

TRANSCRIPTS

from HEX hearing

Case Number: DCI 2003-00080

Case Name: GRADY'S Lodge

Attach a copy of this corm to the top of the transcript packet, and place transcripts in the front of the case file.

LEE COUNTY HEARING EXAMINER MEETING

CASE NO: DCI2003-00080

APPLICANT NAME: Graydon W. Scott, in
reference to Grady's Lodge

TRANSCRIPT OF PROCEEDINGS

Before Salvatore Territo, Lee County Hearing
Examiner, held at the Hearing Examiner's
Hearing Room, 1500 Monroe Street,
Fort Myers, Florida, on May 14, 2004.

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1 THE COURT: Good morning. My name is Sal
2 Territo, Lee County Hearing Examiner. We're here
3 for the continuation of case DCI2003-00080,
4 Graydon W. Scott in reference to Grady's Lodge.

5 Let me explain the process. We've already
6 had a day of hearing or a partial day of hearing
7 on this. For the people that came to the last
8 hearing and filled out one of these forms that we
9 have up here, the public participation form, it is
10 not necessary to fill another one out today, that
11 one will be sufficient for you. Anyone who came
12 today and would like to fill a form out who hasn't
13 done so before you leave there's some more on the
14 table in the back and I'll take those as well.

15 What that form entitles you to is to put on
16 the record basically what your feelings are about
17 this case, but it does not entitle you to speak
18 before the Board of County Commissioners. This
19 case will go before the Board of County
20 Commissioners for a final determination based on
21 my recommendation and everything that's been said
22 here today and all the exhibits that have been
23 supplied today.

24 If you intend to speak before the Board of
25 County Commissioners, it will be necessary for you

1 to speak here today; if you don't speak here they
2 will not let you speak there. That's the way the
3 rules work. There are no time limits on your
4 participation here, but I do like to keep it as
5 brief as you can because when you go to the Board
6 they will limit your time over there, so if you
7 have a very long presentation here they will not
8 hear the entire presentation over there.

9 The way the process works is the Applicants
10 will make their presentation first; they've made
11 that partially already, I'm not sure if they're
12 finished, I'm going to go back to them. Staff
13 member will make his report as well. When both
14 sides are finished I know some people have to
15 leave early today, I'll try to get to you as soon
16 as I can so if you have to leave you'll get your
17 comments on the record, but at the end of both
18 presentations anyone who would like to speak, I'll
19 have you come to the microphone, say what you
20 would like to say at that particular time and
21 we'll get it on the record.

22 I know there's some attorneys here today;
23 normally I would let the attorneys go first, not
24 because of any preference except for the fact that
25 they normally have their case somewhat organized

1 and they want to ask particular questions, so
2 sometimes they will be going ahead of everyone
3 else and sometimes they will probably ask the same
4 questions that you'll be asking as well. And also
5 they are here representing several clients, so
6 it's a way of getting several people through it
7 quicker than if you had the one person making the
8 presentation.

9 If you are represented by an attorney and you
10 are here today, you may speak here as well as your
11 attorney, but the Board has different rules. When
12 you go before the Board, either you may speak for
13 yourself or your attorney may speak for you, but
14 they will not let both of you speak here. Here
15 the rule is different, you may both speak here
16 even if your attorney has spoken for you.

17 We'll try to take breaks every hour and
18 fifteen minutes or so. If we go through lunch
19 we'll take a lunch break and come back this
20 afternoon. I hope we can finish today because if
21 we don't we are so backed up with cases it will be
22 quite a bit of time before we get back to a
23 continued hearing.

24 Any procedural questions? Mr. Ciccarone?

25 MR. CICCARONE: Mr. Hearing Examiner, I

1 represent Bernard Frye and I can only speak for
2 myself, but given the members of the public who
3 are here that need to leave early, I doubt we'll
4 finish cross-examination of the Applicant and the
5 Staff by lunch, which means if we don't let these
6 folks speak after the Applicant speaks they are
7 probably going to be here until at least two
8 o'clock, so we have no objection to letting them
9 speak right after the Applicant speaks and we'll
10 be happy to waive immediate cross-examination
11 rights until later after the public has had a
12 chance to address you, if that's what you want.

13 THE HEARING EXAMINER: Okay. What I'm going
14 to do probably is I'm not sure where we are at
15 this point because there was a lot of different
16 things going on at the last hearing, I want to
17 find out where we are today. I'd like to get to
18 staff member to get a chance to finish his
19 comments as well, and when both of them have
20 finished then we can go to cross-examination if
21 you'd like, but sometimes some of the questions
22 the public is interested in and more information
23 is available if both sides have made their
24 presentation first. I will, before I take a lunch
25 break, ask anyone who has to speak who is not able

1 to come back after lunch, I'll have them come up
2 here and speak as well and get their comments on
3 the record.

4 If you did speak at the last hearing, I would
5 hope you could try to keep your comments today, if
6 you want to speak again, to things that come up
7 today, not repeat things that you said at the last
8 hearing. Also, I prefer that if someone has not
9 spoken before, they get a chance to speak first
10 before you get a second chance, just as a
11 procedural matter.

12 Mr. Uhle, I didn't know exactly what you were
13 doing, if you had any new comments you wanted to
14 make or anything else.

15 MR. UHLE: Yeah. Where we are right now is
16 we have put on one witness, Mr. Hutcherson, he had
17 been cross-examined and I had not done redirect.
18 At that point we took members of the public and so
19 on, so my plan is to put on Mr. Hutcherson to do
20 two things. One of them is to present a slightly
21 revised plan that has incorporated the responses
22 to comments made at the previous hearing, and then
23 to ask him other normal redirect questions.

24 After him we have a witness who will be
25 addressing septic issues and then I'll be doing a

1 closing.

2 THE HEARING EXAMINER: Okay. So why don't
3 you have Mr. Hutcherson come up and finish with
4 his testimony.

5 And for the record you're still sworn.

6 MR. HUTCHERSON: For the record, Robert
7 Hutcherson with Wilson Miller, representing the
8 Applicant.

9 We have submitted a new concept plan based on
10 the concerns, some of the concerns raised at the
11 last hearing. First of all, we have reduced the
12 total hotel units to ten, the very minimum we need
13 to comply with the definition of hotel. We have
14 reduced the height of the cabins to a minimum of
15 twenty feet.

16 THE HEARING EXAMINER: Minimum or maximum?

17 MR. HUTCHERSON: Excuse me, maximum of twenty
18 feet. The hotel building or the hotel lodge
19 itself stayed at thirty-five due to its location.

20 We've also clarified a couple of the notes.
21 Before we had the open space just at the minimum
22 of what's required under the code; the actual
23 calculation now we have fifty percent is what's
24 provided. And we clarified the note on water
25 management being provided by dry retention at

1 grade.

2 THE HEARING EXAMINER: Dry retention at
3 grade?

4 MR. HUTCHERSON: Yes, sir.

5 MR. UHLE: I need to ask you a few questions
6 about the plan, Hutch.

7 EXAMINATION

8 BY MR. UHLE:

9 Q. First of all, with regard to the change from
10 fifteen units to ten, does that represent a change in
11 square footage or the number of bedrooms?

12 A. No, it's the total number of hotel units.

13 Q. Okay. So all you've done there is recognize
14 that some of the units have two bedrooms and so you
15 culled them out as individual?

16 A. Correct.

17 Q. Okay. Is there any additional information on
18 the plan that relates to the lodge building and
19 incorporates changes in square footage?

20 A. Yes, we did clarify the square footage that
21 we had assigned to the lodge building; there had been
22 some question about what was going to be going on
23 internal. There was one typo, the first lobby and
24 administrative office is actually one thousand square
25 feet instead of seven fifty. That's how it breaks

1 down, lobby and administrative office, one thousand
2 square feet; kitchen area, five hundred square feet;
3 restaurant area, seven hundred fifty square feet and
4 then the combination real estate office/general store
5 area, another seven hundred and fifty square feet.
6 And that's the total of three thousand surrounding the
7 interior of the building. We have an eleven hundred
8 and twenty square foot covered porch that will contain
9 some seating and then upstairs is the caretaker's
10 unit, which is approximately twelve hundred square
11 feet.

12 Q. With regard to the Property Development
13 Regulations, were any changes made, particularly to
14 the minimum lot area?

15 A. Yes. We basically have reduced or took the
16 minimum lot area and basically conceded no
17 subdivision. 1.59 acres is the existing subdivision
18 and we have put down under that heading no subdivision
19 requested.

20 Q. Okay. I'd like to ask you some questions
21 about the North Captiva Island Club. I know that that
22 came up at the previous hearing, but can you please
23 just refresh our memories and tell us what facilities,
24 particularly the recreational facilities, are
25 available at the North Captiva Island Club?

1 A. To the best of my knowledge there's a pool, a
2 pool bar, then there are various rentals of water
3 sports, canoes, that type of thing. There's actually
4 a rental agency for housing on the island as well.

5 Q. Who is eligible to use the recreational
6 facilities on this site?

7 A. To the best of my knowledge you have to be a
8 member of the North Captiva Island Club.

9 Q. And is there any relationship to a rental
10 program?

11 A. It's my understanding that the homes -- at
12 least the information available -- that the homes
13 within the rental program are also members of the
14 island club and are able to use those facilities as
15 guests of those particular houses.

16 Q. So people who rent a house through the island
17 club rental program have the ability to use the rec
18 facilities within this project, is that correct?

19 A. To the best of my knowledge.

20 Q. And what is your knowledge based on?

21 A. Basically there's a North Captiva Island Club
22 resort website that lists the homes for rent on the
23 island, as well as the amenities associated with the
24 club, what there is to do on the island, the history
25 of the island, that type of thing.

1 Q. And did it indicate that people who rented
2 houses through the rental program had the ability to
3 use the recreational amenities?

4 A. Yes, sir.

5 Q. How big is the rental program in terms of
6 size, number of houses?

7 A. Best information I believe the website listed
8 up to eighty properties on the website now, different
9 individuals homes that are available through that
10 program.

11 Q. And are any of those houses located within
12 say five hundred feet of the property that's the
13 subject of this application?

14 A. Yes.

15 Q. Roughly if you were to take a radius of five
16 hundred feet from the property, which is the
17 notification radius, roughly what percentage of the
18 houses in that area are included in the North Captiva
19 Island rental program?

20 A. I would say a minimum of seventy-five
21 percent.

22 Q. And is that also based on information on the
23 website?

24 A. Yes.

25 Q. And did you previously provide the Hearing

1 Examiner with information about these houses on the
2 website?

3 A. Yes, I did.

4 Q. Hutch, this case has been referred to as
5 Grady's quote, unquote Lodge. Is there any particular
6 legal or planning significance attached to the term
7 lodge?

8 A. No, it was simply a term we came up with that
9 basically described a type of development we were
10 doing. I mean there's no significance at all, really.

11 Q. So there's not going to be any effort to
12 limit the marketing of the project to fishermen or any
13 other particular class of people?

14 A. No. Actually in the narrative it talks about
15 that market as well as people visiting the park,
16 people looking at the real estate market, that type of
17 thing.

18 Q. To your knowledge is there any reason to
19 believe this lodge will be more of a party place than
20 the surrounding residential uses that are being rented
21 out as part of the North Captiva Island Club rental
22 program?

23 A. No.

24 Q. With regard to the restaurant that's on this
25 particular plan, is it intended to be an ancillary or

1 a principal use of the property?

2 A. Ancillary.

3 Q. Do the commercial site location standards in
4 the Lee Plan regulate ancillary commercial uses?

5 A. No.

6 Q. Are you familiar with Lee Plan Standard 11.2?

7 A. Yes.

8 Q. I'd like to show that to you. Could you
9 please read item number one under that standard?

10 A. Standard 11.2. Sewer. "Any new residential
11 development that exceeds 2.5 dwelling units per gross
12 acre and any new single commercial or industrial
13 development that generates more than five thousand
14 gallons of sewage per day must connect to a sanitary
15 sewer system."

16 Q. So it appears to draw a clear distinction
17 between residential and commercial uses?

18 A. Yes.

19 Q. It has a different standard for each one?

20 A. Yes.

21 Q. This particular project, is it a residential
22 or a commercial use?

23 A. It's a commercial use.

24 Q. So which of the standards within 11.2 applies
25 to this property?

1 A. Five thousand gallons per day.

2 Q. Hutch, you received a lot of questions at the
3 last hearing about specifics regarding this particular
4 plan and why they weren't provided in the plan. Do
5 you typically provide all of the engineering that's
6 necessary for a project at the zoning stage?

7 A. No, you don't.

8 Q. Why not?

9 A. Well, at that level typically you don't have
10 the detail or the final end result. There could be
11 conditions that change the development of the plan
12 throughout the hearing. It's just typically not done
13 at the initial stage and typically for those types of
14 engineering permits and what not you need proof of
15 local zoning approval as well.

16 Q. There was some concern expressed about code
17 enforcement at this particular location. Do you know
18 of any reason why code enforcement would be a bigger
19 problem at that location than say at the North Captiva
20 Island Club?

21 A. No.

22 Q. In looking at the C-1 zoning matrix, is boat
23 storage a permitted use within the matrix in the C-1
24 zone?

25 A. Yes.

1 Q. Is there a -- in your opinion, a market for
2 additional boat storage on North Captiva?

3 A. In my opinion, based on the -- you know, the
4 number of interior lots and the lack of slips on the
5 water, I would say yes.

6 Q. So you would think that that would be a
7 viable use for this property if the property were not
8 rezoned in accordance with our request?

9 A. Correct.

10 Q. Do you have any new information to provide to
11 the Hearing Examiner with regard to the well that's
12 located on the adjoining parcel?

13 A. Only that I have spoken to Lee County Water
14 Resources, the ground water division, and the
15 Department of Health. Neither one could come up with
16 any reason or any problems that would prohibit the
17 expansion of the well to serve the restaurant.
18 Additionally, I asked questions of any reports or
19 complaints of salt water intrusion and the response
20 was no, nothing out of the ordinary.

21 Q. Are you in possession of a number of letters
22 supporting this particular request?

23 A. Yes.

24 Q. Would you please tell us how many there are
25 and give them to the Hearing Examiner?

1 A. There are twenty-two letters of support.

2 THE HEARING EXAMINER: I'll mark these as
3 Applicant's Composite Exhibit Number 10.

4 MR. UHLE: Most of which you might already
5 have in your file.

6 THE HEARING EXAMINER: All right. I'll mark
7 them as Applicant's Composite Number 10 anyway.

8 MR. HUTCHERSON Thank you.

9 MR. UHLE: No further questions.

10 THE HEARING EXAMINER: Mr. Kelner, did you
11 have any questions for him?

12 MR. KELNER: Yes. One question on the
13 rental units that you said are adjacent to it,
14 within five hundred feet. How long are these
15 rented for?

16 MR. HUTCHERSON: The website gave options of
17 three days and seven days, so I would imagine
18 anywhere from three days to a seven day period.

19 MR. KELNER: And the letters of support, are
20 these in addition to the letters that were
21 submitted to the Hearing Examiner?

22 MR. HUTCHERSON: No, they are probably --
23 this is a compilation of all that we have received
24 over the period of time we've been reviewing the
25 project.

1 MR. KELNER: That's all.

2 THE HEARING EXAMINER: Okay. Thank you. Let
3 me ask the people that have to leave, how many
4 there are of you that have to leave say before
5 noon? Okay. And how soon before noon? I mean if
6 we go and break at 11:30 for your comments, will
7 that give you enough time? All right. So what
8 I'll do is I'll continue with the process as it
9 goes right now and around 11:30 or so I will stop
10 and give a chance for the members of the public to
11 speak who have to leave before noon.

12 Okay. Does anyone, any attorney want to
13 cross-examine Mr. Hutcherson? Yes, Mr. Ciccarone?

14 MR. CICCARONE: Do you want me to do it from
15 here?

16 THE HEARING EXAMINER: Come up here if you
17 would like to, there's a little bit of room over
18 here maybe. If not you can stand wherever you're
19 comfortable.

20 MR. CICCARONE: Or would you rather have Mr.
21 Hutcherson sit and I'll stand? Whatever works.

22 THE HEARING EXAMINER: Fine, why don't we do
23 that. The microphones are live now, so they'll
24 pick up everyone.

25 MR. CICCARONE: Mr. Hearing Examiner, good

1 morning. For your record let me identify myself.
2 I'm attorney Michael Ciccarone with the law firm
3 of Goldstein, Buckley, Cechman, Rice and Purtz.
4 We're here on behalf of our client, Bernard Scott
5 Frye, whose address is identified within the
6 application as one of those persons to whom notice
7 was sent.

