
12 has worked here for many, many years  
13 because of people like you who are  
14 willing to be involved and who are  
15 willing to sit for four hours and  
16 listen to this type of thing but I am  
17 begging you, when you go back, today,  
18 remember what your job is because your  
19 job is not to come in here with a  
20 predetermined belief that the Town was  
21 right or the predetermined belief that  
22 we were wrong, for some reason.

23 Because the question that has been  
24 repeatedly asked by Mr. Cutrer, today,  
25 about standing is one that has already

1 been decided in this case and, believe  
2 me, Greg handed it very smoothly like  
3 he does but this question is one of  
4 pleadings which has already been in  
5 front of Judge Dukes and if there was  
6 any question to our standing he would  
7 have already addressed it and everybody  
8 in here knows that. It was before  
9 Judge Dukes, there was no question  
10 about but what we had happen here today  
11 was someone who came from this Board  
12 and raised that issue repeatedly, you  
13 saw lawyers come to it like blood in  
14 the water. That issue is not before  
15 you. It was not raised by staff. It  
16 was not raised by lawyers. It has not  
17 been adjudicated by Judge Dukes. It is  
18 clearly something that only one member  
19 of this Boards wants to hammer out  
20 today and, once again, it came in that  
21 everybody came to it. It's the same as  
22 Barry's argument about it being a take.  
23 That issue is not before this Board.  
24       Everybody may have an idea about  
25 it. It may not seem fair to people but



1 the issue of whether or not this is a  
2 taking has not been litigated.

3 You all who have been on this  
4 Board for two years and who have heard  
5 this will remember, this is about one  
6 thing. This is about whether the  
7 density requirements of the PD-2  
8 Overlay District apply.

9 Nicole testified in November of  
10 2016 that if you accept that Chet's  
11 math is right. It's as simple as that.

12 I'd ask that you all please  
13 remember what your job is when y'all go  
14 back to the jury room, y'all go back to  
15 your executive session room. It's not  
16 to give gifts to one side or to punish  
17 another, it's to independently evaluate  
18 the facts that were in front of you to  
19 come to a fair resolution.

20 Thank you, Mr. Chairman.

21 MR. FINGERHUT: Thank you. Any  
22 questions of Mr. Taylor? Thank you.

23 Counsel, you want to do some  
24 rebuttal?

25 MR. JOHNSON: No, sir. I've been

1 waiting a few minutes now  
2 notwithstanding the comments just made  
3 by my friend, Tom Taylor.

4 This is the first occasion when in  
5 the record there had been established  
6 that the appellants are not aggrieved  
7 parties and I base what we have learned  
8 about that today as the foundation for  
9 a motion I'm about to make and the  
10 motion is for you to dismiss the appeal  
11 for lack of standing.

12 The Town code in Section 16-2-103,  
13 T as in Tom, Sections 2 says that 'Any  
14 person who's aggrieved by the decision  
15 or interpretation of an LMO official or  
16 other administrative official may  
17 appeal.

18 Subsection B -- that's in  
19 Subsection A.

20 Subsection B says 'For purposes of  
21 this subsection a person is aggrieved  
22 if there are some special or  
23 particularized injury to that person or  
24 that person's property resulting from a  
25 decision or written interpretation.'

1 The record is clear. They do not  
2 have a particularized or special injury  
3 to themselves as legal persons or their  
4 property resulting from the decisions  
5 of the LMO official. They don't have  
6 standing. The matter should be  
7 dismissed where it stands. The  
8 standing is a jurisdictional issue. It  
9 can be raised at any time. Thank you.

10 MR. FINGERHUT: Counsel? Fair  
11 enough. Mr. Alford.

12 MR. ALFORD: I'll about be.

13 I join in Mr. Johnson's motion. I  
14 think this motion should be dismissed.

15 I think -- I disagree with Mr.  
16 Taylor when he says that it's not  
17 something for you to consider.  
18 Jurisdiction can be raised at any time.  
19 Standards can be raised at any time  
20 and, keep in mind, we all agreed with  
21 Judge Dukes that this would be a full  
22 rehearing. Everything's on the table.  
23 They wanted testimony, goose/gander.  
24 They said, no, we want you to hear this  
25 testimony. Okay, it's a rehearing.

1 It's a new day. That issue's on the  
2 table now. They've conceded. They  
3 have no injury.

4 MR. WILLIAMS: Mr. Johnson is  
5 incorrect when he says this is the  
6 first time it's been raised. We  
7 specifically -- we had standing when we  
8 filed the initial appeal. It's all in  
9 the record.

10 MR. FINGERHUT: Anything else on  
11 that particular issue?

12 MR. WILLIAMS: No.

13 MR. TAYLOR: No, sir.

14 MR. FINGERHUT: Are there any  
15 other comments on the appeal, itself?

16 Okay. So I'm going to close the  
17 argument section. We're going to  
18 address the motion section as part of  
19 our decision.

20 Before I -- Brian, what's the time  
21 on this? I can work until whenever but  
22 -- and I ask everybody on the Board the  
23 same thing.

24 MR. HULBERT: You've got the room  
25 for as long as you want tonight but if

1 you come back in the morning I have to  
2 check the calendar but I do believe  
3 it's open tomorrow morning.

4 MR. FINGERHUT: So that closes the  
5 arguments of the appeal.

6 Let's discuss the standing issue  
7 first.

8 MR. CUTRER: After receiving my  
9 lecture from Mr. Taylor I apologize for  
10 using the wrong word. I have referred  
11 to 'standing' several times and I think  
12 what I was really talking about was  
13 grievance or injured and I don't have  
14 the citation Mr. Johnson just gave us  
15 but it speaks to injury and grievance.

16 Mr. Johnson, would you like me to  
17 refresh that for us, sir? Section  
18 16-2-103 T, Capital T. 16-2-103 and --

19 My iteration is on page 2-54. Let  
20 me get there.

21 So that's page 2 --

22 MR. JOHNSON: It's print it out  
23 the same. It's up on the screen, too,  
24 and you can see --

25 MR. CUTRER: I'd like to find it

1 in my book.

2 MR. JOHNSON: Yes, sir. You see  
3 up here at the top it's got the code  
4 section of which this is the  
5 subsection.

6 MR. CUTRER: Okay. So I want to  
7 apologize for using the word 'standing'  
8 and what I was really trying to get to  
9 is whether this is an aggrieved party  
10 that's going to suffer injury from the  
11 ruling that the Town has -- determined  
12 -- Town has made so thank you for that  
13 citation.

14 THE COURT: Any of you have any  
15 particular thoughts on standing? Mr.  
16 Cutrer, would you like to start?

17 MR. ROBERT JOHNSON: I should  
18 note, is this piece of property  
19 contiguous with E and --

20 MR. FINGERHUT: Yes.

21 MR. ROBERT JOHNSON: It's  
22 contiguous.

23 MR. WILLIAMS: Parcel E is  
24 contiguous with the Beachwalk Hotel  
25 site --

1 MR. ROBERT JOHNSON: Which is your  
2 client?

3 MR. WILLIAMS: Yes.

4 MR. ROBERT JOHNSON: Yes.

5 MR. FINGERHUT: How do you feel  
6 that impacts on standing in your  
7 experience?

8 MR. ROBERT JOHNSON: In my  
9 experience, if there was a distance of,  
10 you know, could be hundred yards, could  
11 be ten feet. If there's a distance  
12 between it there's some -- there could  
13 be some discussion or argument that you  
14 can't be aggrieved from a thousand feet  
15 away. I mean you've got to have  
16 some -- you know, can you see this  
17 building? Can you see that building?  
18 Can you --

19 MR. FINGERHUT: What's your view  
20 in this case?

21 MR. ROBERT JOHNSON: Well, I think  
22 that because it's contiguous there  
23 could be an argument to the aggrieved  
24 only through the fact that it's  
25 contiguous.

1 MR. FINGERHUT: Mr. Walczak?

2 MR. WALCZAK: I agree with that  
3 interpretation.

4 I also agree -- I also agree that  
5 it should be -- this was brought back  
6 to us. I wasn't here the first time  
7 but this was sent back to us because of  
8 a judge's decision.