8 I believe if you will look at the documents
9 in the file you will see that he owns an existing
10 residential dwelling that is, for lack of a better
11 description, one lot west of the northwest corner
12 of the subject property. Mr. Frye could not be
13 here, so I'll be speaking on his behalf.

14 Let me start off by telling you that I did
15 order a transcript from the previous hearing so
16 that I could find out what happened. I don't know
17 whether you were provided with a --

18 THE HEARING EXAMINER: Yes, I was.

19 MR. CICCARONE: All right. So I don't need
20 to give you another one.

21 THE HEARING EXAMINER: You don't, no.

22 EXAMINATION

23 BY MR. CICCARONE:

24 Q. Mr. Hutcherson, looking at what has been
25 submitted, I guess just yesterday, and I'm referring

1 now to the new Master Concept Plan, just a couple of
2 questions, if I could.

3 In the lower right corner under item number
4 12 you've added the words "at grade" at the end of
5 what was in the original application. What
6 distinction are you trying to make with this addition?

7 A. Basically we're not digging an excavation.
8 There was some question as to where we were going to
9 be providing water retention at the last hearing, I
10 was just trying to clarify it with some additional
11 information.

12 Q. Now, you have not shown where that would
13 occur on the site plan because my understanding is
14 your intention is that the site plan be somewhat
15 conceptual as to what's within the envelope, buildings
16 and so forth could be moved around?

17 A. Right.

18 Q. Now, it does appear to me that you did make a
19 substantial change in the area of the lodge building
20 and that you have now included a breakdown of interior
21 space and I believe in your direct testimony you made
22 a correction saying that the seven hundred and fifty
23 square foot number for the lobby and administration
24 building should be changed to a thousand.

25 A. Yes, that's correct.

1 Q. Is the plan still correct with its depiction
2 of the crossed hatched area that's proposed for
3 consumption on premises?

4 A. Yes, sir.

5 Q. I believe you also submitted, I think it was
6 yesterday, a list of additional conditions, five
7 additional conditions, is that correct?

8 A. Well --.

9 MR. UHLE: I did that.

10 MR. CICCARONE: Oh, Mr. Uhle did. I'm sorry.
11 I guess the question I have for maybe the
12 Applicant, through either Mr. Uhle or Mr.
13 Hutcherson, is are these additional conditions
14 being offered today as part of the hearing?

15 MR. UHLE: That will be part of my
16 presentation. The answer is yes.

17 BY MR. CICCARONE:

18 Q. All right. Let me ask Mr. Hutcherson, I did
19 not see within the proposed conditions or on the
20 conditions set forth on the new site plan any language
21 which would make the parenthetical square foot
22 references for the lodge building binding. Is it the
23 Applicant's intent that these square foot numbers be
24 maximum amounts allowed for each of these discreet
25 uses within the lodge building?

1 A. That was our intent. We were asked to break
2 it down as to the proposed square footage on the
3 interior, something we don't typically do for zoning,
4 so we sat down and basically laid out a floor plan for
5 it.

6 Q. Well, this is very important and so that we
7 don't waste time examining an issue that may not be
8 relevant, what I need to know is, is the Applicant
9 proposing then that a condition be added limiting the
10 restaurant to seven hundred and fifty square feet?

11 A. On the interior of this building, right,
12 that's a breakdown of the interior square footage.
13 Now I had also described there would be some seats out
14 on the covered porch as well, but yes, that's correct,
15 inside of that surrounding exterior wall under the
16 definition of floor area, that's what it would be. By
17 putting it on the plan we would expect that to be the
18 detail that we'll be held to.

19 Q. So again, not meaning to have you speak for
20 your counsel, but am I understanding your answer to
21 say that the Applicant would have no objection to a
22 condition being included that would limit the square
23 footage within the lodge building to the maximums that
24 are set forth for each of these discreet uses as
25 you're showing them on the revised Master Concept

1 Plan?

2 A. I think we've probably already done that by
3 placing it on the concept plan, so I'd have to answer
4 yes.

5 Q. Okay. Appreciate that. Did I understand in
6 your direct testimony a moment ago that you said boat
7 storage is not a permitted use?

8 A. Is a permitted use.

9 Q. It is a permitted use in C-1. All right. I
10 did misunderstand you.

11 Did you prepare the application?

12 A. Yes.

13 Q. Aside from any corrections that would have to
14 be made as a result of information presented at the
15 last hearing or as a result of any information that
16 you've presented today, are there any corrections
17 you'd like to make to that application?

18 A. To the best of my knowledge, I mean we're
19 going to have to go back and reflect what's changed on
20 the concept plan. I mean that won't match, obviously,
21 because we've lessened the intensity from what was
22 originally submitted.

23 Q. Well let me ask you specifically to look at
24 page 4 of 12, Item I.

25 A. I'm sorry, what was that again, Mike?

1 Q. Page 4 of 12, Item I, current use of
2 property.

3 A. To the best of my knowledge there is no use
4 on the property.

5 Q. Have you inspected the property recently?

6 A. Yes. There's a dumpster there, a boat there.
7 Let's see, there's an old shed underneath the -- back
8 in toward the center with some junk laying around
9 that's been accumulated over the years, but to the
10 best of my knowledge there's no actual use of the
11 property.

12 Q. It's not being used for boat storage?

13 A. Like I said, there's a boat sitting there,
14 but I think it's more abandoned than storage, since
15 I've been there.

16 Q. And there is a structure on the property, is
17 there not?

18 A. There is a building that's sitting in there.
19 I don't believe it's being used. I thought it was
20 abandoned myself, having inspected the property.

21 Q. Did you prepare the survey that was submitted
22 as part of the application?

23 A. No.

24 Q. Did you look at the survey?

25 A. Yes.

1 Q. Is it your understanding that in order to
2 meet the minimum application requirements that the
3 Applicant is supposed to submit a survey like this
4 one, but one that identifies and locates all
5 structures on the property?

6 A. If they are permanent improvements. I don't
7 know that that's a permanent improvement.

8 Q. So your testimony is that the structure
9 that's there is not a permanent improvement and that's
10 why it doesn't need to go on the survey, is that
11 right?

12 A. That's the best explanation I have as to why
13 it's not on the survey. I mean like I said, I didn't
14 do the survey.

15 Q. But there is no disagreement that there is a
16 structure there?

17 A. Yes, there's no disagreement. It's sitting
18 there, but I don't know that it's permanent.

19 Q. Do you have any photographs of this
20 structure?

21 A. No, I don't.

22 Q. I think your testimony was it's an old shed?

23 A. Uh-huh.

24 Q. Is that what it looked like the last time you
25 examined it?

1 A. Yes.

2 Q. Okay. In reviewing your testimony from the
3 first hearing it wasn't clear to me what opinion you
4 were rendering with respect to whether the current C-1
5 zoning is consistent with the Comprehensive Plan.
6 What is your answer to that question? Is it
7 consistent or not?

8 A. Is the zoning consistent with the
9 Comprehensive Plan?

10 Q. Is the current C-1 zoning consistent with the
11 Comprehensive Plan?

12 A. Yes, in that it allows certain uses that are
13 described as being uses to service rural residents,
14 marine traffic and what not.

15 Q. And again, I couldn't tell from your
16 testimony, so I'll ask you, within the list of
17 permitted C-1 uses that are consistent with the
18 Comprehensive Plan, are there any uses that would
19 provide reasonable use of this property?

20 A. I don't know a list of C-1 uses permitted in
21 the Lee Plan. I'm not --

22 Q. Well, there are C-1 uses, correct?

23 A. Correct.

24 Q. This property is zoned C-1, correct?

25 A. Uh-huh.

1 Q. To the extent that any of the uses in there
2 might conflict with the Lee Plan, those uses would not
3 be allowed, notwithstanding the fact they're within
4 C-1, is that a correct understanding?

5 A. Yes, sir.

6 Q. So my question is that with respect to the
7 C-1 uses that are not inconsistent with the Lee Plan,
8 I believe you just testified there are such uses, do
9 any of those provide a reasonable use of the property?

10 A. I'd have to -- I don't know what your
11 definition of reasonable is at this point. There are
12 numerous uses that are allowed in C-1. Now, whether
13 you mean reasonable based on compatibility, based on
14 feasibility.

15 Q. How about a reasonable economic use?

16 A. That I couldn't testify to.

17 Q. So your answer is you don't know?

18 A. Right.

19 MR. CICCARONE: No further questions. Thank
20 you.

21 THE HEARING EXAMINER: Okay. Thank you. Mr.
22 Brookes, do you have any questions?

23 EXAMINATION

24 BY MR. BROOKES:

25 Q. Is there currently -- I'm sorry, Ralf

1 Brookes. I represent the Powells, the Pauls, the
2 Rapps and the Kulins.

3 I had a question for you. You talked about
4 surrounding dwelling units and they're being rented
5 out --

6 A. Yes, sir.

7 Q. -- as vacation rentals or for periods of time
8 of less than thirty days. Is there any ordinance
9 currently in the Lee County code that prohibits
10 vacation rentals or leases of less than thirty days of
11 a residential dwelling unit?

12 A. I believe so. I'll have to look it up in the
13 ordinance. I believe it's limited to seven day
14 periods.

15 Q. And you don't know what ordinance number that
16 would be?

17 A. No, sir. I was more evaluating our request.

18 MR. BROOKES: Okay. Thank you. No further
19 questions.

20 THE HEARING EXAMINER: Thank you. Any other
21 attorneys present? Anyone else have any specific
22 questions that he's just testified to? Yes.

23 MR. DEPEW: I just have one brief one.

24 THE HEARING EXAMINER: Mr. Depew, come up
25 here, please.

1 MR. DEPEW: Dave Depew, for the record,
2 representing Kathrynne Powell.

3 EXAMINATION

4 BY MR. DEPEW:

5 Q. Mr. Hutcherson, you testified that the number
6 of motel/hotel units have been reduced to ten in the
7 current site plan, is that correct?

8 A. Yes.

9 Q. But I believe it was also your testimony
10 there wasn't a reduction in bedrooms?

11 A. No. The two bedroom units are now one unit
12 cottages.

13 Q. So the number of maximum guests available
14 that would be accommodated would remain the same?

15 A. Yes, sir.

16 MR. DEPEW: Thank you.

17 THE HEARING EXAMINER: Okay, thank you.

18 Anyone else have any questions for this witness?

19 Okay. Mr. Uhle, do you have another witness?

20 MR. UHLE: Yes. The next witness is Jim
21 Struthers.

22 THE HEARING EXAMINER: Mr. Struthers, have I
23 sworn you in yet?

24 MR. STRUTHERS: No, sir.

25 (Mr. Struthers was placed under oath by Mr. Territo.)

EXAMINATION

BY MR. UHLE:

Q. Would you please state your full name for the record?

A. James H. Struthers.

Q. And by whom are you employed, Mr. Struthers?

A. Sanibel Surveys.

Q. And what do you do for a living?

A. I'm a professional engineer.

Q. Would you please identify this document?

A. Yes. This is a copy of my resume that I prepared of my professional qualifications.

MR. UHLE: I would like to entire that into the record.

THE HEARING EXAMINER: I'll mark this as Applicant's Exhibit Number 12. Sorry, that should be 11, not 12.

BY MR. UHLE:

Q. Would you please briefly describe your experience with the designing and permitting of septic systems?

A. Yes. Since I started in the engineering field approximately thirty years ago, both through my own firm and through Sanibel Surveys I have designed numerous on-site septic systems, all the way up into

1 public septic systems and package treatment plants, so
2 I have been doing that for over thirty years.

3 Q. And some of that experience is in Florida?

4 A. Yes.

5 Q. This area?

6 A. Yes.

7 Q. How long is that?

8 A. Approximately four years. Since I retired
9 and moved down here full time.

10 MR. UHLE: We would ask that he be accepted
11 as an expert in the field of designing and
12 permitting septic systems.

13 THE HEARING EXAMINER: Any objections?

14 MR. CICCARONE: I do, Your Honor, to the
15 extent that I don't see any indication that he's a
16 licensed professional surveyor in Florida.

17 MR. STRUTHERS: I am not licensed as a
18 surveyor in Florida, but I am as a professional
19 engineer, and my understanding of the Florida
20 codes require septic systems to be designed by
21 professional engineers, not surveyors.

22 MR. CICCARONE: With that clarification we
23 don't have any objection as long as his testimony
24 is restricted exclusively to his expertise as a
25 professional engineer and not a surveyor.

1 THE HEARING EXAMINER: Any objection to that?

2 MR. UHLE: No. We're not asking him to
3 testify as a surveyor.

4 THE HEARING EXAMINER: All right, so with
5 that qualification you are accepted.

6 MR. STRUTHERS: Thank you.

7 BY MR. UHLE:

8 Q. Mr. Struthers, are you familiar with the
9 project that's the subject of this hearing?

10 A. Yes, I am.

11 Q. And have you done an analysis of the capacity
12 of this particular parcel to be served by a septic
13 system and as to whether the project as proposed could
14 be permitted by the health department?

15 A. Yes, I have.

16 Q. I would like to show you a document. Is this
17 the document that you're referring to?

18 A. That is correct.

19 MR. UHLE: We would like to enter this as an
20 exhibit.

21 THE HEARING EXAMINER: All right. This would
22 be marked as Applicant's Exhibit Number 12.

23 BY MR. UHLE:

24 Q. Was it your opinion that this particular
25 project could in fact be permitted by the health

1 department for a septic system?

2 A. It is my opinion that it could be, yes.

3 Q. Could you please briefly walk us through the
4 basis for that opinion?

5 A. Well, primarily going through the
6 regulations, they specifically list out different flow
7 rates to be used for on-site sewage disposal systems,
8 and what I've done is taken this base property,
9 computed the authorized sewage flows as they are
10 specified in the regulation, determined the maximum
11 amount that would be permitted for this site and then
12 looked at the site plan and then compared his usage to
13 it and determined what the proposed sewage flows would
14 be for his project.

15 Q. Okay. So if you don't mind my paraphrasing
16 what you're saying, if I understand correctly you've
17 basically done two things. One of them is to
18 determine the capacity of the soils and so on to
19 handle sewage and then secondly to look at the plan to
20 establish how much sewage it would generate and then
21 to compare them and see if they would comply with the
22 health department regulations, is that a fair
23 statement?

24 A. That's correct.

25 Q. And your conclusion is that this particular

1 project -- well, how many gallons per day will it
2 generate?

3 A. This particular project would generate,
4 according to the regulations, would be three thousand,
5 six hundred and twenty gallons per day.

6 Q. And that can be permitted by the health
7 department?

8 A. Yes. Their authorized sewage flow for this
9 size project would be three thousand, eight hundred
10 and fifty gallons per day.

11 MR. UHLE: No further questions.

12 THE HEARING EXAMINER: Mr. Kelner, do you
13 have any questions?

14 MR. KELNER: No.

15 THE HEARING EXAMINER: Any questions from
16 anyone?

17 MR. BROOKES: Your Honor, we've just been
18 provided this report that has a number of
19 calculations, and if we could have time to look at
20 this before we cross-examine, either now or maybe
21 after lunch.

22 THE HEARING EXAMINER: Are you going to be
23 available for the rest of this morning?

24 MR. STRUTHERS: Yes.

25 THE HEARING EXAMINER: Okay. We'll try to

1 get back to him before the break, if we can. I
2 can make a copy of that for you if you want.

3 MR. CICCARONE: That would be helpful. And
4 then we would like to reserve our right to
5 cross-examine him at the earliest opportunity.

6 Thank you.

7 THE HEARING EXAMINER: You're welcome.

8 MR. CICCARONE: I think we're going to need
9 three copies. Four.

10 THE HEARING EXAMINER: I'll get five. Okay.
11 Let's mark this.

12 Is that all the witnesses you're going to be
13 calling?

14 MR. UHLE: Other than me.

15 THE HEARING EXAMINER: While you're getting
16 up there, let me step out of the room for a second
17 and get this copied.

18 Okay.

19 MR. UHLE: Matt Uhle for the record. What I
20 want to do basically is two things. First of all,
21 I want to present you with the additional
22 conditions that are being proposed today and
23 secondly, to provide some argument based on the
24 exhibits and the testimony on a couple of issues
25 relating to compatibility and to project

1 intensity. I'll start with the additional
2 conditions. I would like to hand that out at this
3 time.

4 THE HEARING EXAMINER: That will be marked as
5 Applicant's Exhibit Number 13. Thank you.

6 MR. CICCARONE: Your Honor, just for
7 clarification for the record, what we're hearing
8 now are, if you will, comments and arguments of
9 counsel and not testimony, is that your
10 understanding?

11 THE HEARING EXAMINER: That's correct.
12 That's correct, yes.

13 For the audience's purposes, the reason that
14 question was asked is legal arguments are not
15 subject to cross-examination, testimony would be.
16 Just so you know what it is we're doing here.

17 MR. UHLE: We have proposed five additional
18 conditions in response to the questions and the
19 testimony that came up at the previous hearing.
20 The first one is consistent with the request that
21 was made by Mr. Brookes.

22 Now, the testimony establishes that Mr. Scott
23 has a legal interest in the property immediately
24 to the northeast that's actually shown on the
25 Master Concept Plan and it has an existing well on

1 it, and we've provided additional testimony today
2 about the capacity of that well, but to the extent
3 that any issue might be raised about my client's
4 legal ability to use that well and the well's
5 ability to adequately service the project, we've
6 provided proposed Condition 1 here, which we think
7 fully addresses that question. It would require
8 us to provide all the necessary documentation to
9 Staff before we get a development order.

10 MR. UHLE: The second item again is in
11 response to some concerns raised by members of the
12 public. There are proposed limitations in the
13 staff report addressing live music that would
14 permit background music outdoors. We have agreed
15 to go over and above that to prohibit background
16 music outdoors after six o'clock in order to
17 eliminate concerns about the quiet in the
18 neighborhood and so on. Frankly, we're not sure
19 that that really is necessary, but it is something
20 we're willing to do if the Hearing Examiner thinks
21 it is.

22 A third item, I believe it was Mr. Depew
23 raised questions about golf cart batteries. It's
24 not our intention to have them be stored outdoors
25 and so we've proposed a condition that makes that

1 quite clear.

2 The fourth point is in response to an issue
3 that Mr. Brookes raised about preserving
4 indigenous vegetation. Frankly, there's already a
5 note on the plan that addresses that, but in order
6 to make it clear we've proposed another condition
7 that makes it absolutely clear that our intent is
8 to preserve indigenous vegetation if and wherever
9 possible. And as Mr. Hutcherson pointed out, in
10 addition to that we've clarified the open space on
11 this property, so it's now not shown as the
12 minimum twenty percent, it's shown as the fifty
13 percent that's actually more consistent with the
14 layout of the plan.

15 And finally, we have number five, which we
16 have mixed feelings about, but let me explain that
17 one. Mr. Brookes raised some questions at the
18 previous hearing about the quality of the roads
19 and whether my client was willing to make a
20 contribution to the road commission in order to
21 help maintain the roads. This condition indicates
22 that my client is in fact willing to make that
23 contribution.

24 Now, I have to say I have to -- I have some
25 legal concerns about this one to the extent that

1 the road commission is a volunteer organization,
2 it's not the government and to my knowledge it's
3 not even a corporation, it just operates on a
4 purely voluntary basis, and so I do have some
5 legal queasiness about requiring us to do business
6 with a volunteer organization; but nonetheless, we
7 wanted to make it clear that my client is willing
8 to do this and we'll accept it as a condition if
9 the Hearing Examiner thinks it's appropriate.

10 That is the sum and substance of the proposed
11 additional conditions. Of course we made the
12 changes to the plan to address some other concerns
13 that were raised during the previous hearing.

14 I'd like to talk now briefly about what I
15 perceive to be the two major issues in the case,
16 which are compatibility of the proposed use and
17 secondly, the appropriateness of the proposed
18 project intensity.

19 As to compatibility, there are four reasons
20 why we think these uses are compatible and
21 appropriate. The first of them is that these
22 uses, as Mr. Hutcherson has already testified, are
23 already permitted in the C-1 zoning district.
24 Now, granted, in the big picture the situation is
25 a little more complicated than that because of the

1 intensity question, but the bottom line is that
2 the hotel and the restaurant use that we're asking
3 for are already shown as permitted uses in the C-1
4 district.

5 In addition to that, there are other uses in
6 the C-1 district and you can see from the exhibit
7 that there's a large list of commercial uses
8 permitted in C-1. Some of them may not be
9 consistent with the Comprehensive Plan, but some
10 of them clearly are, and some of these uses might
11 very well have a larger impact on the community
12 than the one that we're proposing here.

13 Mr. Kelner's staff report talks about that at
14 some length and I don't have a whole lot to add to
15 it except that in my questions I focused on boat
16 storage simply because it's an issue that's kind
17 of fresh in the minds of everybody who worked on
18 the Miller CP zoning case; that was one where a
19 concern was raised about the lack of dockage for
20 the lots that are on the interior of the island.

21 And so it's quite clear in my opinion that
22 that's a use that you could put to this property
23 because of all these lots that don't have dockage
24 right now. And that is a use that typically has
25 pretty intense aesthetic impacts on the community,

1 so that's not the only one that's involved here,
2 but that is one that could be put on the property
3 and then probably there would be a market for it
4 if the zoning remains as it is today.

5 Thirdly, obviously we've done a CPD rather
6 than relying on the conventional zoning. That
7 means that we can apply a substantial number of
8 conditions to limit this project's impact; we've
9 already done that. We've reduced the building
10 heights, for example, to a level that is below
11 what's permitted generally throughout the island.
12 We've provided conditions relating to outdoor
13 uses, to noise. We've designed a site plan that
14 has the focus of its intensity into the interior
15 of the property and toward the North Captiva
16 Island Club property and so on and so on. So
17 we've provided a mechanism to address any
18 additional impacts of the uses.

19 And then finally, when you look at the
20 surrounding uses, we think the use that we're
21 requesting here is quite appropriate. To the
22 north we have the very intense use of the North
23 Captiva Island Club with all of it's commercial
24 and recreational uses. To the east we have C-1
25 property that's partly residential and partly

1 commercial and there is a real estate business.

2 To the south and to the west we have what if
3 you didn't know better would appear to be a
4 single-family neighborhood, but in the real world
5 many of these lots have not been built upon and
6 most of those that have are really part of the
7 North Captiva Island Club rental program, and so
8 to use a term that they use on Sanibel there are
9 really more resort housing than they are an
10 established single-family neighborhood with people
11 living there all the time, and there is a
12 significant difference in terms of the
13 expectations of the people and what kind of quite
14 they are going to have.

15 So the bottom line is that we think that this
16 use is, as the staff report indicated, a very
17 appropriate transitional use between the North
18 Captiva Island Club and the residential slash
19 resort housing to the west and to the south.

20 With regard to the project's intensity, by
21 way of background, the Lee Plan doesn't have any
22 specific regulations addressing hotel densities.
23 The Land Development Code regulates hotel
24 densities in two different ways, depending on what
25 your zoning is. If you have a conventional zoning

1 district, your intensity is regulated by a sliding
2 scale formula that has two variables in it. One
3 of them is the maximum density permitted by the
4 Lee Plan and the second is an equivalency factor,
5 which in turn is tied to the proposed size of the
6 hotel units, and that ranges from one to three.

7 For a planned development, however, you're
8 not bound by that particular formula and so what
9 the regulations tell you is that you can pick
10 whatever formula you like as long as it's
11 compatible and consistent with the Lee Plan for
12 other purposes. So that's the part of the Land
13 Development Code that we're operating under today.

14 I think it's appropriate to try to compare
15 the intensity of this project to the surrounding
16 uses, particularly the residential uses. That's
17 not easy to do perfectly because there is some
18 apples to oranges that inevitably comes up, but I
19 would like to suggest to you that there are two or
20 three ways that you can do the comparison. It may
21 not be perfect, but when you look at them
22 collectively it becomes clear that the intensity
23 of this project is consistent with the resort
24 housing areas to the south and west.

25 First of all, if you look at the formula that

1 is used in the LDC, the first part of it has to do
2 with the Lee Plan density, but I suggest to you
3 that in this particular context, since we're not
4 bound by that and we're looking at project
5 compatibility, the more appropriate number to plug
6 in there is the prevailing density in the area.
7 Now, Mr. Hutcherson testified at the previous
8 hearing that the average residential density in
9 this area is about four units an acre, and
10 that's -- regardless of what the Lee Plan says,
11 that's what it is out there, that's what the lot
12 sizes dictate. So we would submit that if you're
13 trying to run the formula for these particular
14 conditions that that part of the formula should be
15 four units an acre.

16 The second part of the formula is the
17 equivalence factor. There clearly in the Land
18 Development Code is an intent to relate the
19 impacts of a residential use to the impacts of a
20 hotel unit, and that varies from number to number,
21 but the bottom line is that that appears to be
22 what's being done, and it's obviously being done
23 on a county-wide basis. In this particular
24 instance, the house sizes on North Captiva in this
25 particular area are much larger than they are on

1 average in the county as a whole.

2 If you look at the testimony from the
3 previous hearing, Mr. Powell testified that his
4 understanding was that the average house size
5 ranged from twenty-two hundred to twenty-eight
6 hundred square feet. If you review the material
7 that Mr. Hutcherson gave you, the property
8 appraiser information suggests that the numbers
9 are actually significantly higher than that. In
10 fact, it probably would range somewhere between
11 three and four thousand square feet, but -- and
12 this is where the apples to apples comparison gets
13 difficult -- probably some part of that has to do
14 with porches rather than enclosed areas, and the
15 porches are part of the living area and they have
16 some importance, but they probably shouldn't be
17 counted the same way as the area that's totally
18 enclosed.

19 So what I would suggest is for purposes of
20 plugging a number in the formula that a reasonably
21 conservative approach would be to take Mr.
22 Powell's high number, which is twenty-eight
23 hundred square feet and use that, so when you
24 compare that to the average size of a bedroom in
25 this particular project, again, I don't want to

1 confuse things, we've got units that have one
2 bedroom and units that have two bedrooms, but the
3 apples to apples comparison is better if it's by
4 bedroom rather than by units, so we'll assume for
5 purposes of discussion that this is fifteen
6 bedrooms and that's what we're talking about.

7 In any event, if you plug the numbers in you
8 wind up with four units an acre, a ratio of seven
9 to one, that being the difference between the four
10 hundred square foot roughly bedrooms and the
11 twenty-eight hundred square foot houses. Multiply
12 those two together and you will get a figure of
13 twenty-eight bedrooms per acre as being
14 appropriate.

15 What we're asking for in this particular case
16 is fifteen hotel units and a caretaker's residence
17 with two bedrooms on 1.59 acres. And so if you do
18 that comparison, we think it's clear that what
19 we're asking is consistent with the neighborhood.

20 Now, another way of looking at it relies on
21 the information again provided by Mr. Hutcherson,
22 some of it from the website of the North Captiva
23 Island Club and some of it from the property
24 appraiser's website. If you look at the five
25 homes that are in the rental program that Mr.

1 Hutcherson had the information for, they
2 represent -- the lot sizes shown on the property
3 appraiser information added together represent
4 about 1.3, acres just a little bit more than that,
5 which is less than the subject parcel, which is
6 1.59 acres. When you add the number of bedrooms
7 of those houses together you wind up with
8 seventeen bedrooms, which is exactly the same as
9 we're proposing with the fifteen rental units plus
10 the two units and the caretaker's residence.

11 If you look at the maximum occupancies shown
12 on the North Captiva Island Club website you come
13 out with a total of thirty-eight being the maximum
14 occupancy on these five particular rental parcels.
15 Again, that's quite consistent with the notion of
16 us having seventeen bedrooms on our site.

17 So we believe that this information, taken as
18 a whole, makes it clear that what we're doing is
19 compatible and consistent with the area. And that
20 even ignores the fact that we're already zoned C-1
21 and we're abutting a piece of property that's
22 already being intensely used, so it's actually
23 appropriate for this property to be slightly more
24 intense in its use as a transitional area than the
25 areas to the south and to the west.

1 I'll conclude by making a brief comment about
2 Mr. Brookes' argument on the Captiva regulations.
3 Mr. Brookes, you may recall, argued that this
4 particular property was subject to the Land
5 Development Code limitation of three hotel units
6 per acre. We violently disagree with that and I
7 have particularly strong feelings about it because
8 of course I'm the attorney for the Captiva Civic
9 Association and I have a strong familiarity with
10 those regulations.

11 Just so you understand, the Captiva
12 limitation of three hotel units per acre was
13 adopted by an ordinance in 1982. There were a
14 series of ordinances regulating general density on
15 Captiva Island prior to that. Those ordinances do
16 not have legal descriptions attached to them, but
17 if you look at the title block, they all talk
18 about Captiva Island. They don't say the Captiva
19 community, they don't say Captiva Island and
20 surrounding islands, this is Captiva Island, which
21 to the average person means Captiva Island.

22 Captiva and Captiva Island are not terms that
23 are defined in the Land Development Code.
24 However, when you look at the section on building
25 heights in the Land Development Code you will find

1 that there is a distinction drawn between Upper
2 Captiva and Captiva; they have different building
3 heights, and so it's quite clear that the authors
4 of the Land Development Code are able to
5 distinguish between those two islands and do in
6 fact do so.

7 Mr. Brookes' argument is based on the
8 language in the Lee Plan, in the vision statement
9 of the Lee Plan that essentially dove-tails into
10 the planning community's acreage table map which
11 was adopted by the county in the mid-to-late
12 1990s, well after the three unit per acre on
13 height limitation was put into the county
14 regulations. That particular language has a
15 regulatory purpose which is to limit the number of
16 acres that can be used for a particular purpose
17 within a planning area.

18 All of Lee County is put into various
19 planning communities; they are given generic names
20 like Daniels or North Fort Myers. It just happens
21 that the Estero community as defined in the Lee
22 Plan includes a number of other islands. But the
23 Estero community as identified in the mid-to-late
24 1990s has nothing to do with the regulations in
25 the county's zoning regulations back in the 1980s,

1 so it's clear to us that the Captiva Island
2 regulations don't apply to North Captiva. That's
3 the bottom line.

4 That concludes our presentation. If you have
5 any questions, I'll be happy to answer them.

6 THE HEARING EXAMINER: Okay. Thank you. I
7 don't.

8 Okay. This is not a bad place to ask any
9 members of the public who have to leave to come up
10 and make their comments now because that will give
11 you a little bit more time, plus I think this is a
12 good place to insert it at this particular point,
13 so anyone who has to leave -- and again, please
14 don't say you're leaving and then come back. Not
15 that you can't come back, but I'm not going to let
16 you speak the second time if you do come back,
17 let's put it that way. So now is your chance to
18 speak. It's first come, first served, so please,
19 whoever gets up there first.

20 MR. CICCARONE: Mr. Hearing Examiner, I was
21 going to suggest for the sake of expediency that
22 we're probably not going to have need for
23 cross-examination, but in case we do, if everybody
24 would just remain until everybody's had their say
25 in case we have a question or two of an individual

1 we could have that person come back up.

2 THE HEARING EXAMINER: Everyone meaning whom,
3 members of the public?

4 MR. CICCARONE: Yeah, the members of the
5 public.

6 THE HEARING EXAMINER: I'm not throwing
7 anyone out, so anyone who wants to stay certainly
8 may stay. I'm just simply saying that if you say
9 you're leaving I would rather you come up now out
10 of order. I don't want you to come back a second
11 time is all I'm saying.

12 MR. CICCARONE: What I'm talking about is if
13 they leave, if they propose to leave immediately
14 after they're done talking --

15 THE HEARING EXAMINER: Let me just do -- I
16 don't want to change anything. Please, I'm just
17 going to do what I have normally done. You always
18 come up with good suggestions, but it's different
19 than how I want to run it.

20 MR. CICCARONE: So we can cross-examine after
21 each witness?

22 THE HEARING EXAMINER: If you want to
23 cross-examine the witness when they're coming up,
24 that is certainly fine.

25 Okay, fine. Sir, I'm sorry. Raise your

1 right hand, please.

2 (Mr. Jenkins was placed under oath by Mr. Territo.)

3 THE HEARING EXAMINER: Please give your name
4 and address for the record.

5 MR. JENKINS: Okay. I'm Tom Jenkins. I'm
6 the owner of -- somehow I got left out of the loop
7 on this whole development. I'm right across the
8 street. There is me down here (indicating). And
9 anyhow, we've been here before. I've known Grady
10 for years. I've owned the property since '78,
11 camped there before electricity was there, watched
12 a lot of things take place.

13 So I came to this hearing because I didn't
14 really know much about it until I ran into Grady
15 out there and I saw it in the paper when I got
16 back last weekend. School teacher, got to get
17 going, so I've got to cover my class.