9 MR. FINGERHUT: Yes.

10 MR. WALCZAK: So I think we should  
11 honor that judge's decision and take it  
12 as it was said, a brand new hearing and  
13 I think the -- really, the issue is the  
14 interpretation of the code and I just  
15 -- that's where we should be at.

16 MR. FINGERHUT: Okay. Any other  
17 thoughts on standing?

18 MS. LAUDERMILCH: No. I agree.  
19 Sometimes there -- it always seems to  
20 me like the attorneys use either bigger  
21 words or focus on issues that get  
22 beyond common sense but I totally agree  
23 with the property contiguous.

24 I would argue increased density  
25 could, not necessarily does, but could,



1 reduce future property value in the  
2 eyes of a prospective buyer, so, I do  
3 think -- I agree with the fact that the  
4 location of the tract, the fact that  
5 it's contiguous, I think it has a very  
6 direction impact. To me there's  
7 standing.

8 MR. FINGERHUT: Mr. White?

9 MR. WHITE: I agree. You know, it  
10 may not have a direct impact but it has  
11 a potential impact.

12 MR. WALCZAK: Correct.

13 MS. LAUDERMILCH: Correct.

14 MR. CUTRER: Well, as I've stated,  
15 a number of times, it's not clear to me  
16 that the appellant has a valid  
17 grievance and so, in that regard I  
18 don't personally see that there's any  
19 relief due them but the appellant is  
20 the owner of Parcels A and C, which is  
21 currently developed to its maximum  
22 density as a hotel. The hotel doesn't  
23 operate, I suppose that's irrelevant,  
24 but the parcel can be developed under  
25 the current zoning as a hotel,

1 91 units, as residential, 41 units, as  
2 nonresidential 20,800 square feet or as  
3 a B and B 26 unit rooms for B and B.

4 So, whether or not Parcel E is  
5 developed it's just not clear to me in  
6 that the appellant has any valid  
7 grievance or would in any way be  
8 injured.

9 I've asked that question numerous  
10 times and the answer that I get from  
11 the appellants is, we want to make sure  
12 that the Town code is complied with,  
13 which strikes me as some what  
14 disingenuous so I don't think that  
15 there -- the testimony, today, we have  
16 a new hearing, which we do, I don't  
17 see, in my mind, that the testimony,  
18 today, has established that there's a  
19 valid grievance or injury to the  
20 appellant.

21 Going on -- maybe I should stop  
22 there.

23 MR. FINGERHUT: Let's keep on.  
24 We're going to dispose of the motion  
25 and then go to the next step.

1 MR. CUTRER: It seems to me that  
2 -- well, the testimony is that Parcels  
3 A and C conform to the current LMO of  
4 35 units per -- 35 hotel rooms per  
5 acre.

6 Parcel E, which is the proposed  
7 welcome center, if developed, as  
8 requested would have 7,500 square feet  
9 out of an allowable 8,000 per acre, you  
10 actually have a little more than an  
11 acre so -- Parcel E, if developed as  
12 proposed, would comply with the current  
13 LMO.

14 Parcel F is a bit of a problem.  
15 With 198 units and 5,262 square feet of  
16 nonresidential but it was built prior  
17 to the 2014 LMO and what the testimony  
18 today I believe has been is that we've  
19 got to comply with the current LMO.

20 So we've heard testimony that  
21 Parcel F, under the Town code, would be  
22 treated as a legally nonconforming  
23 development with respect to density.

24 You can't make them tear down  
25 units in the Spinnaker Development, so

1 it's a legally nonconforming  
2 development with respect to density,  
3 which my understanding means it's okay  
4 that it's there, you're free to  
5 redevelop it. You couldn't put as many  
6 units as you got now.

7       So, the question becomes, these  
8 three different parcels, the hotel  
9 parcel, the Spinnaker parcel and the  
10 welcome center parcel, do they comply  
11 or would they comply with the current  
12 LMO?

13       The hotel does. The welcome  
14 center site would and the Spinnaker  
15 Development does because it's a legally  
16 nonconforming development with respect  
17 to density and our LMO provides for  
18 that.

19       MR. FINGERHUT: You're still on  
20 the standing issue, right?

21       MR. CUTRER: No, I'm not --

22       MR. FINGERHUT: No, no, no. We're  
23 going to decide that first and --

24       MR. CUTRER: All right.

25       MR. FINGERHUT: -- a position from

1 counsel and we're discussing how we're  
2 going to resolve that issue and get it  
3 out of the way, one way or the other.

4 I'd like to hear a motion from a  
5 Board member on the question of  
6 counsel's motion to dismiss?

7 MR. WALCZAK: Well, as I've said,  
8 earlier, you know, it was sent here to  
9 us to make a decision and I don't think  
10 we should summarily dismiss it as they  
11 suggest, so whatever appropriate motion  
12 is for that I so move.

13 MR. FINGERHUT: So your motion is  
14 deny counsel the motion to dismiss for  
15 lack of standing?

16 MR. WALCZAK: Correct.

17 MR. FINGERHUT: Is there a second?

18 MR. WHITE: I'll second it.

19 MR. FINGERHUT: Thank you, Mr.  
20 White. Any further discussion on that  
21 voting?

22 MR. CUTRER: So just to be clear,  
23 this is a motion to deny --

24 MR. FINGERHUT: Correct. This is  
25 a motion to deny the motion to dismiss

1 for standing.

2 MR. CUTRER: Okay.

3 MR. FINGERHUT: Teresa, will you  
4 please call the roll?

5 MS HALEY: Mr. Walczak?

6 MR. WALCZAK: For the motion.

7 MS. HALEY: Mr. Johnson?

8 MR. ROBERT JOHNSON: For the  
9 motion.

10 MS. HALEY: Mr. Fingerhut?

11 MR. FINGERHUT: For the motion.

12 MS. HALEY: Mr. Cutrer?

13 MR. CUTRER: For the motion.

14 MS. HALEY: Mr. White?

15 MR. WHITE: For the motion.

16 MS. HALEY: Ms. Laudermilch?

17 MS. LAUDERMILCH: For the motion.

18 MR. FINGERHUT: Okay, thank you.

19 Now we just have the appeal.

20 I think it would be appropriate,  
21 because we were ordered by Judge Dukes  
22 to do this, let's answer his questions  
23 and then after we -- because, frankly,  
24 as we answer the questions I think it's  
25 going to lead to the result but it may

1 not but since we -- what else we do we  
2 must answer the questions as we have  
3 been told to, so, Question 1 as posed,  
4 Is Parcel E in the PD-2 Overlay  
5 District established by the LMO?

6 MR. ROBERT JOHNSON: I make a  
7 motion that it is.

8 I make a motion that we affirm  
9 that it is in the -- parcel E is in a  
10 PD-2 Overlay District established by  
11 the LMO.

12 MR. WALCZAK: Second.

13 MR. FINGERHUT: Any discussions on  
14 that motion?

15 Okay. Teresa, please call the  
16 roll.

17 MS. HALEY: Mr. Walczak?

18 MR. WALCZAK: For the motion.

19 MS. HALEY: Mr. Johnson?

20 MR. ROBERT JOHNSON: For the  
21 motion.

22 MS. HALEY: Mr. Fingerhut?

23 MR. FINGERHUT: For the motion.

24 MS. HALEY: Mr. Cutrer?

25 MR. CUTRER: For the motion.

1 MS. HALEY: Mr. White?

2 MR. WHITE: For the motion.

3 MS. HALEY: Ms. Laudermilch?

4 MS. LAUDERMILCH: For the motion.

5 MR. FINGERHUT: Thank you.

6 Question B, If parcel E is in the

7 PD-2 Overlay District, is Parcel E

8 subject to the LMO's PD-2 Overlay

9 District regulations?

10 And we've heard testimony, the

11 appellants are clearly a yes. I

12 believe that the Town and the SDC are,

13 in essence a yes but perhaps -- if you

14 will, anybody have any thoughts on that

15 rule or would like to make a motion on

16 that question?

17 MS. LAUDERMILCH: I would make the

18 motion that Parcel E is subject to the

19 LMO's PD-2 Overlay District

20 regulations.

21 MR. FINGERHUT: Do we have a

22 motion to second?

23 MR. ROBERT JOHNSON: I second the

24 motion.

25 MR. FINGERHUT: Any discussion on



1 that motion? Teresa, please call the  
2 roll.

3 MS. HALEY: Mr. Walczak?

4 MR. WALCZAK: For the motion.

5 MS. HALEY: Mr. Johnson?

6 MR. ROBERT JOHNSON: For the  
7 motion.

8 MR. HALEY: Mr. Fingerhut.

9 MR. FINGERHUT: For the motion.

10 MS. HALEY: Mr. Cutrer?

11 MR. CUTRER: I guess for the  
12 motion.

13 MS. HALEY: Mr. White?

14 MR. WHITE: For the motion.

15 MS. HALEY: Ms. Laudermilch.

16 MS. LAUDERMILCH: For the motion.

17 MR. FINGERHUT: Thank you.

18 Question C, If Parcel E is subject  
19 to the LMO's PD-2 Overlay District  
20 regulations -- which we decided they  
21 are -- what effect does that have on  
22 the development of Parcel E, and must  
23 the existing development on the other  
24 parcels within that PD-2 Overlay  
25 District be taken into account in

1 connection with any proposed  
2 development of Parcel E? A more  
3 complex question. Any thoughts on that  
4 question?

5 Mr. Cutrer?

6 MR. CUTRER: The testimony we've  
7 heard says that apparently RD -- I'm  
8 sorry, PD-2 came about back in the  
9 '80's. The requirement now is that the  
10 Town or the property is conformed to  
11 the current LMO -- so it's still not  
12 totally clear to me how the PD District  
13 or overlay conflicts with the Town's RD  
14 District.

15 MR. FINGERHUT: Does anybody have  
16 any thoughts in response to that?

17 MR. WHITE: The issue here is --  
18 the issue is the importance of legally  
19 nonconforming and what we heard was  
20 that, in fact, this is what's driving  
21 the process and that based on the  
22 master plan what was in effect at the  
23 time that it was conforming and that  
24 subsequent changes have taken place to  
25 develop the plan -- the LMO that allows

1 them to continue as long as they are  
2 going to redevelop and once they  
3 redevelop it goes back into the hopper  
4 and they've got to re -- with respect  
5 to you all. Is that basically what I  
6 heard?

7 MR. FINGERHUT: He can't -- we  
8 can't talk -- so are you saying that --  
9 well, that it has to comply with the  
10 current law, I don't think that's in  
11 dispute, I guess, but does the  
12 development of Parcel E as approved by  
13 the Town comply to the LMO? What do  
14 you think?

15 MR. WHITE: I do think it applies.  
16 Again, when you dissect this there are  
17 sections, Section F is legally  
18 nonconforming.

19 A and C is conforming. E is not  
20 developed and so it would have to meet  
21 the criteria of the LMO, which it does.

22 MR. FINGERHUT: Well, how do you  
23 deal with the PD-2 overlay regulations  
24 when they talk about density?

25 MR. WHITE: I guess my own

1 personal opinion is that the density  
2 question again gets back to the  
3 co-mingling of the different aspect in  
4 and of itself -- except for --  
5 (inaudible)

6 MS. LAUDERMILCH: As I -- yeah.  
7 As I look at this the fact that it is a  
8 PD-2 Overlay District, the other  
9 parcels singularly are -- irrelevant  
10 because they are not the subject of  
11 either the hearing but they are not  
12 being developed. They exist as they  
13 are.

14 Parcel E is being proposed to be  
15 developed and because it is part of the  
16 PD-2 over lay district I think we're  
17 required to consider the totality of  
18 the density of the PD-2 District.

19 If it were not in the PD-2  
20 District you could look at it solely  
21 from a position of the resort, the RD  
22 zoning but it is not outside of the  
23 PD-2 District, so I think we need to  
24 look at the totality of the density.

25 The specific density of the other

1 individual parcels is irrelevant but  
2 the total density is what's important.

3 MR. FINGERHUT: Mr. Cutrer?

4 MR. CUTRER: I guess I'm confused  
5 over how Parcel F could be legally -- a  
6 legally nonconforming parcel with  
7 respect to the LMO but not a legally  
8 nonconforming parcel with respect to  
9 the PD-2 overlay. It either is or it  
10 isn't and we have this somewhat  
11 restrictive PD-2 overlay which, if  
12 applied here, is only to prevent a  
13 parcel from being developed and we've  
14 heard that the court and the law tend  
15 to allow people to develop their  
16 property.

17 The Lucas case was cited earlier.  
18 It seems to me that the property, as a  
19 whole, is conforming with the PD-2  
20 overlay because Parcel A and C conform.

21 F -- pardon me, E would conform,  
22 if developed, but F is a legally  
23 nonconforming development with respect  
24 to density, so I guess what I'm coming  
25 down to is, because F is a legally

1 nonconforming development with respect  
2 to density, A and C meet the  
3 requirement. F would, based on the  
4 square footage.

5       Seems to me that the totality of  
6 this is F had a density exemption is  
7 the way I see it and so -- but the  
8 proposed development taken with the  
9 Spinnaker and the hotel would all  
10 comply with the RD-2 pardon me, the --  
11 PD-2 and LMO -- district.

12       MR. FINGERHUT: It seems to me  
13 that the whole PD-2 is legally  
14 nonconforming. That's the function of  
15 it to view it as whole.

16       MR. CUTRER: That's a good point.  
17 The whole purpose, as I understand it,  
18 of allowing legally nonconforming uses  
19 are densities is all this gets done  
20 over time and you can't take away  
21 something that's already there, so I  
22 don't know how we penalize Parcel E  
23 because of a legally nonconforming use  
24 in Parcel F.

25       MR. WALCZAK: Can I say something?

1 MR. FINGERHUT: Yes.

2 MR. WALCZAK: Because we would be  
3 penalizing Parcel A and C but they have  
4 a right to redevelop that property and  
5 if they decide to do something with  
6 that property if we allow development  
7 in Parcel E they may -- they would be  
8 aggrieved because of that.

9 MR. ROBERT JOHNSON: No.

10 MR. WALCZAK: Why is that?

11 MR. ROBERT JOHNSON: Because  
12 they're already at the maximum. I  
13 think I'm going to agree with Jerry  
14 that to restate it, I don't think we  
15 can penalize a piece of property, E,  
16 for what was done on property F. You  
17 almost have to assume or calculate the  
18 allowances based on it not actually  
19 being per code but getting it --  
20 getting the calculation that it meets  
21 the code and then you put the other  
22 properties in there.

23 MR. WALCZAK: See, I just think  
24 this is all one --

25 MR. ROBERT JOHNSON: Well, that's

1 what we're supposed to do.

2 MR. WALCZAK: I see this as one  
3 thing. It's a one -- it's a one PUD  
4 named PD-2, it's one unit and it's like  
5 your neighbor's having an effect on  
6 your property, all right, so we have to  
7 consider all the neighbors, not just  
8 the one man and, you know, I look at  
9 this, I'm trying to put myself in the  
10 position of both sides and if I were  
11 the owner here and I'm going to have  
12 somebody that's going to beat me or I  
13 look at myself as trying to develop the  
14 E parcel apparently, you know, am I  
15 going to have an effect on someone  
16 else?

17 I don't know. It's just -- it's a  
18 tough decision. I think we've got to  
19 look at the PUD as a whole like a  
20 neighborhood and how it conforms to the  
21 LMO or not.

22 MR. FINGERHUT: I would agree but  
23 the problem is the result is these  
24 owners -- but I will say this and we've  
25 said this as a Board many times --



1 before us, we have to follow the law.  
2 That's our charge. That's our job.  
3 We're not -- we're not here to agree  
4 but we're not here to rewrite the law  
5 because we don't like the result and I  
6 think that this is one of those  
7 difficult cases where the result seems  
8 somewhat unfair notwithstanding the  
9 fact that I think the party aggrieved  
10 here or the party that's going to be  
11 harmed here did have some hand in the  
12 development of this property.