18 So sometimes I think we're missing a little
19 bit of the point. I have some good things to say
20 and some bad things to say, and so to me the whole
21 thing here, we're going over density here, density
22 there. This is a barrier island; there's only one
23 way for people to get there is by boat. Now, my
24 impact is -- and I know you brought it up about a
25 boat, using it as boating storage and things like

1 that. Well, people have got to get there by boat.
2 What I need to know is -- and what I -- and I may
3 be wrong on this so you have to correct me --
4 there's a total of eight boating docks for ten
5 units and a restaurant? Am I wrong on that?
6 Correct me if I am.

7 THE HEARING EXAMINER: Why don't we do this:
8 Why don't everybody ask their questions if you
9 have questions and when we're finished I'll ask
10 them to answer them all at one time.

11 MR. JENKINS: Okay, great, because I mean
12 you're talking about ten units, fifteen beds. If
13 everybody drives their boat out there I know where
14 they're going to park their boat, one more down
15 the canal, and that's probably our biggest problem
16 now. Anybody that's here that goes out to that
17 island, you'll understand that trying to find that
18 dock space out there is probably the most
19 difficult thing.

20 And so when it comes to like a regular
21 restaurant, let's say if you do a regular motel or
22 restaurant, would you need a parking space for
23 each unit that's available? I don't know. I'm
24 not up on this stuff.

25 So there is a totally different animal we're

1 dealing with out there, and so it's -- they're
2 legitimate questions. I know what he has planned
3 there will be done good, what he does, it will
4 look good and will be aesthetically nice, but I'm
5 really worried about what are we going to do now
6 we've got more people coming? We have enough
7 problems keeping up with the people that buy homes
8 there to try and give them some dockage.

9 So that's it.

10 THE HEARING EXAMINER: Thank you, sir. Any
11 questions of this gentleman?

12 MR. UHLE: No.

13 THE HEARING EXAMINER: Okay. Thank you, Mr.
14 Jenkins.

15 Yes?

16 (Mr. Hurst was placed under oath by Mr. Territo.)

17 THE HEARING EXAMINER: Please give your name
18 and address.

19 MR. HURST: My name is Robert Hurst. I live
20 on Championship Drive out in Gateway, and I read
21 the article in the paper on Sunday and I was very
22 excited about the opportunity for your average Lee
23 County citizen to be able to go out to Upper
24 Captiva and not have to rent a house for three
25 thousand, four thousand dollars a week, that I

1 could bring my family up there for two or three
2 nights. I enjoy fishing on Pine Island Sound and
3 to me this presents a great opportunity for the
4 citizens of Lee County to be able to access the
5 island.

6 And I know there's people out there that have
7 other businesses and have houses and I feel like
8 maybe some of the people that are here today are
9 here because they feel there's a conflict of
10 interest, but I like to fish on Pine Island Sound
11 and to me it represents a great opportunity for
12 the average guy who lives here in Lee County to
13 have access to your island, and we promise we
14 won't trash it, we won't overrun it.

15 THE HEARING EXAMINER: Thank you. Any
16 questions of this gentleman? Okay. Thank you,
17 sir.

18 Please come up.

19 (Mr. McDonald was placed under oath by Mr. Territo.)

20 THE HEARING EXAMINER: Please give your name
21 and address.

22 MR. MCDONALD: My name is Zeke McDonald. I
23 live on Upper Captiva. I've lived on Upper
24 Captiva about five or six years and moved to Upper
25 Captiva from Captiva.

1 And just to clarify, my general proclivity is
2 I'm one of those people, like many here, that I
3 found this paradise and of course I'd like to
4 close the gate behind us; I've always wanted to
5 blow up the causeway when I lived on Captiva to
6 keep the development from coming.

7 That being said, I know that that is an
8 unreal attitude and I ameliorate that with reason,
9 I think. I have known Grady for several years and
10 I have come to respect him and I expect that his
11 project will be done with the highest integrity.
12 I believe the site is perfectly appropriate. If
13 there's any place on Upper Captiva for hotel
14 rooms, I think Grady's lot is the perfect place.

15 There's already huge development of intensive
16 usage in the North Captiva Island Club, as with
17 saying they rent eighty houses. I was in one of
18 the houses that is a part of their rental program.
19 It was six bedrooms, three and a half baths and
20 advertised to sleep fifteen people. And this was
21 an old house, it's on the end of the runway on the
22 gulf side. They used to have two bedrooms and
23 it's been remodeled, if you will, just in the past
24 year or two.

25 My point is that Grady's project is not going

1 to increase the density of use on Upper Captiva.
2 What I think it will do, what I hope it will do,
3 is begin the process of giving some logic and some
4 legitimacy to the rental activity that's going on
5 out there right now. There seems to be absolutely
6 no enforcement of codes, no really limitation to
7 any renter's desires. I think that Grady's
8 project probably will have less impact on the
9 island than the surrounding houses that have been
10 built in the last couple of years that are used
11 primarily for rentals.

12 Also, because Grady's project is confined to
13 one area, I suspect that his clientele will be
14 more of pedestrians than other renters on the
15 island who are spread out in houses all over the
16 island and of necessity have to use golf carts,
17 which is an additional rental item. And I can
18 tell you by living on the one of the busy access
19 roads on Upper Captiva that we can see these
20 rental carts go up and down, up and down the --
21 what we call roads, which are just basically
22 easements -- fifteen times in two hours, the same
23 people just running back and forth.

24 I suspect that Grady's clientele will not be
25 doing that. He has said that he's not going to be

1 involved in cart rental; whether he rents a couple
2 of carts or not I don't think will be very
3 significant. But like I say, I think that the
4 type of development that he's suggesting will
5 be -- will lend to a more pedestrian and boat
6 centered kind of clientele.

7 I'm really happy to think that we could have
8 a small hotel up there and that would maybe put
9 some limitation on the random rental of these
10 residences up there that seem to be rented without
11 any oversight at all.

12 I believe the project -- and I've had a
13 chance to look at the staff report, as a member of
14 the Captiva Fire Commission I have been exposed to
15 the staff report and the draft plans and I think
16 they have a lot of integrity and would really be a
17 benefit to the island and to the people of Lee
18 County and I'm very aware that a lot of the
19 economic prosperity of Lee County comes from the
20 Lee Island Coast, and I think that this would be
21 an addition, welcome addition to that.

22 THE HEARING EXAMINER: Thank you, sir. Any
23 questions of this gentleman? Yes, Mr. Brookes or
24 Mr. Ciccarone?

25 MR. CICCARONE: Mr. McDonald --

1 THE HEARING EXAMINER: Come up closer so we
2 can get you on the record.

3 EXAMINATION

4 BY MR. CICCARONE:

5 Q. Mr. McDonald, I believe you testified that in
6 your words there's no enforcement of codes on Upper
7 Captiva.

8 A. I have not seen a lot of enforcement of codes
9 on Captiva and I don't really know the codes, to tell
10 you the truth, but I understand that we're an out
11 island, it's hard for code enforcement people to come.
12 And if I said that, that's what I meant.

13 Q. And do you mean sheriff enforcement or Lee
14 County administrative enforcement?

15 A. Oh, the sheriff comes up there every now and
16 then when there's something bad going on and in about
17 half an hour the sheriff will make it.

18 Q. Does that include at night?

19 A. Perhaps. I don't know. The sheriff doesn't
20 come to my house, thank goodness.

21 Q. Do you have any reason to believe that if
22 this application is approved that the county will be
23 more diligent in enforcing codes on Upper Captiva?

24 A. I don't think I'm qualified to answer that.

25 Q. I gather, though, that your comments are

1 based on perhaps observations that there has been what
2 you thought might be a need for code enforcement and
3 there hasn't always been a response to it, is that
4 correct?

5 A. My point is actually that I don't know that
6 there's any regulation over the number of people that
7 can use a particular bedroom or a particular toilet in
8 a private residence that's being rented fifty weeks a
9 month or a year. And I don't know, I don't know the
10 codes of Lee County, certainly not as well as you or
11 Mr. Uhle, but I have witnessed overuse of private
12 residences in rentals.

13 MR. CICCARONE: Okay. Thank you.

14 THE HEARING EXAMINER: Mr. Brookes? Let me
15 let Mr. Brookes speak.

16 EXAMINATION

17 BY MR. BROOKES:

18 Q. Could you walk over to the map of the
19 developed portion of the island and show us where the
20 public beach access points would be?

21 A. Well, right here (indicating) would be public
22 access, I would think, and down here at the state
23 lands would be public access. And the public tends to
24 like the end of the runway here, and as an owner, as a
25 partner in the runway, we've never kicked anybody off

1 that beach.

2 Does that answer your question?

3 Q. There's some good sea trout right off there.

4 A. Yes, there is. I caught some right out here
5 just the other day, but we'd just as soon not tell
6 everybody about that. It's where the Captiva guys go
7 when they can't catch fish.

8 Q. While you're out at the map, from Grady's
9 Lodge there, I guess the yellow, could you then show
10 us with your finger how you would get to the public
11 beach access points along the trails or what they call
12 roads or golf cart paths?

13 A. Yeah. They're easements, and the only way to
14 get to the state one would be would to go down here,
15 cross one of these roads here and walk down to the
16 state park right here (indicating). Other than that
17 you walk up here through Safety Harbor and down around
18 here and over there.

19 Q. Okay. And is that a length of route that
20 people on Upper Captiva Island normally take a golf
21 cart to get to?

22 A. Some people take golf carts, some people take
23 bicycles and I just walked that route yesterday, as a
24 matter of fact.

25 Q. Okay. And do you have a golf cart?

1 A. Sort of, yes. Sort of.

2 Q. Where is your house located?

3 A. Right here (indicating).

4 Q. Okay. And so when you cross through Safety
5 Harbor do you usually walk or take your golf cart?

6 A. Most of the time I drive there because I'm
7 going to my boat, which is in Safety Harbor.

8 Q. And once you get on a golf cart it's hard to
9 walk the same distance again, isn't it? You feel like
10 the golf cart is easier and you tend to jump on it?

11 A. My golf cart is not very fast. I can just
12 nearly walk as much. In fact, when it rains a lot I
13 leave my golf cart at home and wade there.

14 Q. You wade because the puddles actually take up
15 the entire road from left to right and you actually
16 have to walk through the road with your tennis shoes
17 or barefoot through inches of water, correct?

18 A. Sometimes feet.

19 Q. Yeah. Now, how long have you lived on the
20 island?

21 A. Like I said, five or six years. You want to
22 know exactly?

23 Q. No, that's fine. Did you vacation there
24 before you actually moved into your house there?

25 A. No.

1 Q. When you first moved into your house did you
2 use the beach more frequently than you use it now?

3 A. No.

4 Q. You still use the beach or you don't use the
5 beach at all?

6 A. Yes.

7 Q. Okay. And if someone is staying in a hotel
8 with their family, are they apt to be going to the
9 beach?

10 A. Not necessarily. There's a lot of activity
11 going on here in the bay, as was testified earlier.
12 The North Captiva Island Club have kayaks that go out
13 here and motor boats and jet skis, I think all manner
14 of watercraft. I don't know that -- I can't testify
15 that the users or the clients of Grady's Lodge would
16 be beachgoers. A lot of people that come to Upper
17 Captiva never go to the beach, that's why there are so
18 many -- so many swimming pools.

19 Q. Okay. I guess I would go to the beach, I
20 went there many times when I was there.

21 There's nothing to prohibit the people from
22 Grady's Lodge from going to visit the beach once or
23 twice a day when they're out there at least, correct?

24 A. I shouldn't think so, any more than it would
25 prohibit -- there would be any prohibition from the

1 eighty rental houses that are rented through North
2 Captiva Island Club.

3 Q. Okay. And people from all over the island
4 drive their golf carts in to use the existing two
5 restaurants on the island, correct?

6 A. Yes.

7 Q. They're pretty popular places to go eat if
8 you're not going to cook in your house, right?

9 A. Well, they're the only games in town if
10 you're not going to cook in your house. That's one
11 reason I think it would be very beneficial to have a
12 restaurant at Grady's Lodge, to stimulate competition.

13 Q. You think it would get a lot of business?

14 A. What I know of Grady's work and his pricing
15 and his compatibility, he'll probably do as well as
16 anyone.

17 THE HEARING EXAMINER: Okay, thank you.

18 Anyone else like to speak? Yes, sir.

19 (Mr. Wildeman was placed under oath by Mr. Territo.)

20 THE HEARING EXAMINER: Please give your name
21 and address.

22 MR. WILDEMAN: Roy Wildeman. My wife and I
23 reside at 4420 Harbor Bend Drive on North Captiva
24 Island.

25 THE HEARING EXAMINER: Spell your last name,

1 please.

2 MR. WILDEMAN: W-I-L-D-E-M-A-N.

3 THE HEARING EXAMINER: Thank you.

4 MR. WILDEMAN: We've been full-time residents
5 of the island for the past two years and have
6 owned property there since 1988. Our home is
7 located across the street from -- slower? Yeah.
8 Our home is located across the street from the
9 North Captiva Island Club, NCIC, and it is within
10 five hundred feet of the parcel under
11 consideration at this hearing.

12 Neither my wife, nor I, have any financial
13 interest in the subject property or its eventual
14 use and we have no social or business relationship
15 with the Applicant whatsoever.

16 I have read the staff report, read the
17 requested zone change and studied the site plan
18 artist renderings contained therein. I think the
19 small cabins or cottages will provide much needed
20 diversity of scale relative to the large
21 residential houses that have been built on small
22 lots in the immediately surrounding area. In
23 fact, as proposed, Grady's Lodge appears to be
24 less intense or less dense than that of the
25 surrounding dwellings when measured in terms of

1 total area per acre or bedrooms per acre.

2 Also, relative to the maximum permitted
3 coverage in either the C-1 or CPD zone, the
4 proposed development is significantly less intense
5 or less dense than the maximum permitted under
6 either regulation.

7 Furthermore, perimeter landscaping and the
8 placement of the cabins or cottages themselves
9 between the pool and lodge are sensitive to and
10 considered of abutting property owners.

11 Noise and nuisance are legitimate concerns
12 whenever a commercial zone abuts a residential
13 zone. Imposing operational stipulations and
14 limitations help reduce the likelihood of the
15 frequency of unwanted noise or nuisance, but there
16 will always be infractions and operational
17 policing is as important as the rules themselves.

18 NCIC has generally done a good job with
19 operational policing. There have certainly been
20 occasions when activities there have intruded on
21 our privacy, but these occasions have been
22 infrequent. Usually the sounds we hear from NCIC
23 are of a pleasant background nature; they are
24 rarely loud and rarely do they extend late in the
25 night. Wedding receptions and holiday weekends

1 generate the most noise and an occasional
2 nuisance, but even at these times the atmosphere
3 is generally festive and pleasant.

4 The noise from large cigarette-type boats in
5 the harbor are far more intrusive and
6 objectionable than that by the most boisterous of
7 NCIC activities. Grady's Lodge will probably
8 generate some of the same type of activity and
9 sounds as NCIC or the other island clubs or
10 restaurants. The fundamental question of fairness
11 is why shouldn't Grady's Lodge be just as entitled
12 to operate as these other dining, recreational and
13 entertainment entities.

14 I do have a few concerns with the proposed
15 project and a couple of constructive suggestions.
16 My concerns pertain to outside storage of
17 equipment, trash, garbage and junk. On the one
18 hand, I am pleased that the incinerator has been
19 withdrawn from the application. On the other
20 hand, I am concerned that Grady's Lodge and NCIC
21 will both utilize the area along their common
22 property line for outside storage and thereby
23 create unsightly back alley that each blames on
24 the other.

25 NCIC generally does a nice job with

1 landscaped fences to conceal their off-site
2 storage and I urge Mr. Scott a consider similar
3 solution. The other suggestion I have is to
4 elevate the cabins or cottages as little as
5 possible above the base flood elevation for
6 aesthetic reasons. The relatively small
7 structures would look ridiculous if they were
8 Perched on tall pilings.

9 Lastly, I think it is important to recognize
10 that the property under consideration has been
11 zoned for commercial use since 1964, '65;
12 consequently for the past thirty-nine or forty
13 years Mr. Scott or any other owner of this
14 property has been fundamentally entitled to
15 develop it for any of the many and varied uses
16 permitted in a C-1 zone.

17 As the staff report points out, many of these
18 permitted uses would be less compatible for the
19 residential nature of the surrounding area than
20 the proposed lodge and cabins or cottages. I
21 would much rather have Mr. Scott develop the
22 property as proposed than have it developed for a
23 use which would be less compatible or more
24 intrusive.