13 MR. WALCZAK: Right. And as --  
14 pointed out, they had the opportunity  
15 to do so.

16 MR. FINGERHUT: And they did not.  
17 So, it's going to be harmful -- but I  
18 do think that is the -- if you apply  
19 the law as written that's what it says  
20 I don't think that that that's part of  
21 our charge to sort of rework it in a  
22 way that has a more favorable result.

23 MR. WALCZAK: So can we make a  
24 motion here?

25 MR. CUTRER: I wanted to ask

1 Charlie a followup.

2 My question is the same a it's  
3 been all day, how is Parcel A and C  
4 aggrieved? They currently have the  
5 right to develop a hotel, residential,  
6 nonresidential and B and B. If  
7 Spinnaker builds this welcome center,  
8 how does that adversely impact the  
9 hotel?

10 MR. WALCZAK: Because it would  
11 limit what they would be able to do  
12 with their property if it weren't  
13 developed.

14 MR. CUTRER: How?

15 MR. ROBERT JOHNSON: Because they  
16 have 91 units and they can have 91  
17 units if they redevelop or they can  
18 have any of the other three categories  
19 up to the limit, so they're really not  
20 the --

21 MR. CUTRER: They've got 2.6 acres  
22 and that zoning allows for hotel,  
23 residential, nonresidential, for B and  
24 B.

25 MR. WALCZAK: Aren't we at maximum

1 density or over maximum density?

2 MR. FINGERHUT: We're over that.

3 MR. WALCZAK: For the entire

4 neighborhood? Okay. But how many --

5 MR. ROBERT JOHNSON: But are we

6 calculating that density based on the

7 overflow on Parcel F?

8 MS. LAUDERMILCH: We have to.

9 MR. ROBERT JOHNSON: Well, why?

10 Why do you --

11 MS. LAUDERMILCH: Because it's --

12 MR. ROBERT JOHNSON: Well I'm just

13 --

14 MS. LAUDERMILCH: -- totality.

15 MR. ROBERT JOHNSON: And I --

16 that's okay but I would say what I've

17 tried to say before is take it back to

18 what the LMO says now and use that as a

19 calculation, not the fact that it's

20 over like ten units because basically

21 what you're doing is penalizing

22 somebody else for a grandfathered

23 project. You can't -- that doesn't --

24 MR. FINGERHUT: That's just -- the

25 average density for the PD-2 Overlay

1 District shall not exceed the maximum  
2 density permitted -- so how do we  
3 get -- I just don't see how we -- the  
4 calculations have been done actually by  
5 both sides here in front of us. They  
6 both come up with the same numbers -- I  
7 just don't see how we don't -- because  
8 it's not fair.

9 MR. WALCZAK: We would be  
10 extending the nonconformity of that.

11 MR. FINGERHUT: Well, we'd also be  
12 substituting our amendment with Town  
13 Council -- that LMO.

14 MR. CUTRER: The fact that Parcel  
15 F is to use your term we've used,  
16 overdeveloped, is in my opinion,  
17 irrelevant. It's developed. It's  
18 there. The Town code accepted it. You  
19 can't unchange that.

20 MR. FINGERHUT: Agreed.

21 MR. CUTRER: So you've got to look  
22 at these four parcels, they -- I'm  
23 sorry, these three. A and C is one. E  
24 is one, F is one. Do they now or would  
25 they comply with the LMO?

1 MR. WALCZAK: See, I look at

2 the --

3 MR. CUTRER: And A and C comply.

4 I'm sorry, F complies because it's a

5 legally nonconforming development with

6 respect to density.

7 MR. WHITE: Charlie, you made a

8 good point. If you're trying to do

9 this in totality and do the mathematics

10 of coming up with the total density,

11 then if, in fact, F has been accepted

12 as a legally nonconforming piece of

13 property, then what you also would have

14 to do is take the next step and say,

15 okay, you also have to accept that

16 legally nonconforming density from way

17 back.

18 MR. WALCZAK: Well, it was

19 conforming way back.

20 MS. LAUDERMILCH: Right.

21 MR. WALCZAK: And has this changed

22 that they have not conformed but

23 that's -- but now, like I said, they

24 had the opportunity to development

25 Parcel E at the time when it could have

1 been conforming. The -- opportunity  
2 was gone. (Phonetic)

3 MR. WHITE: We can't change what's  
4 happened. We can only deal with --

5 MR. WALCZAK: Right.

6 MR. WHITE: -- with what's --  
7 what's we have now.

8 MR. CUTRER: Well, when this  
9 property was originally a master plan  
10 way back in the dark ages there was  
11 contemplations that all of these  
12 parcels would be developed. One of  
13 them got developed with what must have  
14 been a permitted density at the time  
15 because they got a building permit, and  
16 so, Parcel F, which is the Spinnaker,  
17 got developed legally but the master  
18 plan and the Town fathers at the time  
19 all anticipated that each of these  
20 parcels would be developed, so now --  
21 now there's a passage of time and a  
22 changing of the LMO. Parcel F is  
23 nonconforming but it's okay because  
24 it's permitted under the code.

25 MS. LAUDERMILCH: Yes, it is --

1 MR. CUTRER: It's nonconforming so  
2 it's okay --

3 MS. LAUDERMILCH: -- LMO, uh-huh.

4 MR. CUTRER: -- now, because it  
5 was developed over density sometime in  
6 the past -- I'm sorry, because it was  
7 developed in accordance with the  
8 permitted regulations at some time in  
9 the past but the density has changed  
10 subsequent to that how do you penalize  
11 E or what is okay on F? And now --

12 MR. FINGERHUT: You don't  
13 penalize, you apply the law.

14 MR. CUTRER: Which is -- I'm  
15 sorry, which is 8,000 square feet per  
16 acre.

17 MS. LAUDERMILCH: Another way that  
18 I look at this is the changes in the  
19 LMO over time which resulted in the  
20 density changes, that is the very  
21 reason in 1995 the developers received  
22 a five-year categorical exemption. You  
23 put them on notice if things change and  
24 they had a five-year window to develop.  
25 This was 16 years later.

1 If they come back one year later,  
2 you know, you might have some sympathy  
3 or suggest they seek an extension of  
4 their exemption but they had a  
5 five-year you're on notice --

6 MR. FINGERHUT: Right.

7 MS. LAUDERMILCH: -- categorical  
8 exemption to develop as originally  
9 intended and this was 16 years later.

10 MR. WHITE: The question is, is  
11 the density question in totality for  
12 that property because it is the  
13 property --

14 MR. WALCZAK: In Totality.

15 MR. FINGERHUT: That's the  
16 question. That is literally the third  
17 question. Yeah, that brings us --

18 The third question is, If Parcel E  
19 is subject to the LMO's PD-2 Overlay  
20 District regulations -- and we already  
21 voted that it is -- what effect does  
22 that have on the development of Parcel  
23 E, and must the existing development on  
24 the other parcels within the PD-2  
25 Overlay District be taken into account



1 in connection with any proposed  
2 development of Parcel E? So I mean  
3 this is what we -- this is it.

4 MR. CUTRER: I would submit that  
5 -- read the first part of question,  
6 what effect --

7 MR. FINGERHUT: Well, okay, If  
8 Parcel E subject to PD-2 Overlay  
9 District what effect does that have of  
10 the development of Parcel E, okay, and  
11 must the existing developments on the  
12 other parcels within the PD-2 overlay  
13 be taken into account in connection  
14 with any proposed development of Parcel  
15 E?

16 MR. CUTRER: I would propose that,  
17 yes, they did. Yes, they must and, in  
18 fact, they comply because Parcel F is a  
19 nonconform -- legally nonconforming use  
20 with respect to density and so, you  
21 can't do the calculation of  
22 10.735 acres at 16 units to the acre  
23 and say that impacts the other.

24 Parcel F complies with the LMO.

25 MR. FINGERHUT: Okay. So you're

1 saying if this is --

2 MR. CUTRER: I think I said yes  
3 and yes, however, the fact that Parcel  
4 F is a legally nonconforming  
5 development with respect to density it  
6 makes all of this acceptable.

7 MR. ROBERT JOHNSON: I'd agree  
8 with Jerry. I think what he's been  
9 proposing or advocating for is you take  
10 each one of these as a parcel, okay,  
11 and decide whether they meet the  
12 current code but then you put them all  
13 together at the end and you say,  
14 there's still some room for development  
15 because we can't use Parcel F as -- in  
16 its entirety. I just can't see how you  
17 can -- because it was allowed at the  
18 time.

19 MR. WHITE: Yeah, that's right.  
20 At the end of the day you can't do the  
21 mathematics, so, it takes the totality  
22 question out as far as I'm concerned.

23 And then the added thing we didn't  
24 discuss is depending on what our  
25 response is we either take -- we either

1 make a -- that property E, either E is  
2 viable or not.

3 MR. ROBERT JOHNSON: Right.

4 MR. WHITE: And it is my  
5 understanding -- has always been my  
6 understanding -- that that is not  
7 something you want to do. You -- on a  
8 piece of property. (Phonetic)

9 MR. FINGERHUT: Yeah, I just --  
10 for me I'm much more wondering about  
11 -0- our job is to follow the law and  
12 let the Town council decide -- or a  
13 property owner. I feel like we have to  
14 follow the law as written but that's --  
15 but --

16 MR. WALCZAK: We've got to decide  
17 on the law, not make it ourselves.

18 MR. FINGERHUT: Okay. Seeing  
19 where everybody is, do we have a motion  
20 pertaining to the third question?

21 I mean really -- we need to answer  
22 the question, so whatever that answer  
23 is, I'd ask for -- if somebody would  
24 like to do this I feel how the vote is  
25 going to come out.

1 UNIDENTIFIED SPEAKER: Well, does  
2 the answer to that question make sense  
3 with, yes, is that --

4 MR. FINGERHUT: No, no. The  
5 answer's --

6 MR. WHITE: What should the answer  
7 be?

8 MR. FINGERHUT: Well, must the  
9 existing development -- what effect  
10 does that have on Parcel E? That's an  
11 open-ended question. If we answer,  
12 yes, that's --

13 MR. WHITE: I adopt that.

14 MR. FINGERHUT: Okay. And must  
15 the existing developments on the other  
16 parcels be taken into account and I'm  
17 hearing two different things from two  
18 different members, so is there somebody  
19 who would like to make a motion that  
20 addressed those questions?

21 MR. CUTRER: I move that we  
22 respond that Parcel -- in answer to the  
23 Judge's third question, that Parcel E  
24 is subject to the PD-2 Overlay District  
25 regulations, that's part one.

1 And in response -- the judge's  
2 question is; If Parcel E subject to  
3 PD-2 -- if Parcel E is subject to --  
4 I move in response to Judge Dukes'  
5 question, Number 3, which is, If Parcel  
6 E is subject to PD-2 Overlay District  
7 regulations, A -- this is my A -- what  
8 effect does -- on Parcel E development,  
9 what is its effect on Parcel E  
10 development and, B, must existing  
11 development of other parcels in the  
12 Overlay District be taken into account,  
13 and my motion would be that in response  
14 to the judge's question to what effect  
15 does -- on Parcel E development is the  
16 PD-2 Overlay District have that applies  
17 and must the existing development of  
18 other parcels in the Overlay District  
19 be taken into account for any  
20 development of Parcel E and I would  
21 submit, yes, so, I think it applies and  
22 we must take it into account. I  
23 guess --  
24 MR. FINGERHUT: You're still  
25 making -- sorry, go ahead.

1 MR. CUTRER: Then I would say that  
2 because Parcel F is a legally  
3 nonconforming development that PD-2  
4 overlay is, in fact, complied with.

5 Parcel F complies because it's legally  
6 nonconforming.

7 Parcel A and C comply because they  
8 are within their -- at the limit of the  
9 zoning and Parcel E would comply  
10 because it's proposed for less  
11 development and permitted under zoning  
12 district.

13 MR. FINGERHUT: Do we have a  
14 motion? I won't ask you to repeat that  
15 for the moment. Is there a second?

16 MR. WHITES: I'll second that.

17 MR. FINGERHUT: Any discussion?

18 MR. ROBERT JOHNSON: Yes.

19 MR. CUTRER: Let me just say what  
20 I'm trying to do with that motion as  
21 convoluted as it was is say, yes, it's  
22 obvious that this applies and we need  
23 to apply it and in the application of  
24 it you have to recognize that Parcel F  
25 is legally nonconforming, therefore,

1 the whole development would comply --  
2 less than 8,000.

3 MR. ROBERT JOHNSON: I'm agreeing  
4 with what you're saying right now but I  
5 think it should be two motions.

6 I think you should make the first  
7 part of the answer to these two parts  
8 of the -- C, and then I think we ought  
9 to make -- introduce a second motion  
10 that addresses how we're taking it into  
11 consideration.

12 MR. CUTRER: So you're asking me  
13 to withdraw the motion?

14 MR. ROBERT JOHNSON: I'm asking  
15 you to modify your motion, withdraw it  
16 and restate it answering just the two  
17 items -- the two halves of Question C  
18 from the judge.

19 MR. CUTRER: I agree with what I  
20 said here --

21 MR. ROBERT JOHNSON: Doesn't his  
22 approach answer those two questions? I  
23 mean you can't get to the second part  
24 of Judge Duke's question without  
25 understanding what the methodology is,

1 either. That's what we're talking

2 about, the methodology.

3 MR. WALCZAK: For one thing, I  
4 have to speak against this because the  
5 judge didn't ask us our opinion on Lot  
6 F. He didn't ask for an opinion on  
7 that so why is that part of the motion?  
8 That's where I'm coming from.

9 MR. CUTRER: Well, ultimately  
10 we've got to decide -- we're getting  
11 kind of -- answer the judge and  
12 ultimately we've got to decide --

13 MR. FINGERHUT: Right. That will  
14 be --

15 MR. WHITE: It does get back to  
16 his question with respect to does it  
17 have an effect on the other parcels?

18 MR. HULBERT: Mr. Chairman, may I?

19 MR. FINGERHUT: Yes.

20 MR. HULBERT: The judge referred  
21 back for a rehearing and ask that you  
22 have particular focus on these three  
23 questions that he had from the first  
24 hearing if that helps.

25 MR. FINGERHUT: Absolutely. We



1 have to answer these three questions  
2 regardless of whatever else we do, we  
3 have to answer these three.

4 MR. WALCZAK: Do we -- can we take  
5 part of it? It says, If Parcel E is  
6 subject, if Parcel E is subject to,  
7 okay, yes, it is subject to.

8 MR. FINGERHUT: We decided that.

9 MR. WALCZAK: All right. What  
10 effect does that have on the  
11 development of Parcel E? That's a  
12 second issue, what effect does it have.  
13 He said he wants an answer on that and  
14 then, 'And must the existing  
15 developments of the other parcels  
16 within -- be taken into account in  
17 connection with the development of  
18 Parcel E, so there's really three  
19 questions in one.

20 MR. FINGERHUT: Yes.

21 MR. WALCZAK: So why can't we  
22 address each one accordingly.

23 MR. FINGERHUT: That's -- as long  
24 as we do it with clarity, it's  
25 absolutely fine, correct.

1 MR. WALCZAK: That's -- yeah. But

2 it's --

3 MR. FINGERHUT: We want to make a

4 good record for all of these folks who

5 have to live with this after today, but

6 yes, so -- okay, what effect does that

7 have on the development of Parcel E?

8 There are six of us here and I think

9 three of us would say is that answer is

10 none and I think the other three would

11 have a different response to that, so

12 I'm not -- I would just ask for I guess

13 a motion on that and then for the next

14 question, again, and must the existing

15 developments on the other parcels be

16 taken into account?

17 UNIDENTIFIED SPEAKER: Yes.

18 MR. FINGERHUT: Well, I hear three

19 of us I think said yes and the other

20 three think, no, but that doesn't

21 answer the questions and then we can

22 discuss appeal but I think --

23 MR. UNIDENTIFIED SPEAKER: I heard

24 Jerry say yes to 3, Number 3.

25 MR. FINGERHUT: Well then --

1 MR. CUTRER: We have before us a  
2 motion and a second and a suggestion  
3 that it might be withdrawn and re --

4 MR. WHITE: I think we're all a  
5 lot closer than we think. I don't  
6 think that there's two very separate  
7 opinions it's just in the way we define  
8 the third question.