25 Also, I feel that Mr. Scott's long-term

1 presence on the island and his experience as a
2 developer, builder and operator of one of two
3 island restaurants speaks well of both his
4 long-term commitment to the island and his
5 determination to deliver what he proposes.

6 Thank you.

7 THE HEARING EXAMINER: Any questions of this
8 gentleman? Okay, thank you, sir.

9 MR. CICCARONE: If he could just show us
10 where he lives on the map.

11 THE HEARING EXAMINER: Okay.

12 MR. WILDEMAN: Well, let's see. This is the
13 location over here (indicating).

14 THE HEARING EXAMINER: Yes. Anyone else like
15 to speak?

16 (Mr. Durling was placed under oath by Mr. Territo.)

17 THE HEARING EXAMINER: Please give your name
18 and address.

19 MR. DURLING: My name is Richard Durling,
20 6720 Winkler Road, Fort Myers.

21 THE HEARING EXAMINER: Spell Durling, please.

22 MR. DURLING: D-U-R-L-I-N-G. I'm here today
23 to speak in favor of the approval of this project.
24 I've had the -- I'm the owner of Marvin
25 Development Corporation, we're home builders here

1 in Lee County for thirty-two years. I've had the
2 opportunity to build a couple of homes on Upper
3 Captiva and I'm very familiar with this piece of
4 property and the project in question.

5 I want to speak to, as I said, in favor of
6 the project. Not only do I feel it's compatible,
7 but I believe that the work that Mr. Scott has
8 done on Upper Captiva over the years has
9 demonstrated that he's going to do a quality job
10 in his, you know, concern for the neighbors. This
11 property has been vested as commercial property
12 for several decades now. Mr. Scott's been
13 involved on the island for many, many years, so
14 certainly his intentions and his vesting of that
15 property and the use of that is something that is
16 not new to anyone who lives or vacations on Upper
17 Captiva.

18 Quite frankly, Mr. Scott is a fixture of
19 Upper Captiva. It's not uncommon when talking
20 about Captiva and Upper Captiva to friends and
21 family that they will have known Grady for years
22 or know of him and he's like a fixture, a
23 permanent fixture of that island.

24 So there is no doubt in my mind that he will
25 do an excellent job and provide a needed

1 additional service and benefits to that island.
2 Many times people do go up there for weekends;
3 this will provide them with another opportunity,
4 not as large and I don't believe as intense, so
5 certainly I would hope that the Hearing Examiner
6 and the County Commission would move forward and
7 allow Mr. Scott the use of his property.

8 THE HEARING EXAMINER: Thank you, sir. Any
9 questions of Mr. Durling? Thank you, sir.

10 Anyone else like to speak? Yes, sir.
11 (Mr. Rapp was placed under oath by Mr. Territo.)

12 THE HEARING EXAMINER: Please give your name
13 and address.

14 MR. RAPP: Mike Rapp. I'm at 546 North
15 Captiva on Burt Circle. My primary residence is
16 in Ohio, Granville, Ohio, 43023, and you have my
17 address. I'll show where you I'm at.

18 THE HEARING EXAMINER: Yes.

19 MR. RAPP: Basically right in that area
20 (indicating), okay, so I'm relatively close. I've
21 got several concerns, in terms of testimony these
22 are my concerns. I may not necessarily have all
23 the facts, but I'm trying to gather that
24 information now.

25 Really, in terms of additional units on the

1 island, when I look at the data base of the North
2 Captiva Island Club I see very low occupancy rates
3 in other than the peak season, so there is plenty
4 of property available for folks to rent. And
5 there's also different rental agencies as well, so
6 you don't have to restrict yourself to the North
7 Captiva Island Club.

8 I see the island when I came to it as being a
9 single-family home setup. Most all the lots and
10 the highest percentage of the island are really
11 single-family dwellings. Some are used for
12 personal use all year round, some are used for
13 seasonal use. My biggest concern with this is the
14 fact that we're allowing zoning creep, and when I
15 say that zoning creep is that once we add one CPD
16 rating, then we allow others to continue to allow
17 that creep to occur. So that's my biggest
18 concern.

19 As far as C-1 uses, Grady, who I don't know,
20 I assume he's here in the room somewhere, I'm
21 fully in support of him using his C-1 zoning; he
22 has the right to do that, he purchased the land
23 like that. I'm more concerned about the zoning
24 creep.

25 I'm also concerned about things happen in

1 life that's not necessarily in your control. If
2 we turn around and we allow a CPD zoning, I think
3 that things can change, plans can change.
4 Something could happen to Mr. Scott, something
5 could happen to his investors and then the
6 property gets turned and now you have somebody
7 else that you're not used to dealing with. So I'm
8 very concerned with the fact that plans can change
9 and as a consequence what we're looking at today
10 is not what we would be looking at in the future.

11 I also have concerns about all the other
12 infrastructure things that I think everybody has
13 concerns with, even the current property owners,
14 such things as how long will the aquifer last,
15 what's the drainage rate, what's the trash
16 concerns. We have lots of issues with trash.
17 Sewage concerns. In case of a hurricane how would
18 we get everybody out if you have folks out there.
19 There's not very many ways out.

20 I think we heard earlier that dockage is a
21 concern on the island, the ability to get on and
22 off the island. A place to be able to take your
23 boat. You can spend as much on a dock as you can
24 spend on a house out there, so it's very expensive
25 to get a location for a dock.

1 Noise-wise I'm very, very close, at times I
2 agree, somebody else testified there are noises
3 coming from the club, typically it's very low key,
4 typically it's not big, it's the weddings, it's
5 the -- you know, the occasional crowd that gets
6 over there. When you're outside of my porch you
7 can hear it all, and so I'm a little bit concerned
8 about what I would call the back and forth.

9 There's another bar there, there's another
10 restaurant, whose got the loudest music, who's
11 playing the most current music, who's playing
12 whatever. And the thing that goes back and forth.

13 Beach access. We heard that earlier,
14 concerns about people getting to the beach.
15 There's not a very big beach access, as pointed
16 out there's really -- as far as I know there's
17 only one public beach access, but there are trails
18 or private roads that end at the beach, so I
19 really thought there was only one public beach
20 access. Most of the things that I see out there
21 that come to the island are the family rentals.
22 Most of the time you see families with small kids
23 coming there, and that's the type of environment
24 that when I came out and I fell in love with was
25 the serenity and the beautiful nature of the

1 island, and I was very impressed with just the
2 character and the way the island had been
3 developed, so I fell in love with it and that's
4 one of the reasons I built a home there.

5 And I hope to come back more and more and
6 stay there more and more over time, as times goes
7 on; when I retire it could be a great place for me
8 to live.

9 Let's see if I've covered everything here. I
10 think that's basically it, those are my concerns.
11 I'm not in favor at this point of going forward
12 with the plan that I see, and mainly it's centered
13 around where will it go if something would happen
14 where all of a sudden the property gets turned and
15 somebody else is now developing the property, then
16 we're back here talking about something different.

17 THE HEARING EXAMINER: Thank you. Anyone
18 have questions of Mr. Rapp? Yes, ma'am, come on
19 up.

20 MR. SCOTT: I have one question, yeah. Your
21 house on Longboat Circle, which one is it, the
22 pool home or the one closer to me or the one that
23 was just constructed?

24 THE HEARING EXAMINER: Give your name for the
25 record.

1 MR. SCOTT: My name is Grady, Grady Scott.
2 Pleasure to meet you.

3 MR. RAPP: I think on this map -- I'm going
4 to have to look here. There's a house here
5 (indicating). I'm in the middle.

6 MR. SCOTT: So this is the pool house, your
7 house, then the newly constructed one.

8 MR. RAPP: Yeah. I think this is the
9 Paradise Partners owns that lot. I own the next
10 one.

11 MR. SCOTT: Correct. You mentioned you were
12 from Ohio?

13 MR. RAPP: Yes, I am.

14 MR. SCOTT: When that was rented like three
15 weeks ago to all those ladies you had like ten
16 people and they were really partying down in the
17 pool, on the deck. Do you know how loud your
18 music was?

19 THE HEARING EXAMINER: Mr. Scott, ask
20 questions.

21 MR. SCOTT: I'm sorry.

22 THE HEARING EXAMINER: I don't want to get
23 into that kind of discussion. If you want to ask
24 a question you certainly may.

25 MR. SCOTT: One more thing. Now when you go

1 to sell your house, do we screen them on who you
2 sell it to? Is there a problem there? I mean you
3 have children, you have family. What happens?

4 THE HEARING EXAMINER: Let's not get into
5 this. He has a right to speak and if you disagree
6 you'll get a chance to speak as well.

7 MR. SCOTT: I'm sorry.

8 THE HEARING EXAMINER: I don't want to get
9 into that kind of discussion here. It gets too
10 personal.

11 MR. SCOTT: I apologize.

12 THE HEARING EXAMINER: That's all right.

13 Ma'am, you're next.

14 (Ms. Anders was placed under oath by Mr. Territo.)

15 THE HEARING EXAMINER: Give your name and
16 address.

17 MR. ANDERS: My name is Kristie Anders. I
18 live at 4550 Schooner Drive on North Captiva
19 Island. I have been a full-time resident for
20 almost eleven years. I do not rent my house. I'm
21 a year round resident there and commute every day
22 by boat to Captiva Island in order to continue to
23 work at the Sanibel Conservation Foundation.

24 I have known Grady for about eleven years now
25 and let me just show you where our property is so

1 that you know. We're located here (indicating).
2 We also are one-seventh owner in two hundred feet
3 of beach front property here (indicating).

4 In the eleven years that we've lived on the
5 island we knew that when we came and we looked at
6 the plat map that every one of those little tiny
7 squares that you see on the map has the potential
8 to be developed as a family home, and that's what
9 we had hoped would happen was that family homes
10 would be built, and we have in fact been sort of
11 suffering the consequences of the short-term
12 rentals that seem to be quite prolific on the
13 island. And we've had golf carts stolen and
14 smashed, we've had boats stolen, we've had all
15 kinds of consequences from visitors coming to the
16 island that are not very considerate about the
17 condition of the island.

18 Knowing Grady's Scott and the kind of quality
19 of business that he conducts, we have no -- I have
20 no doubt in my mind that his visitors will be well
21 informed about how to conduct themselves on the
22 island. I personally believe by witnessing what's
23 happened on North Captiva and the acquisition of
24 the North Captiva lands through the Conservation
25 Recreational Lands Program that that state park

1 land is something that should be used by the
2 people of the State of Florida and by the people
3 of the United States since their tax dollars did
4 buy that, and I think that Grady's Lodge will give
5 an opportunity to those people who might not be
6 able to afford those longer term rentals of five
7 bedroom houses to be able to come and stay
8 overnight and enjoy the property that they're
9 entitled to enjoy, and that's the state land to
10 the south of it.

11 And quite frankly, if you don't have a boat
12 the only way to do that is to come to a place like
13 Grady's Lodge and spend the night and go down and
14 enjoy those public lands that seem so inaccessible
15 and cost prohibitive to many people.

16 So I would ask that you consider Grady's
17 proposal. When I look at the difference between a
18 five bedroom house that may be the potential there
19 versus the lower impact cottages and the type of
20 unit that he has proposed there, I think that
21 we're going to get a visitor that I'd be really
22 proud to share the island with.

23 I also have with me letters from other
24 residents of the island, and I don't know if I'm
25 permitted to read those, I just have to ask.

1 THE HEARING EXAMINER: If you want to read
2 them, yes, you may, or you can give them to me and
3 I'll read them, whatever you want to do.

4 MS. ANDERS: I can read some of them,
5 perhaps.

6 THE HEARING EXAMINER: How many do you have
7 and how long are they?

8 MS. ANDERS: There are thirteen of them.

9 THE HEARING EXAMINER: We don't want to go
10 through thirteen letters. If you want to read one
11 of the shorter ones and give me the rest, I'll
12 take them as an exhibit. These are letters in
13 favor?

14 MS. ANDERS: Yes, they are.

15 THE HEARING EXAMINER: Okay.

16 MS. ANDERS: This is John Ed Pierce, who is
17 unable to be with us today.

18 "Gentlemen, I wish to endorse the approval of
19 Grady's Lodge on North Captiva Island proposed by
20 Grady Scott. I'm confident that his proposal will
21 receive your fair and impartial judgment. I am a
22 homeowner on the island as well as the owner of a
23 boat slip and residential building lot. I've
24 known Grady Scott since coming to the island nine
25 years ago and know that he is a popular and

1 respected resident and businessman.

2 I am also aware of his concern for the
3 welfare and of the environment of the island. It
4 is my opinion that Grady's Lodge for which he
5 seeks approval would be a sound addition and not a
6 detriment to the island.

7 It will be noted, I trust, that his proposed
8 establishment, rather than being an intrusion,
9 would fit well into the existing area. It would
10 abut the Mango Island Restaurant, the pool bar,
11 the swimming pools, the tennis courts, the
12 basketball courts and other things operated by the
13 North Captiva Island Club. It's operation would
14 not therefore violate the area's ambiance or
15 create an unusual or disruptive traffic; on the
16 contrary, the lodge would answer a need long
17 recognized for visitors who come to the island and
18 look for overnight lodging, which does not exist
19 unless a visitor wishes to rent a house for rates
20 of fifteen hundred to four thousand dollars a
21 week, the minimum rental period.

22 Such visitors would not be an unseemingly
23 addition and would likely form a very positive
24 impression of the island. They would be unlikely
25 to create more noise than already emanates from

1 the aforementioned businesses and adjoining boat
2 docks.

3 Grady Scott is a reputable businessman and
4 valued resident. You may be assured that he would
5 operate this facility conscientiously and I beg
6 your careful consideration."

7 That and twelve others here.

8 THE HEARING EXAMINER: Thank you, ma'am.
9 What I'll do is I'll take those as Ander's Exhibit
10 Number 1. Thank you, ma'am.

11 Anyone else like to speak? Anyone? This is
12 only for people who can't come back. Were you
13 finished?

14 MS. ANDERS: Just one other point. I have
15 also witnessed that Grady has done -- as a
16 conservationist that Grady has worked aggressively
17 to keep that lot beaten back from the invasive
18 exotic species that are on the island and
19 Brazilian Pepper control is already something that
20 he's worked on, and I have seen the landscape on
21 his other businesses on the island, particularly
22 the restaurant and know that it's done with a
23 minimal amount of irrigation and sensitivity to
24 the native plants of the area.

25 THE HEARING EXAMINER: Thank you very much.

1 Yes, ma'am.

2 (Ms. Kinsey was placed under oath by Mr. Territo.)

3 THE HEARING EXAMINER: Please give your name
4 and address.

5 MS. KINSEY-SCALA: My name is Ava
6 Kinsey-Scala. I live on Bokeelia, 15696; my
7 family homestead is North Captiva. We bought our
8 land in 1962. One of the first neighbors and one
9 of the first friendly competitors we had on North
10 Captiva was Grady when he had his restaurant
11 there. He conducted himself in a fine manner and
12 he did a good job with what he had.

13 I'll say that for a while -- if you want to
14 know where my land is, I'll show you.

15 THE HEARING EXAMINER: Yes, please do that.

16 MS. KINSEY-SCALA: Okay. I've got that
17 (indicating), I've got that, I've got that, I've
18 got that, I've got that, I've got that, I've got
19 that, I've got that one up here. So I have been
20 there a while. You want me to go to the other
21 one?

22 THE HEARING EXAMINER: No, that was fine.
23 Thank you.

24 MS. KINSEY-SCALA: Now, we have been there,
25 we have been developing, Grady has -- this is

1 besides the point, but let me give you my feeling
2 on this. When my father used to fly to the
3 island, Grady was the line boy at the airport and
4 used to fill his plane with gas, and that's how
5 Grady became in love with the island. And all
6 these years he's held this dream of doing
7 something on the island and I believe that if he
8 follows these strict rules that Lee County has
9 laid forth, there is no reason he shouldn't be
10 able to do that.

11 So that's all I have to say.

12 THE HEARING EXAMINER: Thank you very much.

13 (Mr. Holzapfel was placed under oath by Mr. Territo.)

14 THE HEARING EXAMINER: Please give your name
15 and address.

16 MR. HOLZAPFEL: My name is Bill Holzapfel,
17 H-O-L-Z-A-P-F-E-L, and I'm a landowner on Upper
18 Captiva; I have been for the past twenty-three
19 years I have lived there full-time, owning a house
20 there for the last eight years.

21 I just wanted to say that I'm in favor for
22 all the reasons that everyone has spoken of Grady
23 being able to do this. I also wanted to make you
24 aware, sir, that I'm a chairman of the fire
25 commissioners on the island and the fire

1 commissioners voted unanimously to approve Grady's
2 project, with the exception in the original plans
3 we had an incinerator, which we didn't want;
4 that's since been struck from the plans, but the
5 fire department has no problem with this project.

6 THE HEARING EXAMINER: Thank you very much.
7 Yes?

8 (Ms. Payne was placed under oath by Mr. Territo.)

9 THE HEARING EXAMINER: Give us your name and
10 address, please.

11 MS. PAYNE: Carrie Payne, 14360 McGregor
12 Boulevard. Our family actually owns two pieces of
13 property on Upper Captiva. We don't have houses,
14 so I'm one of the vacationers who brings -- who
15 rents those rentals, and I think I'm in favor of
16 Grady's project just due to the fact that we do
17 have to get three people together and rent one of
18 these homes for the week, and I think with Grady's
19 project having individual units we can have the
20 privacy of just bringing our family and just going
21 for the weekend or the week and not having to get
22 three couples together, three families. And I
23 think it would be less intrusive than the rental
24 homes already out there.

25 And as someone said something about the beach

1 earlier, I can attest to the beach is great for
2 one day, but when you have little kids they get
3 really tired of the beach, they would much rather
4 go right straight to the pool. That's what we
5 normally do when we go out.

6 THE HEARING EXAMINER: Thank you. Anyone
7 else? Yes, sir. Spell your last name.

8 MS. PAYNE: P-A-Y-N-E.

9 (Mr. Claypool was placed under oath by Mr. Territo.)

10 THE HEARING EXAMINER: Give us your name and
11 address.

12 MR. CLAYPOOL: Chuck Claypool. I live at
13 15179 Anchorage Way. I own the property at 4491
14 Smuggler's Cove, and again, we intend to build out
15 there, it's not built on right now, and we wholly
16 support this project. One of the reasons that I
17 support it is my family goes out there and they
18 rent spaces and myself and my wife, we'd love to
19 go out in the boat and go out there, but we're not
20 a couple that likes to stay out there for a week;
21 we would like to have a place we could go out,
22 spend a night, two nights at a time and there's no
23 place you can do that.

24 Like I said, we own property there, and to
25 alleviate the gentleman's concern about the CPD, I

1 believe that the regulations and the reason they
2 have the CPD is the fact that -- and I'm a
3 builder -- is the fact that the County does have
4 that as a way that the County does have of putting
5 stipulations onto a project to where it's C-1
6 zoning or whatever the zoning is, there may be
7 hundreds of uses that you can do, and with the CPD
8 you're limited to what you can do and what you
9 apply for; there's very specific uses, then they
10 also then will allow you to have maybe two or
11 three other items and that would do it.

12 So if your concern is about what can be done,
13 the most safest thing that can be done on a
14 project is a CPD rather than just having your
15 regular zoning. And again, I wholly support this
16 and would hope that the Hearing Officer concurs.

17 THE HEARING EXAMINER: Thank you, sir.

18 Anyone else? Yes.

19 (Mr. Anders was placed under oath by Mr. Territo.)

20 THE HEARING EXAMINER: Please give your name
21 and address.

22 MR. ANDERS: My name is Wilton Anders, 4550
23 Schooner Drive, one block south of the property
24 Grady wishes to propose.

25 I'd really like to see his property go

1 forward. I have -- I grade my street, Schooner
2 Drive, the road commission has brought the dozer
3 down and taken dirt off of my property and pushed
4 it into the holes next door, and I had to bring
5 the police out and have them stopped and have them
6 replace my dirt because they virtually stole it,
7 because they put it over on my neighbor's
8 property.

9 Besides that, the golf cart impacts that I
10 see on my street and the other streets are more
11 from the new tires and the bigger cars that we
12 have and the big mud tires; and all the old carts
13 that we used to have were the flat tires, like
14 they roll across the grass on the golf carts. So
15 the impacts that Grady's going to create with the
16 few new carts that he has is nothing compared to
17 just the change of tires and the models of new
18 golf carts they have coming out nowadays.

19 As far as sheds on Grady's property, that was
20 brought up before, it's a tool shed that I worked
21 on a few times to keep the leaks out; it had
22 tarpaper on it for many years, but it's on skids
23 and we move it around the property just to house
24 tools and keep it out of sight so that it would
25 always stay no eye sore to the community.

1 I would like to say that I do want this
2 property to be built because my family, when they
3 come down, we have a little one bedroom house on
4 Upper Captiva and there is no room for our guests
5 when they come, and if you can't put them up for
6 two nights at a place that's on the island, you
7 have to rent one of the larger houses, and I'm a
8 worker as a carpenter and the incomes on these
9 rentals break you, you can't afford it.

10 And so things like Grady's would be a great
11 benefit to our area. I do appreciate it.

12 Thank you very much.

13 THE HEARING EXAMINER: Welcome.

14 Anyone else? Yes. Folks, you are going to
15 be coming back. What I'm going to do is I'm going
16 to make a one hour break for lunch, then we'll
17 come back and see what we can do for the rest of
18 the day.

19 Okay. We're going to come back at 1:15.

20 (A luncheon recess was taken at this time and
21 the proceedings resumed at 1:15 p.m.)

22 THE HEARING EXAMINER: Okay, we're back on
23 the record and I'm going to have Mr. Kelner make
24 his presentation now.

25 MR. CICCARONE: We were going to tell you

that if you want, we can go ahead with the cross-examination of the Applicant's engineer, get him out of here before Mr. Kelner goes forward, if that's what you want to do.

THE HEARING EXAMINER: That's fine, sure.

That makes some sense, too. Are you going to have questions for their first witness as well, Mr. Hutcherson?

MR. CICCARONE: We did that already.

THE HEARING EXAMINER: I know. You didn't have much and I didn't know --

MR. CICCARONE: No, that was it.

THE HEARING EXAMINER: All right. That's fine. Okay. That's fine, sir. Come back up here. Either that or you can sit over here and we can have the attorney get up there. Why don't you sit over here, that way you'll have your paperwork and Mr. Ciccarone, you can go to the microphone then, we'll do it that way.

MR. CICCARONE: Okay. Once again for the record, Michael Ciccarone representing Bernard Frye. I only have a couple questions for Mr. Struthers.

EXAMINATION

BY MR. CICCARONE:

1 Q. One is now that we've had a chance to review
2 your report dated February 23, 2004, if I'm reading it
3 correctly you've calculated that the -- because of
4 soils and whatever, that the maximum septic demand
5 that the property could be -- could sustain,
6 notwithstanding whatever else might be in the zoning
7 ordinance, is three thousand, eight hundred and fifty
8 gallons per day. Are we reading that correctly?

9 A. That's correct.

10 Q. Okay. Now, the next question is when you
11 look at the projected sewage flow, that's the next
12 page that breaks it down by use, do you have that in
13 front of you?

14 A. Yes.

15 Q. Okay. Under food operation you have thirty
16 seat at forty gallons per day, six seat at twenty
17 gallons per day. My question is, why did you use
18 those numbers? Not the gallon per day, but the number
19 of seats.

20 A. Basically what I was told with the project
21 that the proposal was a thirty seat restaurant and
22 that they were proposing six bars around a pool bar
23 outside.

24 Q. All right. So let me see if I understand,
25 then. If those numbers change then obviously your

1 calculations would have to change, correct?

2 A. That's correct.

3 Q. All right. And I'll defer to you on the map,
4 but I did a quick calculation over lunch and am I
5 correct that if an additional seventy seats were added
6 for the restaurant use, which is at forty gallons per
7 day per seat, that would put you at a demand that
8 would exceed the 3850 limitation? Seventy. Forty.

9 Oh, I'm sorry. I guess the question is --
10 since I'm not very good at math and Mr. Depew has just
11 reminded me once again and it's a supreme irritation
12 that I'm not good at math, what would the number be in
13 the seating demand that would cause that thirty-eight
14 fifty to be exceeded? And I presume so many seats at
15 forty, so many at six or some combination thereof
16 would cause you to exceed the ability of the property
17 to handle its waist by septic, is that correct?

18 A. Yes. Any increase in any of the categories
19 would cause, you know, a change in the fluctuation,
20 and if you look on the last page in the summary, what
21 we have is basically we're under the allowable sewage
22 flow of two hundred and thirty gallons, so any
23 combination we would make to exceed two hundred thirty
24 we would exceed the state requirements.

25 Q. I see. So there we go. So if I have forty

1 gallons per day per restaurant seat, if I had six
2 extra seats then I would exceed your thirty-eight
3 fifty number. Is my math finally getting better? Is
4 that correct?

5 A. If you make it a thirty-six seat facility?

6 Q. Yeah. If I were to change your thirty to
7 thirty-six seats, would that then require me to have a
8 package plant?

9 A. No. It would require -- well, in other words
10 it would not meet the state regulations, which they
11 have a permitted -- an authorized sewage flow based
12 upon the acreage of the ground, and if you look though
13 the beginning calculations it's twenty-five hundred
14 gallons per day per acre, so it has nothing to do with
15 requiring a package treatment plant, it's what would
16 be permitted on the site.

17 Q. Regardless of how the sewage is handled?

18 A. That's correct.

19 Q. So that even with a package treatment
20 plant -- I mean is it your testimony that even if the
21 applicant wanted to put a package treatment plant in,
22 unless he connected to a central sewer, if the thirty
23 seat facility were to be a thirty-six seat facility or
24 in the alternative the six seat pool bar were to
25 become a twelve seat pool bar, then you could not meet

1 the state regulations for handling the sewage demand
2 from this development, is that correct?

3 A. Not exactly.

4 Q. Okay. Tell me where I'm wrong.

5 A. If we exceed the three thousand, eight
6 hundred and fifty gallons, we would not be able to get
7 a permit for an on-site sewer system because that
8 exceeds the requirement that is specified by the state
9 regulations.

10 Q. And that's on-site sewage system, regardless
11 of whether it's a septic systems or a so-called
12 package treatment plant?

13 A. Well, we're dealing with an on-site system
14 here.

15 THE HEARING EXAMINER: I'm having the same
16 problem you are. Basically you're saying that if
17 you are using a septic system, that's how they
18 calculate the maximum sewage use for a septic
19 system because it's the land that has to absorb
20 that?

21 MR. STRUTHERS: Correct.

22 THE HEARING EXAMINER: If you had a sewer
23 system that went to a package plant, then you'd
24 use a different calculation, presumably?

25 MR. STRUGHERS: Exactly.

1 THE HEARING EXAMINER: So if it's anywhere
2 between the thirty-six eight, or whatever it is,
3 and five thousand, does that mean you can't do it
4 unless you put a package plant in there of some
5 sort or is there some other way of doing that?
6 Do you take it off? You carry it off or what do
7 you do with it?

8 MR. CICCARONE: So that's my question. You
9 asked it much better.

10 MR. STRUTHERS: Essentially what we're
11 dealing with is an on-site treatment system.

12 THE HEARING EXAMINER: Right. And this is
13 the maximum capacity for that system.

14 MR. STRUTHERS: Right.

15 THE HEARING EXAMINER: If you were to exceed
16 that, then how would you handle that?

17 MR. STRUTHERS: Then we'd have to come up
18 with another alternative to meet state
19 regulations.

20 THE HEARING EXAMINER: Which is what? Is
21 there any other way besides doing an actual sewage
22 plant, from an engineering perspective?

23 MR. STRUTHERS: You mean a package plant?

24 THE HEARING EXAMINER: Any other way. I'm
25 just asking.

1 MR. STRUTHERS: Well, I'm sure there are
2 package treatment plants that could meet the
3 requirements, you know, in design, but again,
4 that's not something that we've explored at this
5 particular time because we're looking for, you
6 know, an on-site septic system that would meet the
7 state and county permitting requirements. I
8 haven't explored going any further because with
9 this project we were under the guidelines for an
10 on-site system.

11 MR. CICCARONE: I understand. In other
12 words, you're qualified in the area, but you
13 haven't been hired to perform a package treatment
14 plant alternative analysis?

15 MR. STRUTHERS: Yeah.

16 MR. CICCARONE: All right. I'm not going to
17 ask you to suddenly do that for free as you a sit
18 here. Those are my questions.

19 MR. STRUTHERS: Now, as far as the
20 qualifications, I mean we have the technology and
21 I have designed plants that -- well, I got in a
22 lot of trouble with Sanibel because I told them I
23 could design a treatment plant I could discharge
24 into the Sanibel River.

25 MR. CICCARONE: They didn't like that?

1 MR. STRUTHERS: No. But the technology is
2 there.

3 MR. CICCARONE: I can't speak for Mr. Depew,
4 but I'm done, and as far as I'm concerned, unless
5 the Applicant needs you, you are certainly free to
6 go.

7 THE HEARING EXAMINER: Thank you. Anyone
8 else have any questions for this gentleman?

9 Okay. Thank you. As soon as you walk out
10 they're going to want you, I'm sure.

11 MR. KELNER: For the record, Brian Kelner,
12 Principal Planner, Department of Community
13 Development.

14 My resume is on file at the Hearing
15 Examiner's Office and I would like to be qualified
16 as an expert in zoning and planning.

17 MR. UHLE: No objection.

18 MR. BROOKES: No objection.

19 MR. CICCARONE: No objection.

20 THE HEARING EXAMINER: Without objection you
21 are accepted.

22 MR. KELNER: The Staff reported was
23 originally completed April 7, 2004; it's on file
24 with the Hearing Examiner's Office. I had
25 received a few calls on it, plus numerous e-mails

1 and faxes and letters, which I have forwarded all
2 of them to the Hearing Examiner's Office, so they
3 are on file with the Hearing Examiner's office.

4 Also today I received a call from Richard
5 Pepper and he advised that Mr. Holzapfel, who's
6 here today, I'm not sure if he's still in the
7 hearing room here today, I don't think so, but
8 basically what Mr. Pepper had relayed to me was
9 the Upper Captiva fire department -- that he had
10 several questions asked of him about hurricane
11 evacuation and Mr. Pepper advised me that a
12 hurricane evacuation plan for the island is on
13 file with the Emergency Operations Center, so I
14 just wanted to relay what Mr. Pepper had mentioned
15 to me.

16 THE HEARING EXAMINER: Okay. Thank you.

17 MR. BROOKES: I have to enter a brief
18 objection here. I had asked the fire district,
19 Chief Pepper, to mail that to me, he did not mail
20 that to me. I asked my clients, the Rapps, to go
21 out there yesterday and they could not locate the
22 evacuation plan, so at this point I'm unable to
23 review that evacuation plan, kind of being given
24 the runaround to different places and it's not
25 anywhere that I go for it.

1 So I think it's hearsay that he's not here to
2 ask him about it, I don't have the document, I
3 can't review the document, so it would be unfair
4 to assume that it's in compliance without having
5 the document or someone here to question him about
6 it.

7 THE HEARING EXAMINER: I understand the
8 objection. I'll let it in as hearsay, but I will
9 not base my opinion on it. Thank you. My
10 recommendation.

11 MR. KELNER: Some additional information of
12 course is provided by the Applicant regarding the
13 proposed rezoning. Also, staff had recommended a
14 couple of changes to the staff report and
15 conditions of approval at the last hearing. What
16 I tried to do this time is just bundle together
17 all of the previous conditions, the ones that the
18 Applicant had provided to date, into one document
19 to make it just easier, and I could go over those
20 now.

21 THE HEARING EXAMINER: Okay.

22 MR. CICCARONE: Do you happen to have another
23 copy?

24 MR. KELNER: Yes, I think I do.

25 THE HEARING EXAMINER: All right. I'm mark

1 this as Staff Exhibit Number 1, I believe.

2 MR. KELNER: With regard to -- under the
3 application on page 2 of 6 -- and I tried to put
4 these also in bold -- as you can see where the
5 incinerator of course has been deleted from the
6 proposed schedule of uses.

7 Also in the schedule of uses, as you see
8 here, the only permitted use within this
9 commercial planned development is a hotel and
10 motel. If a person wants to permit any other uses
11 they would have to come back in for a public
12 hearing again to add uses to it. So the use of
13 this particular project is just limited to
14 hotel/motel.

15 THE HEARING EXAMINER: Okay. You have the
16 maximum of fifteen cabins in there. Do we want to
17 change that to ten?

18 MR. KELNER: Yes, I believed that had got in
19 there.

20 THE HEARING EXAMINER: Not in the one I have.
21 Mine says fifteen.

22 MR. KELNER: Oh, that's correct, yes. I'm
23 sorry, I missed that. That should be ten.

24 MR. CICCARONE: Mine does say ten.

25 THE HEARING EXAMINER: I must have a

1 different copy then.