9 MR. FINGERHUT: Okay.

10 MR. WHITE: So I withdraw. Jerry,  
11 you withdraw?

12 MR. CUTRER: I will. Is that a  
13 proper part of the -- way to do it?

14 MR. WALCZAK: Yes. So you will  
15 consent to withdraw and restate it and  
16 bifurcate it into two motions because  
17 we want three.

18 MR. ROBERT JOHNSON: Can we  
19 discuss this more?

20 UNIDENTIFIED SPEAKER: Sure.

21 UNIDENTIFIED SPEAKER: Let me make  
22 sure.

23 UNIDENTIFIED SPEAKER: So your  
24 motion --

25 MR. CUTRER: I'm agreeing to

1 withdraw my motion. Tell us how to do  
2 it.

3 MR. WALCZAK: That -- you've just  
4 done it because you both withdrew and  
5 he seconded it. Now you can restate it  
6 as simple or complex as you want.

7 MR. ROBERT JOHNSON: And we  
8 discuss it before --

9 MR. WALCZAK: You always have to  
10 discuss a motion before you vote.

11 MR. ROBERT JOHNSON: Here's my  
12 point. Again -- well, no, I don't want  
13 to make a motion. I see this as three  
14 different questions and we may agree on  
15 -- we may all agree on the first part  
16 of it, none of us may agree on the  
17 second part and then there's a --  
18 there's three parts and by just  
19 saying --

20 MR. WALCZAK: -- three motions.

21 MR. ROBERT JOHNSON: I agree.

22 MR. WALCZAK: For each one of  
23 those things so I'll make the first  
24 motion to say, yes, I move that Parcel  
25 E is, in fact, subject to the PD-2

1 Overlay District.

2 MR. FINGERHUT: We did vote on

3 that.

4 MR. WALCZAK: We did vote on that?

5 MR. FINGERHUT: We're on C.

6 MR. WALCZAK: Yeah, that's not

7 what it says. No, I'm reading C. If

8 Parcel E is subject to the --

9 UNIDENTIFIED SPEAKER: That comes

10 from B.

11 MR. WALCZAK: All right. So we

12 don't need that so we really only need

13 two motions.

14 MR. FINGERHUT: Right. What

15 effect --

16 MR. WALCZAK: All right. So --

17 UNIDENTIFIED SPEAKER: What effect

18 does it have on Parcel E?

19 MR. CUTRER: In response to the

20 judge's question of If Parcel E is

21 subject to the LMO's PD-2 Overlay

22 District, what effect on Parcel E

23 development does this have?

24 MS. LAUDERMILCH: I will move that

25 because we've determined Parcel E is

1 subject to the LMO's PD-2 Overlay  
2 District we need to take into  
3 consideration the existence of the PD-2  
4 Overlay District and it's regulation as  
5 we consider development for Parcel E.

6 MR. CUTRER: Second.

7 MR. FINGERHUT: Any further  
8 comments on that motion?

9 Teresa, will you please call the  
10 roll.

11 MS. HALEY: Mr. Walczak?

12 MR. WALCZAK: For the motion.

13 MS. HALEY: Mr. Johnson?

14 MR. ROBERT JOHNSON: For the  
15 motion.

16 MS. HALEY: Mr. Fingerhut?

17 MR. FINGERHUT: For the motion.

18 MS. HALEY: Mr. Cutrer?

19 MR. CUTRER: For the motion.

20 MS. HALEY: Mr. White?

21 MR. WHITE: For the motion.

22 MS. HALEY: Ms. Laudermilch?

23 MS. LAUDERMILCH: For the motion.

24 MR. FINGERHUT: Thank you. Okay.

25 Now, the PD Overlay District, it

1 has to be -- overlay regulations must  
2 be considered in the development of  
3 Parcel E, that's what we voted on.

4 Now, must the existing development  
5 on the other parcels within the PD-2  
6 Overlay District be taken into account  
7 in connection with any proposed  
8 development of Parcel E?

9 MR. WALCZAK: We all agree that --  
10 we just did. We just did that.

11 MR. FINGERHUT: I realize the last  
12 clause of that question is basically  
13 asking the same thing using more words.

14 MS. LAUDERMILCH: Yes.

15 MR. ROBERT JOHNSON: I'd like to  
16 try to make a motion.

17 Because Parcel F is grandfathered,  
18 it is assumed -- because Parcel F is  
19 grandfathered a square -- the density  
20 level is a legal nonconforming density,  
21 that's Parcel F.

22 Moving to Parcel A, C and that  
23 being the hotel site of 2.6 acres at  
24 it's maximum of 91 units it is in  
25 accordance with the LMO.

1 The remaining -- the only  
2 remaining property that needs to be  
3 addressed is Parcel E that assuming F  
4 and A, C, Parcels A, C meet the density  
5 level the assumption is under the --  
6 the belief is under the current LMO the  
7 Parcel E would have some -- would have  
8 density rights, either they could put  
9 8,000 square feet of commercial, they  
10 could put whatever hotel rooms it would  
11 support, they could put whatever condos  
12 it would support, so my belief is that  
13 this property meets the LMO  
14 requirements.

15 MR. FINGERHUT: Right. But we  
16 have to answer -- we've literally got  
17 to direct answer what he's asking  
18 about. What he's saying, must the  
19 existing development of other parcel be  
20 taken into account --

21 MR. ROBERT JOHNSON: I just took  
22 every one of them into account.

23 MR. FINGERHUT: So the answer to  
24 the question is yes.

25 MR. CUTRER: The motion is how do



1 we take that into account?

2 MR. FINGERHUT: Well, that's after

3 we -- the answer is yes.

4 MR. WALCZAK: Why don't we just

5 say that we move that the existing

6 development of other parcels must be

7 taken into account.

8 MS. LAUDERMILCH: Yes --

9 MR. ROBERT JOHNSON: I've got one

10 objection to it being one total and

11 then when you made your --

12 UNIDENTIFIED SPEAKER: You

13 discussed the motion when first you

14 should ask is there a second to the

15 motion, if it doesn't then you have

16 another option.

17 MR. FINGERHUT: I'm not sure I

18 would restate that as a motion. I'm

19 not --

20 MR. WALCZAK: I'll withdraw.

21 MR. CUTRER: I have a -- did we

22 not just vote in the affirmative the

23 answer to the judge's question that,

24 what effect does that have on the

25 development of Parcel E and must the

1 existing development on the other  
2 parcels within that PD-2 Overlay  
3 District be taken into account?

4 MR. FINGERHUT: Well, we broke it  
5 into two questions. The first clause  
6 of it --

7 MR. WALCZAK: The next motion  
8 should be this, if you don't mind, I  
9 would move that the existing  
10 development on the other parcels within  
11 the district must be taken into account  
12 with any proposed development per  
13 Parcel E.

14 MR. CUTRER: Second.

15 MR. FINGERHUT: Any discussion on  
16 that point? Okay. Teresa, please call  
17 the roll.

18 MR. CUTRER: Second.

19 MS. HALEY: Mr. Walczak?

20 MR. WALCZAK: For the motion.

21 MS. HALEY: Mr. Johnson?

22 MR. ROBERT JOHNSON: For the  
23 motion.

24 MS. HALEY: Mr. Fingerhut?

25 MR. FINGERHUT: For the motion.

1 MS. HALEY: Mr. Cutrer?

2 MR. CUTRER: For the motion.

3 MS. HALEY: Mr. White?

4 MR. WHITE: For the motion.

5 MS. HALEY: Ms. Laudermilch?

6 MS. LAUDERMILCH: For the motion.

7 MR. FINGERHUT: Excellent. Now we  
8 have to decide the appeal.

9 MR. CUTRER: Now, when we decide  
10 on the appeal it's important that our  
11 motion, whatever it is, state findings  
12 of fact and conclusions of law. We  
13 can't just --

14 MR. FINGERHUT: I would agree.

15 MR. CUTRER: That was one of our  
16 criticisms of our prior action in  
17 November that we didn't --

18 MR. WALCZAK: Then I would suggest  
19 that we allow our lawyer to word it.

20 MR. WHITE: Oh I think Jerry's  
21 perfectly qualified to make a motion.  
22 Perhaps not me but I think Jerry can do  
23 it quite well.