2 MR. UHLE: Mine says fifteen as well.

3 MR. KELNER: This is on page 2 of 6, right up
4 at the top.

5 MR. CICCARONE: I see it.

6 THE HEARING EXAMINER: It also says fifteen
7 in the request, but I understand that. Okay.

8 MR. KELNER: Yeah. On page 3 of 6, with
9 regard to the area, the Applicant on their
10 application I believe had showed that no
11 subdivision requested as far as the area, and I
12 have inserted in there 1.5 acres, which is the
13 actual acreage of the property itself.

14 THE HEARING EXAMINER: 1.59 acres.

15 MR. KELNER: That's correct.

16 THE HEARING EXAMINER: Okay.

17 MR. KELNER: With regard to the development
18 perimeter, the Applicant had requested ten feet
19 and of course we're showing that as fifteen feet,
20 because that's your easement that's required along
21 the perimeter south of the property.

22 With regard to the maximum height, we had
23 thirty feet, thirty-five feet, maximum is two
24 stories. We added lodge only and the maximum
25 height, twenty feet for the ten cabins.

1 With regard to number 3, and Mr. Ciccarone
2 raised it in the relationship to what's on the
3 Master Concept Plan and what's in the condition of
4 approval, we had this development is limited to
5 four thousand, two hundred square foot lodge
6 building containing a caretaker's residence,
7 commercial retail and office uses, a one thousand,
8 one hundred and twenty-five square foot covered
9 porch and an outside three hundred square foot
10 pool bar as depicted on the Master Concept Plan.

11 And I put in there also is that on the Master
12 Concept Plan with the change here we have the
13 different areas; we have lobby and administrative
14 office and of course that's been increased to a
15 thousand square feet. We have the kitchen, five
16 hundred, restaurant, seven fifty, real estate
17 office, seven hundred and fifty square feet. So
18 in other words they'll have to comply with those
19 requirements as shown on the Master Concept Plan.

20 THE HEARING EXAMINER: That comes to three
21 thousand, if I added it up correctly, so to get
22 the forty-two hundred is the other twelve hundred
23 feet for the caretaker's residence on the second
24 floor? Is that correct?

25 MR. HUTCHERSON: Yeah.

1 THE HEARING EXAMINER: All right.

2 MR. KELNER: And the development is also
3 limited to a maximum of ten hotel/motel units,
4 cabins, having a maximum size of seven hundred and
5 fifty square feet, or five cabins and a maximum
6 size of four hundred square feet for the remaining
7 five cabins, excluding the optional porches.

8 The typical cabin must be in substantial
9 compliance with the attached artist rendering
10 attached hereto as Exhibit A; the caretaker's
11 residence within the lodge building is in addition
12 to the ten hotel/motel units.

13 The typical exhibit, of course we don't have
14 it up here at this time, but there was an exhibit
15 from the last hearing showing the various
16 configurations of the typical cabin.

17 There is no changes to the environmental
18 conditions. Also to the enhanced buffer, there's
19 been no change to that.

20 Number 6, again on page 4 of 6, consumption
21 on premises. The Applicant had in there the
22 background music is prohibited before -- and he
23 had 6:00 p.m. Monday through Sunday; Staff added
24 background music is prohibited before 10:00 a.m.
25 and after 6:00 p.m. Monday through Sunday. And if

1 it was left at 6:00 p.m. that means you could have
2 it early in the morning, so Staff felt that it's
3 good to limit it in the morning, also. I don't
4 think there's an objection from the Applicant on
5 that.

6 MR. UHLE: No. It makes sense.

7 MR. KELNER: Of course item number 8 on page
8 5 of 6 has been deleted in its entirety.

9 Number 11 -- and this was from a previous
10 correspondence to the Hearing Examiner on April
11 15th, and the only change is we reduced the
12 fifteen hotel/motel units to ten and it now reads,
13 "The ten hotel/motel units cannot be
14 condominiumized, nor can separate long-term leases
15 be granted for more than thirty days per calendar
16 year. Prior to local development order approval
17 these restrictions must be recorded in the public
18 records of Lee County."

19 And number 12, again changing from fifteen to
20 ten hotel/motel units and it now reads, "The ten
21 hotel/motel units cannot be outfitted with
22 kitchens or cooking facilities." This does not
23 prevent a person from having a coffee maker or the
24 likes within a room.

25 "The developer must provide" -- number 13.

1 "The developer must provide for their project --
2 provide that the project will be served by an
3 adequate water flow supply prior to any
4 development order approvals."

5 And these last conditions of course were just
6 brought in. Number 14, golf cart batteries may
7 not be stored outdoors.

8 Number 15, the exact location of all building
9 footprints, accessory uses, driveways and golf
10 cart parking areas will be adjusted as necessary
11 to avoid unnecessary destruction of indigenous
12 vegetation and no indigenous vegetation will be
13 removed outside of these designated areas.

14 And number 16, the developer will make an
15 annual contribution of four thousand dollars to
16 the North Captiva Road Commission to offset any
17 additional impacts to the road system as long as
18 the Commission continues to solicit and use funds
19 to improve the roads to North Captiva.

20 And that I think summarizes all the changes
21 we had over the two hearings. There is one
22 deviation that was requested with regard to
23 Section 10-291(2) which requires that all
24 development must abut and have access to public
25 and private streets designed and constructed or

1 improved to meet the standards in Section 10-296,
2 (a category A road); to allow golf cart access to
3 existing shell and gravel road.

4 Policy 1.4.2 of the Lee Plan addresses the
5 continuation of the Outer Islands essentially in
6 their present character, which is intended to
7 provide for rural character and lifestyles,
8 conserve open space and important natural upland
9 resources. The subject property, located on a
10 barrier island, is not required to provide parking
11 areas pursuant to Section 34-2011 of the Land
12 Development Code. However, the Applicant has
13 provided parking spaces for the golf carts.

14 And Upper Captiva island is not connected to
15 the mainland, and with the exception of work and
16 fire vehicles, the primary mode of transportation
17 is by golf carts. By requesting the deviation,
18 the Applicant is maintaining the rural character
19 and lifestyle intended by the island in Policy
20 1.42 of the Lee Plan.

21 And Staff has recommended approval of that
22 deviation.

23 THE HEARING EXAMINER: Thank you.

24 MR. KELNER: I will try and summarize the
25 report as best I can so that we won't get into as

1 much detail as possible. I think everybody knows
2 where the property is located and it's not
3 necessary to go over that in much detail.

4 I would like to point out, though, that there
5 is previous rezonings in the area and that the
6 subject property, of course being 1.59 acres is
7 zoned C-1. There's been two zoning requests on it
8 with regard to the subject property. The first
9 request rezoned the most easterly portion of the
10 property to C-1 in December, 1964, and the second
11 request rezoned the most westerly portion of the
12 property to C-1 in 1965.

13 Also in December of 1964 there was a request
14 for the Board of County Commissioners that also
15 included a special permit for a marina on the
16 adjacent property immediately northeast of the
17 subject property, and what I think we're really
18 referring to is that portion that would be right
19 up in this location right here (indicating) where
20 the marina is now located.

21 The Staff of course has contacted the Upper
22 Captiva Fire Department with regard to the
23 proposed development. The fire department had no
24 objections to the project; however, they had two
25 minor concerns: Access to the most southerly

1 units and access to the docks, draft point number
2 eleven. And I'll just point that out on the
3 Master Concept Plan, draft point number eleven I
4 believe is right at this location here
5 (indicating).

6 And the district would like to ensure that
7 the south buffer is accessible to the rear of the
8 south units. This would entail staggering the
9 buffer so that they can get hoses into it, yet
10 still have a continuous buffer, and Staff has a
11 condition in the conditions of approval that
12 addresses that; and of course when they plant the
13 buffer they'll have to contact the Upper Captiva
14 Fire Department to ensure that those access points
15 are there. And this also not only extends to the
16 south side, but it also extends to the east side
17 of the property. Another thing is that the
18 Applicant also has revised the inside turning
19 radius on the project driveway to thirty-five feet
20 to accommodate the fire department vehicles that
21 they presently have.

22 With regard to the Master Concept Plan,
23 again, there is a fair amount discussion on it;
24 the Applicant has laid out the location of them.
25 There's ten cabins and of course with optional

1 porches.

2 A Type D buffer adjacent to Rum Road and a
3 Type A buffer would be adjacent to the Captiva
4 Island club on the north side of the subject
5 property.

6 The Applicant also is proposing consumption
7 on premises with regard to the property, and the
8 closest residence roughly from what we could see
9 from measuring from the pool and outdoor deck area
10 would be about a hundred and fifteen feet, and
11 Staff again had a concern with permitting
12 consumption on premises in close proximity to the
13 residential uses and especially with the outdoor
14 seating area. And Staff -- we had reviewed the
15 consumption on premises approval for the Captiva
16 Island Club and the Mango Island Cafe, which both
17 have outdoor seating and both are located
18 immediately north of the subject property.

19 Staff has recommended of course similar
20 conditions in our approval to those that were
21 approved for those two projects.

22 With regard to the Lee Plan, Staff finds that
23 there's Policy 1.4.2, the Outer Islands, and also
24 Captiva. With regard to Captiva in general, the
25 community includes the major islands of Captiva

1 Island, Upper Captiva Island, Cayo Costa, Useppa,
2 Buck Key and Cabbage Key and the surrounding
3 smaller islands.

4 Although Captiva Island is a seasonal resort
5 community in comparison to other islands in the
6 community, it is the center of activity. Due to
7 the nature of the community, residents must
8 satisfy their major commercial and industrial
9 needs outside the community. Conversely, the
10 commercial aspects of the Captiva community are
11 utilized by many residents and tourists from
12 outside the community.

13 With regard to Policy 1.4.2, the outer
14 islands are sparsely settled, have minimal
15 existing or planned infrastructure and are very
16 distant from major shopping and employment
17 centers. They are not expected to be programmed
18 to receive urban-type capital improvements in the
19 time frame of this plan, and as such can
20 anticipate a continued level of public service
21 below that of other land use categories. The
22 continuation of the Outer Islands essentially in
23 their present character is intended to provide for
24 a rural character and lifestyle and conserve the
25 open space and important natural resources.

1 Upper Captiva Island is within the Captiva
2 Island community and the commercial aspects of the
3 Captiva community are utilized by many residents
4 and tourists from outside the community. It is
5 this aspect that the Applicant is looking to
6 capture by providing a hotel/motel development
7 that will mimic the rural character and lifestyle
8 of the community.

9 And I think we heard some of the testimony
10 today with respect to that; of course we have the
11 park to the south of it and people are coming to
12 enjoy that particular facility.

13 With regard to Section 34-1801, which deals
14 with -- defines a hotel and motel as a building or
15 a group of buildings on the same premises under
16 single control consisting of ten or more sleeping
17 rooms used, maintained and advertised or held out
18 to be -- to the public to be a place where
19 sleeping accommodations are supplied for pay to
20 transient guests or tenants.

21 Hotel/motels must be registered with the
22 Department of Revenue as a bona fide hotel/motel
23 operation and are required to pay the levied
24 tourist development tax promulgated by the county.
25 Hotels and motels that are not registered with the

1 Department of Revenue or do not pay the tourist
2 tax will be subject to the density limitations and
3 property development regulations for multifamily
4 buildings; therefore the Applicant must have at
5 least ten units to be a hotel/motel, be registered
6 with the Department of Revenue as a bona fide
7 hotel/motel operation and pay the development
8 tourist tax.

9 So in essence what we have here is that the
10 Applicant has met the minimum requirement to be a
11 motel/hotel by having the ten units. And of
12 course I think it's been gone over a number of
13 times with the different ways of calculating
14 density. Of course if it was under the C-1 zoning
15 district then of course density would be involved
16 with an equivalency ratio in determining the
17 number of units that you can put on a particular
18 property. When this was initially started it
19 would have worked out to approximately -- it could
20 have had approximately 5.4 units plus the
21 caretaker's and it would have been a total of 6.4
22 units on that particular property. However, the
23 Applicant has reduced the units to ten, but by
24 increasing the units to ten actually by -- I
25 should say reducing the units to ten, but because

1 the units are larger now, it's sort of increased
2 the density to 7.6. dwelling units; so by going
3 the other way, the way they had it originally, the
4 number of dwelling units worked out to 6.4 because
5 it was based on the equivalency and the size of
6 the units.

7 By adding all of these, by increasing or
8 decreasing the number of motel/hotel units to ten,
9 but they're larger, the equivalency increases the
10 density, if it was under a C-1 zoning category.

11 Under Section 34-1802(4)d of the Land
12 Development Code it says hotel/motels approved as
13 planned developments are not subject to rental
14 unit size or density requirements set forth above,
15 provided all other aspects of the development
16 (height, traffic, intensity and uses, etc.) are
17 found to be compatible with the surrounding area
18 and otherwise consistent with the Lee Plan.

19 The Applicant has, in a number of ways, met
20 the height, traffic and intensity uses of course
21 by -- one was reducing the number of units from
22 fifteen to ten. He's reduced the height to twenty
23 feet from thirty-five feet for the cabins
24 themselves. The shape and the type of cabins that
25 they're proposing I think would fit in with the

1 ambience of the Captiva Comp Plan of
2 characterizing this as a rural character and
3 lifestyle and conserving open space; it would
4 increase the open space to fifty percent from
5 twenty percent from the previous plan.

6 Also, the mode of transportation in the area
7 would be by golf cart, so there's no traffic on
8 the island. Parking spaces are not required and
9 the Applicant, though, has provided 14 golf
10 parking spaces for the guests of the hotel/motel.

11 Also with regard to the uses, the property
12 again, as Staff noted, is commercial C-1. It is
13 1.5 acres in area. Usually roughly about ten
14 thousand square feet of commercial retail office
15 you can get on an acre of land, so we would be
16 looking at approximately sixteen thousand square
17 feet of commercial retail could go on the subject
18 property. You have to realize of course that you
19 don't have to count for parking here so that
20 figure actually could be increased.

21 With regard to such a commercial retail
22 building in the C-1 and some of the concerns with
23 it of course is that the building can take any
24 shape on the property itself. As an example, if
25 they put the building on the property they could

1 have an L-shaped building going up thirty-five
2 feet, which could block a lot of the view off for
3 the surrounding residential property owners. This
4 way here it's going to be up against the Captiva
5 Island Club where they have the swimming pool and
6 their recreation area right here (indicating),
7 plus right along this area here there's a golf
8 cart storage area, also a maintenance facility
9 right behind it.

10 With regard to the variety of uses, of course
11 in the C-1 commercial zoning district it's quite
12 varied that could be allowed within the district.
13 The Staff looked at the uses and looked at some
14 uses that would be able to go on the property that
15 would make sense in this particular area, such as
16 boat rentals and boat sales, dry boat storage,
17 contractors and builders group one and two; these
18 are contractors that could have indoor and outdoor
19 storage with light fabrication work. We could
20 have rental or leasing establishments groups one
21 or two and what I'm thinking of here is Mopeds,
22 scooters, golf carts, those types of uses. Open
23 storage is permitted and vehicle and equipment
24 dealers group two are permitted, which includes
25 golf carts, a package store, convenience food and

1 beverage store and restaurants.

2 So the possible development of these
3 intensities would not be compatible with the
4 present character of the community, nor would this
5 intensity of development preserve the rural
6 character, lifestyle and preserve open space. In
7 a lot of cases when you have such things as boat
8 storage facilities they have lifts to move boats
9 around, they have vehicles when they back up they
10 have these buzzers that go on continuously, and
11 under the current C-1 zoning you can't place
12 conditions on it; in other words, they could just
13 go ahead and develop this property and you would
14 not have the limitations that you do through the
15 planned development with regard to the
16 hotel/motel, and by rezoning just the hotel/motel
17 all these uses are eliminated from going on the
18 property without another rezoning.

19 So Staff finds it consistent with Policy
20 1.4.2.

21 With Policy 4.1.1, development designs will
22 be evaluated to ensure that land uses and
23 structures are well integrated, properly oriented
24 and functionally related to the topographic and
25 natural features of the site, and that the

1 placement of uses, structures within the
2 development minimize expansion or construction of
3 street or utility improvements. The proposed
4 cabins are arranged and oriented around the
5 perimeter towards the pool and lodge, away from
6 the single-family residential dwelling units to
7 the south, the west and to the east.

8 The Applicant has stated that exotic
9 vegetation will be removed from the site and the
10 cabins placed so as not to remove the remaining
11 native vegetation on the site and the Applicant,
12 through this revised condition, has made that very
13 clear exactly what can and cannot be removed from
14 the site.