24 MR. FINGERHUT: There isn't a  
25 motion. I would be happy to make one.

1 MR. CUTRER: I move -- I offer the  
2 following motion, that the Board of  
3 Zoning Appeals uphold the  
4 determination -- I offer the following  
5 motion;

6 I move that the Board of Zoning  
7 Appeals uphold the determination by the  
8 Town staff and deny the appeal of the  
9 appellant based on the following  
10 findings of fact:

11 That Parcel E is in a PD-2 Overlay  
12 District established by the LMO.

13 Because Parcel E is in a PD-2  
14 Overlay District Parcel E is subject to  
15 the LMO's PD-2 district regulations and  
16 that the development of Parcel E is  
17 governed by the PD-2 Overlay District  
18 regulations and the existing  
19 development on the other parcels within  
20 that PD-2 Overlay District must be  
21 taken into account with connection or  
22 in connection with any proposed  
23 development of Parcel E.

24 The further finding of fact, that  
25 the property is composed of three

1 separate significant parcels and one  
2 not significant, that one being the  
3 road right-of-way.

4 There is a hotel property, a  
5 Spinnaker property and a proposed  
6 welcome center property.

7 The hotel property conforms to the  
8 current LMO as well as the PD-2 Overlay  
9 District.

10 The Spinnaker property, Parcel F  
11 complies with the current LMO as well  
12 as the PD-2 Overlay District because it  
13 is a legally conforming development,  
14 legally nonconforming development with  
15 respect to density.

16 And that Parcel E, if developed to  
17 7,500 square feet would also comply  
18 with both the LMO RD District and the  
19 PD-2 Overlay District because it would  
20 be less than the allowance of 8,000  
21 square feet.

22 And further, that failure to  
23 sustain the staff's determination  
24 would, pursuant to the Lucas case,  
25 cause all economic utility to be zoned

1 out of existence and that would result  
2 in a taking which we should not do.

3 That's my motion.

4 MR. ROBERT JOHNSON: I second. I  
5 second the motion.

6 MR. FINGERHUT: Any discussion on  
7 the motion before we vote? Teresa,  
8 please call the roll.

9 MS. HALEY: Mr. Walczak?

10 MR. WALCZAK: Against the motion.

11 MS. HALEY: Mr. Johnson?

12 MR. ROBERT JOHNSON: In favor of  
13 the motion.

14 MS. HALEY: Mr. Fingerhut?

15 MR. FINGERHUT: Against the  
16 motion.

17 MS. HALEY: Mr. Cutrer?

18 MR. CUTRER: For the motion.

19 MS. HALEY: Mr. White?

20 MR. WHITE: For the motion.

21 MS. HALEY: Ms. Laudermilch?

22 MS. LAUDERMILCH: Against the  
23 motion.

24 MR. CUTRER: Okay. Can we go home  
25 now?

1 MR. FINGERHUT: Well, let's ask a  
2 question, Brian, some thoughts?

3 Three to three means a tie which  
4 means the decision stays the way it is  
5 but the question where do we go from  
6 here? Do we try to work through this  
7 or are we done?

8 MR. HULBERT: I would ask that you  
9 ask the parties where their thoughts --  
10 on what occurred on that.

11 MR. FINGERHUT: Now that we've  
12 closed the argument we ask the parties?

13 MR. HULBERT: You never know -- if  
14 you want to continue on, is there a  
15 legal need to go beyond what you just  
16 did? I ask that you ask each side what  
17 their position is.

18 MR. FINGERHUT: I'm curious as to  
19 whether or not we can -- from you,  
20 whether or not we can go on or does  
21 this conclude our business?

22 MR. JOHNSON: It does.

23 MR. HULBERT: Well, the answer is  
24 the appeal if you're asking that.

25 The LMO determination is upheld.

1 It takes a majority to overrule it and  
2 you've answered the judge's questions  
3 and those motions have passed so it's  
4 up to the Board if there's something  
5 further to consider and, of course,  
6 anybody that voted for the motion could  
7 have a change of opinion and ask for a  
8 motion to reconsider, things like that,  
9 but it --

10 MR. FINGERHUT: Right, right.

11 MR. ROBERT JOHNSON: How about a  
12 motion to adjourn? Can it be done  
13 while either people --

14 MR. HULBERT: If there's  
15 additional business it must --

16 MR. ROBERT JOHNSON: Okay. My  
17 question is, can we make a motion to --

18 MR. HULBERT: If there's no  
19 further motions. You don't need a  
20 further motion if you don't want to do  
21 anything else.

22 MR. ROBERT JOHNSON: Okay, all  
23 right.

24 MR. FINGERHUT: Anybody interested  
25 in reconsidering their position on



1 affirmative?

2       Okay. Hearing no interest in  
3 doing so at 6:20 then we move on to the  
4 next item on the agenda and this appeal  
5 is closed.

6       (Whereupon, the hearing of was  
7       concluded at approximately  
8       6:19 p.m.)

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1           C E R T I F I C A T E

2

3 STATE OF GEORGIA:

4 CHATHAM COUNTY:

5

6           I, Kyle J. Saniga, Court Reporter and  
7 Notary Public in and for the above county and  
8 state, do hereby certify that the foregoing  
9 testimony was taken before me at the time and  
10 place herein-before set forth; that the witness  
11 was by me first duly sworn to testify to the  
12 truth, the whole truth, and nothing but the  
13 truth, that thereupon the foregoing testimony  
14 was later reduced by computer transcription; and  
15 I certify that this is a true and correct  
16 transcript of my stenographic notes so taken.

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

20

21

22

23           \_\_\_\_\_  
              Kyle J. Saniga, CCR

24           Notary Public, B-2038

25           Savannah, Georgia

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STATE OF SOUTH CAROLINA

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

COUNTY OF BEAUFORT

APPLICATION FOR APPEAL  
NO. APL-001673-2016



**MEMORANDUM ON SUBPOENA AND TOWN RESPONSE**

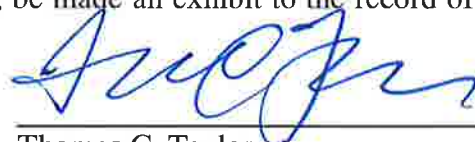
In her Memorandum of August 1, 2018, Nicole Dixon “interprets” the LMO in a manner to say that the average density requirement of LMO Section 16-3-106.G.4 simply does not apply to Parcel E. Because that position is such a tortured interpretation of the LMO--basically amounting to the disregarding of a mandatory provision of the LMO--the Petitioners/Appellants immediately sought to determine if there was any precedent for the Town’s staff position.

Pursuant to S.C. Code Annot. Section 6-29-790, the attached Subpoena was issued to Teri Lewis on August 3, 2018, *requiring* the Town to produce any and all documents that showed any precedent of the staff taking the position that one or more sections of the LMO applied or apply only prospectively to new proposed development or that one or more sections of the LMO do not apply to a development that was previously approved under prior regulations and partially constructed. The Town staff, by the subpoena, was also *required* to produce any documentation showing that they had ever before taken the position that LMO Section 16-3-106.G did not apply to a tract of land in a PD-2 Overlay District. The subpoena also *required* production of all documents showing any prior “interpretations” by the LMO official that the provisions of an LMO overlay district did not or do not control over the provisions of the LMO base zoning district.

Not surprisingly, on August 21, 2018, Town Attorney Brian Hulbert notified the Petitioners/Appellants that “the Town has no documentation to provide in response to your subpoena.” (See email of Mr. Hulbert to Tom Taylor attached.)

*By its failure to locate and provide any documentation establishing a precedent for this tortured interpretation of the LMO, the Town staff has admitted that there is no precedent in the Town’s history for the staff taking the position that a basic, crystal-clear mandate of the LMO may simply be ignored on a whim.*

Petitioners/Appellants respectfully request that this memorandum, the Subpoena of August 3, 2018 and Mr. Hulbert’s email reply of August 21, 2018, be made an exhibit to the record of the rehearing on this appeal on August 27, 2018.

  
\_\_\_\_\_  
Thomas C. Taylor  
Counsel for Petitioners/Appellants

August 27, 2018

## Tom Taylor

---

**From:** Hulbert Brian <brianh@hiltonheadislandsc.gov>  
**Sent:** Tuesday, August 21, 2018 11:48 AM  
**To:** Lewis Teri; Tom Taylor  
**Cc:** Gregg Alford; Barry Johnson; dlfingerhut@afdny.com; Law Office of Chester C. Williams; Donna Taylor; Hulbert Brian  
**Subject:** RE: request for copies of subpoenaed documents in Beachwalk

Tom,

It looks like the Town has no documents to provide in response to your subpoena.

R/

Brian Hulbert  
Staff Attorney and Town Prosecutor  
Hilton Head Island, SC 29928  
843 341-4633

**From:** Lewis Teri  
**Sent:** Tuesday, August 21, 2018 11:31 AM  
**To:** Hulbert Brian; Tom Taylor  
**Cc:** Gregg Alford; Barry Johnson; dlfingerhut@afdny.com; Law Office of Chester C. Williams; Donna Taylor  
**Subject:** RE: request for copies of subpoenaed documents in Beachwalk

Brian-

I have consulted with Nicole and we have not located any additional documents. The decisions that were reached were as a result of documents that already exist as a part of the record.

Regards-

Teri B. Lewis, AICP  
LMO Official  
Community Development Department  
One Town Center Court  
Hilton Head Island, SC 29928  
(843) 341-4698(p)  
(843) 842-8907(f)  
[teril@hiltonheadislandsc.gov](mailto:teril@hiltonheadislandsc.gov)

**From:** Hulbert Brian  
**Sent:** Tuesday, August 21, 2018 11:29 AM  
**To:** Tom Taylor; Lewis Teri  
**Cc:** Gregg Alford; Barry Johnson; [dlfingerhut@afdny.com](mailto:dlfingerhut@afdny.com); Law Office of Chester C. Williams; Donna Taylor; Hulbert Brian  
**Subject:** RE: request for copies of subpoenaed documents in Beachwalk

Teri,

Can you tell me if you have located any documents related to Mr. Taylor's subpoena in the subject case? Thx.



Brian Hulbert  
Staff Attorney and Town Prosecutor  
Hilton Head Island, SC 29928  
843 341-4633

**From:** Tom Taylor [<mailto:tom@thomastaylorlaw.com>]

**Sent:** Tuesday, August 21, 2018 11:26 AM

**To:** Hulbert Brian

**Cc:** Gregg Alford; Barry Johnson; [dlfingerhut@afdny.com](mailto:dlfingerhut@afdny.com); Law Office of Chester C. Williams; Donna Taylor

**Subject:** request for copies of subpoenaed documents in Beachwalk

Brian—Good morning. Please see my attached letter requesting copies of the subpoenaed documents, if any have been located, by this Friday if possible. If we can get them early, it will significantly expedite the hearing on Monday. Thanks for your consideration.

All counsel are copied along with the Chairman.

Tom

*Thomas C. Taylor*

Law Office of Thomas C. Taylor, LLC  
22 Bow Circle, Suite A  
Hilton Head, SC 29928  
843-785-5050 (office)  
843-785-5030 (fax)  
843-301-6900 (cell)

Mailing Address:  
P.O. Box 5550  
Hilton Head, SC 29938

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**SUBPOENA  
BOARD OF ZONING APPEALS**

<b>SOUTH CAROLINA</b>		<b>TOWN OF HILTON HEAD ISLAND</b>	
		CASE NO: APL-001673-2016	SUBPOENA FOR (CIRCLE ONE) <del>PERSON</del> <i>DL</i> DOCUMENT OR OBJECTS
TO: Teri Lewis			
<ul style="list-style-type: none"> <li>YOUR ARE HEREBY COMMANDED to appear at a hearing before the Board of Zoning Appeals in the Town Council Chambers located at One Town Center Court, Hilton Head Island, South Carolina at the place, date and time specified below to testify in the above-entitled case.</li> </ul>			
PLACE One Town Center Court, Hilton Head Island, SC 29928	TOWN COUNCIL CHAMBERS	DATE AND TIME August 27, 2018; 1:00 p.m.	
YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s)			
LIST DOCUMENT(S) OR OBJECT(S):			
See attached Exhibit A.			
This subpoena shall remain in effect until you are granted leave to depart by the Board or by an officer on behalf of the Board. This Subpoena is issued in accordance SC Laws Section 6-29-790, and other applicable provisions of law.			
CHAIRMAN OF THE BOARD OF ZONING APPEALS (BZA) David Fingerhut <i>David Fingerhut</i>		DATE: August <u>3</u> , 2018	
BY CHAIRMAN OF THE BZA			
THIS SUBPOENA IS ISSUED UPON APPLICATION OF: Thomas C. Taylor, Esq. Law Office of Thomas C. Taylor, LLC. Post Office Box 5550 Hilton Head Island, SC 29938		APPELLANTS'S NAME AND ADDRESS: Beachwalk Hotel Condominiums Association and Beachwalk Hilton Head. LLC c/o Thomas C. Taylor, Esq.	

STATE OF SOUTH CAROLINA

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BEFORE THE  
BOARD OF ZONING APPEALS  
FOR THE  
TOWN OF HILTON HEAD ISLAND, SC

COUNTY OF BEAUFORT

APPLICATION FOR APPEAL  
APL-001673-2016

**EXHIBIT A  
TO SUBPOENA TO TERI LEWIS**

- A. Any and all written interpretations of, or determinations under, the Land Management Ordinance (the “LMO”) or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that one or more sections or provisions of the LMO applied or apply only prospectively to new proposed development; or that one or more sections or provisions of the LMO did not apply or do not apply to a development that was previously approved under prior regulations and partially constructed.
- B. Any and all written interpretations of, or determinations under, the LMO or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that one or more provisions of LMO Section 16-3-106.G did not or do not apply to a tract or parcel of land located in a PD-2 Overlay District.
- C. Any and all written interpretations of, or determinations under, the LMO or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that one or more provisions of LMO applied to or apply to an existing development in a manner that restrict or limit the density of development on any tract or parcel below that which was allowed under a previous provisions or versions of the LMO.
- D. Any and all written interpretations of, or determinations under, the LMO or other decisions of the LMO Official or her designees in which the LMO Official or her designee decided that the provisions of an LMO overlay district did not or do not control over the provisions of the LMO base zoning district.

# ATTACHMENT H



**TOUR CENTER PUD  
ANALYSIS OF PUD USES  
APPROVED AND PROPOSED**

Uses	PUD AS APPROVED			PROPOSED			CRANGES
	Area (Acres)	S.F. of Units	Density	Area (Acres)	S.F. of Units	Density	
Commercial/Office	2.3	36,000	15652 sf/A	1.4	21,913	15652 sf/A	14087 sf reduction
Commercial/Retail	4.3	52,000	12093 sf/A	3.0	36,279	12093 sf/A	15721 sf reduction
Hotel/Motel	1.0	50 rms.	50rm/A	2.6	94 rms.		44 room increase
Common-Open Space	—	—	—	1.3	—	24 cm/A	
Residential	7.5	222 u.	29.6 u/A	6.8	200 u.	29.4 u/A	22 unit reduction
<b>TOTALS</b>	<b>15.1</b>	<b>88,000 SF</b> <b>242 u.</b>	<b>5822 SF/A</b> <b>16 du/A</b>	<b>15.1</b>	<b>58,192 SF</b> <b>238 u.</b>	<b>3854 SF/A</b> <b>15.67 du/A</b>	<b>29808 SF reduction</b> <b>4 unit reduction</b>

\* The total area required for the proposed 54 room motel as a special exception within the R9-1 Zoning District (at 24 rooms/acre) is 3.9 acres. The motel would have to be developed on a 3.9 acre site or as shown in the table. The acreage not utilized for the motel would be set aside as common open space not to be used for any other development or open space requirements.

May 5, 1987

15.1  
- 2.9

91	HOEL	15.1	6.026 r/ac
5262	SF COM	15.1	348.48 SF/ac
19.8		15.1	13.113 UNIT/ac

~~8700 SF/ac~~