15 Also the Staff has provided a condition to
16 enhance the right-of-way buffer to reduce the
17 visibility of the rear of the cabins from Rum
18 Road. What it is here of course is that Rum Road
19 surrounds the property, basically, so by
20 increasing the vegetative buffer in here it
21 would -- you will not be able to see the backs of
22 the cabins, also. So Staff finds it consistent
23 with Policy 4.1.1.

24 Policy 6.1.2 and Policy 6.1.7. Policy 6.1.2
25 requires all commercial development be consistent

1 with the site location standards; however, Policy
2 6.1.2.2.c, neighborhood commercial, states, "On
3 Lee County's islands where there is no
4 intersecting network of collectors and arterials,
5 neighborhood commercial centers may be located
6 using standards for minor commercial area
7 centers." And also notwithstanding this policy,
8 Policy 6.1.7 makes exceptions and specifically
9 addresses hotel and motel uses. And Policy 6.1.7
10 states that hotel/motel uses do not need to comply
11 with site location standards. Therefore given the
12 wide range of commercial uses that could
13 potentially be developed on the site, the impacts
14 on adjacent land uses and surrounding
15 neighborhoods must be considered. The Staff finds
16 that given the orientation of the hotel/motel
17 cabins, proximity to existing commercial
18 establishments immediately to the north and
19 northeast and the additional buffering along Rum
20 Road, the proposed hotel/motel provides an
21 excellent transition for the more intense
22 commercial activities to the north and the less
23 intense single-family residential neighborhood to
24 the west, south and east.

25 On balance, the proposed fifteen unit

1 hotel/motel -- in this particular case now it
2 would be a ten unit hotel/motel -- is least
3 intrusive to the surrounding neighborhood than
4 developing the site with more intensive commercial
5 uses.

6 Again, Staff finds that the project is
7 consistent with Policy 6.1.2 and 6.1.7.

8 And Goal 75, protection of life and property
9 in the coastal high hazard zone. The protection
10 of life and property needs to be considered in any
11 development on barrier islands. The project is
12 not a residential development where residential
13 density must be considered in reviewing projects
14 on barrier islands. However, Staff is aware of
15 the need to provide guests of the hotel/motel
16 information on evacuation procedures in case of a
17 hurricane; therefore, Staff has provided a
18 condition to ensure the guests of the lodge are
19 made aware of these procedures.

20 The Staff therefore finds it consistent with
21 Goal 75 and Policy 75.1.2.

22 With neighborhood compatibility, given the
23 acreage of the site, the square footage of retail
24 commercial that could go on the site, some of the
25 uses that most likely would go on the site if it's

1 not developed as a hotel/motel, such as the boat
2 rentals, boat sales, dry boat storage, contractors
3 and builders, rental leasing establishments groups
4 one and two, open storage and vehicle and
5 equipment dealers, package stores, convenience
6 food and beverage stores and restaurants, Staff
7 finds that of course the use of the site as a
8 motel/hotel would be compatible with the adjacent
9 properties and also acts as a nice transition
10 between that and the commercial to the north and
11 northwest.

12 Therefore, Staff finds the proposed
13 development, as conditioned, compatible with the
14 surrounding residential development.

15 With regard to the environmental issues, Kim
16 Trebatoski is not here, but if there's need to ask
17 questions we can also recess for a moment and I
18 can get Kim to come in. The Environmental Staff
19 have recommended a condition to ensure that the
20 preservation of the native tree cover within the
21 design of the project are met and has a condition
22 to that effect.

23 Transportation. Of course no traffic
24 analysis was completed since this is a barrier
25 island; however, the Applicant has provided

1 parking spaces for fourteen golf carts, which is
2 the primary mode of transportation on the barrier
3 island.

4 And that's the essence of the staff report
5 and if there's any questions I'll be glad to
6 answer them.

7 THE HEARING EXAMINER: Any questions, Mr.
8 Uhle?

9 MR. UHLE: Yes, just a few.

10 EXAMINATION

11 BY MR. UHLE:

12 Q. Bryan, at the last hearing Mr. Brookes was
13 asking some questions about documents that he felt
14 weren't included in the original application, and I'd
15 just like to ask first of all, Staff did find this
16 application sufficient, did they not?

17 A. That's correct.

18 Q. And the Staff has the ability to waive
19 certain submittal requirements if they find them
20 unnecessary?

21 A. That's correct.

22 Q. With regard to the concern about code
23 enforcement, is my understanding correct that the code
24 enforcement process is largely complaint driven?

25 A. That's correct.

1 Q. And in that sense this particular project
2 isn't any different than any other project on North
3 Captiva or anywhere else for that matter?

4 A. That's correct.

5 Q. Are you aware of any reason why it would be
6 any harder to enforce the conditions of approval at
7 this location than it is for example at the Mango
8 Cafe, where they have conditions of approval on their
9 COP?

10 A. No.

11 Q. And with regard to hotels and hurricane
12 evacuation, is it fair to say that the standard county
13 response to the need to deal with hotel evacuations is
14 to require a condition addressing visitor education
15 and evacuation plans?

16 A. Yes.

17 MR. UHLE: No further questions.

18 THE HEARING EXAMINER: Anyone have any
19 questions?

20 UNIDENTIFIED PERSON: Can the general public
21 ask questions?

22 THE HEARING EXAMINER: Yes. Again, I'm not
23 trying to slight anyone, but let me go through the
24 attorneys first and then I'll go to the general
25 public for questions, certainly. Mr. Ciccarone?

1 MR. CICCARONE: Brian, why don't you go ahead
2 and get comfortable, it would probably be easier
3 at this point.

4 Once again for the record, Michael Ciccarone,
5 representing Bernard Frye.

6 EXAMINATION

7 BY MR. CICCARONE:

8 Q. Mr. Kelner, I probably wasn't listening
9 closely when you talked been the enhanced buffer. Do
10 you recall that?

11 A. Yes.

12 Q. What are you referring to again? Enhanced as
13 opposed to what?

14 A. As opposed to the required buffer.

15 Q. And the required buffer would be what?

16 A. I don't have the information right in front
17 of me, but it's fifteen feet wide. Here, I would
18 rather get it out.

19 Q. Sure.

20 A. The minimum width is fifteen feet, number of
21 trees is five feet per hundred feet and a double
22 staggered row hedge.

23 Q. How high?

24 A. The hedge is thirty-six inches.

25 Q. All right. So the enhanced buffer then would

1 differ from the standard buffer how?

2 A. There's a minimum of four feet height at
3 planting, four feet on center, five trees per one
4 hundred feet on the west, south and east properties.
5 Existing trees and native shrubs may be used toward
6 the required buffer and plantings.

7 Q. So if I understand the difference basically
8 the hedge has to be one foot higher?

9 A. Higher.

10 Q. Okay. I just want to make sure I understood
11 that.

12 Now let me ask you just a couple of basic
13 questions so we can get this out of the way. Confirm,
14 if you will, that you sat here through Mr.
15 Hutcherson's testimony and cross-examination. You
16 did, did you not?

17 A. I'm sorry?

18 Q. You sat here through Mr. Hutcherson's
19 testimony?

20 A. Yes. Yes.

21 Q. All right. And you heard Mr. Hutcherson
22 testify that he saw nothing inconsistent with the
23 existing C-1 zoning and the Comprehensive Plan, is
24 that correct?

25 A. Yes.

1 Q. You agree with that?

2 A. Yes.

3 Q. All right. You heard Mr. Hutcherson testify,
4 I believe, that he didn't know whether the uses that
5 would be permitted under the C-1 zoning would provide
6 a reasonable economic use of the property. Do you
7 have an answer to that same question? Would it?

8 A. Well, the only -- when I looked at it I
9 looked at it from what is reasonable with regard to
10 the particular site and location, and that's in my
11 staff report that's what it narrows down to, just
12 those types of uses that I had mentioned in there. I
13 didn't look at all of the uses within there to see
14 whether they would be compatible or uses that would be
15 permitted at that location.

16 Q. Am I interpreting your answer to say there
17 are at least some uses you found in C-1 that would
18 provide a reasonable economic use?

19 A. Yes.

20 Q. Okay. Thank you. Now, with respect to the
21 application itself, when an application like the one
22 that was filed in this case is received, I presume
23 that you, among other staff members, review it to see
24 if it is correct and sufficient?

25 A. Yes.

1 Q. Let me ask you to look at page 4 of 12,
2 subsection I, current use of property.

3 A. Yes.

4 Q. It says vacant.

5 A. That's correct.

6 Q. Now, you're aware there is a building on it?

7 A. Yes.

8 Q. Were you aware that there was a building on
9 it when you reviewed the staff report -- I'm sorry,
10 when you reviewed the application and in the staff
11 report identified the current use of the property as
12 vacant?

13 A. No. I did know after we did a site
14 inspection that there was a building on the property.

15 Q. All right. So I presume we should have the
16 staff report corrected to be consistent with your
17 testimony then that the property is not vacant, that
18 there is a structure on it?

19 A. Yes.

20 Q. All right. Let me ask you to go to page 5 of
21 12. Now, right up at the very top the Applicant is
22 asked to confirm by checking the appropriate line that
23 there are no deed restrictions or other covenants on
24 this property that would affect this request. You see
25 that?

1 A. Yes.

2 Q. Now, the Applicant has checked what I think
3 is an indication that there are no such deed
4 restrictions or covenants. Is that how you read that?

5 A. That's correct.

6 Q. What do you do to verify that that's correct?

7 A. In some cases we'll look at these and we go
8 through sufficiency review on the application, so if
9 there's been a sufficiency review and we note these
10 and we'll ask that question if we need a clarification
11 or not.

12 Q. Well, my question is more specific. How do
13 you know there are no deed restrictions or other
14 covenants, other than taking the Applicants word for
15 it?

16 A. Now, the only other way if it's not in here
17 is if you ask the Applicant that question.

18 Q. All right. I'm going to show you what I'm
19 going to ask the Hearing Examiner to mark as Frye
20 Exhibit 1, and I'll represent that that is a certified
21 copy which I believe is self authenticating under the
22 Florida Rules of Evidence, of a covenant which appears
23 to relate to this property. Let me ask you to look at
24 a copy of that document and tell me if you've ever
25 seen it before.

1 MR. CICCARONE: I'm sorry, Matt, I should
2 have shown it to you first. Oh, we have some
3 extra copies, I think.

4 BY MR. CICCARONE:

5 Q. You need the question repeated?

6 A. No, I was just looking through the
7 sufficiency review to see if that was mentioned in
8 there. No, it's not in here.

9 Q. Now, if the Applicant had not checked that
10 box you would have asked the Applicant to provide you
11 with a copy of this document, would you not?

12 A. Yes.

13 Q. And I presume you then would have sent it to
14 the county attorney for the county attorney to render
15 an opinion as to whether the document was still valid
16 and applicable to the property and whether it might be
17 relevant to the rezoning request, is that correct?

18 A. If need be, yes.

19 Q. So therefore I presume I'm correct in
20 assuming that the county attorney has never seen this
21 document until I handed it to her about a minute or so
22 ago?

23 A. Yes.

24 Q. And so I presume that it's the county's
25 position at this point that the county does not know

1 whether this covenant has any impact on this zoning
2 request. Is that correct?

3 A. No.

4 Q. You do not know?

5 A. No.

6 Q. The answer is you do not know? Yes, you do
7 not know?

8 A. Yes, I do not know, yes.

9 Q. All right. Thank you. Those double negative
10 questions are hard, aren't they?

11 All right. Now, I want to ask you, if you
12 would, to look at your file where necessary, but let
13 me represent to you that in several places I see
14 references to subordinate uses. Do you recall that
15 terminology?

16 A. Yes.

17 Q. All right. I believe even in the application
18 in some places it might refer to subordinate uses and
19 then in other places it talks about accessory uses, in
20 other places it may be ancillary uses. Are those
21 terms intended to be used synonymously?

22 A. I think what it is is in a lot of cases they
23 are used interchangeably.

24 Q. That's what I mean. In other words, we
25 should attach no significance to the fact that one of

1 these uses that is related to the hotel/motel is
2 described as subordinate as opposed to accessory as
3 opposed to ancillary, is that correct?

4 A. Yes, but I don't know the context that you're
5 using that in.

6 Q. What I mean is that the words themselves do
7 not, from your perspective, convey any special
8 difference in meaning.

9 A. Well, I think when they're put in a lot of
10 cases by the individual they may have a difference in
11 meaning, but I think a lot of people tend to use them
12 interchangeably.

13 Q. All right. Are you using them
14 interchangeably in your analysis?

15 A. I don't think so, no.

16 Q. You think there's a difference between a
17 subordinate use and an accessory use?

18 A. Well, an accessory use is a defined use and a
19 subordinate use, we have those uses with regard to
20 hotel/motels in the Land Development Code and there's
21 a listing in a couple cases will have subordinate uses
22 that are mentioned within the Land Development Code.

23 Q. As subordinate uses?

24 A. Yes.

25 Q. Now, let's just confirm for the record I

1 believe when you look at the definitions which are in
2 Section 34-2 of the Land Development Code -- I'll give
3 you a minute to locate that.

4 A. Sure.

5 Q. It's entitled definitions. Do you have it
6 there?

7 A. Of uses.

8 Q. Well, my question is this: I could not find
9 a definition for ancillary use or subordinate use, but
10 I did find a definition for accessory use. Am I
11 reading this correctly?

12 A. That's correct.

13 Q. All right. Now, the definition for accessory
14 use is, if I'm reading this correctly, use of a
15 structure or in this case premises which is
16 customarily incidental and subordinate to the
17 principal use of the structure or premises.

18 Have I read that correctly?

19 A. Yes.

20 Q. And about three or four definitions down,
21 principal use means the primary purpose for which land
22 or a structure or a building is used. Did I read that
23 correctly?

24 A. Yes.

25 Q. Am I correct then in reading the application

1 and the staff report to say that the principal use
2 that's being requested is hotel/motel with everything
3 else listed under that as being an accessory use?

4 A. That's correct.

5 Q. And is it your understanding, based upon your
6 many years of experience working in the planning and
7 zoning field, that when you are confronted with an
8 undefined term such as in this case subordinate, you
9 would look to the dictionary for a common and ordinary
10 meaning, unless perhaps there might be some special
11 definition given to it as used within the profession
12 in question, which would be to say your particular
13 profession?

14 A. Yes.

15 Q. That's correct? All right. Have you
16 consulted either the professional literature or the
17 dictionary to determine what definition is the one
18 that you should be using when you are applying the
19 word subordinate to uses?

20 A. With regard to that, on Section 30-3021 of
21 the Land Development Code we have other subordinate
22 commercial uses, and there it speaks to applies to --
23 this section applies to subordinate commercial uses
24 for hotels, motels, multifamily buildings and etc. and
25 it gets into it further and says this section refers

1 to clearly subordinate to the principal use subject to
2 the following requirements: Retail uses totally
3 within the building housing the proposed use, retail
4 use may not occupy more than ten percent of the total
5 floor area, public access use may not be evident from
6 any abutting street and personal services group one or
7 two are permitted, especially retail shops,
8 restaurants and retail leasing establishments are
9 permitted as subordinate uses.

10 Q. Coincidentally I happen to have that very
11 article in front of me right here, and am I
12 understanding your testimony to be that in your
13 opinion the process you should use in evaluating
14 whether these requested subordinate uses are
15 consistent with the Land Development Code is whether
16 these subordinate uses meet the requirements of
17 Section 34-3021?

18 A. I think that's part of it. You also have to
19 look at the location and the use also, so in other
20 words I don't think this is just limited to this. I
21 think also there are other uses you may want to
22 include should be looked at also, because we're
23 talking about a planned development here.

24 Q. Well, let me ask you about that. Do you have
25 3021 in front of you, by any chance?

1 A. It's just back here.

2 Q. When I looked at this I found that this sits
3 within a division of Chapter 34 all by itself, which
4 is to say this is not a provision under the
5 conventional zoning regulations. Is that how you read
6 it?

7 A. No. This would be also under the
8 conventional zoning. If you have a motel or hotel
9 under conventional you would use this also.

10 Q. Well let me rephrase the question, I didn't
11 ask it very well. Reading the first line, the purpose
12 of this section is to provide for certain commercial
13 uses. Now stop at that point and my question is, are
14 you applying this to mean certain commercial uses in
15 any type of zoning request?

16 A. I think you'd look at this also with regard
17 to it and again, we're talking about a Commercial
18 Planned Development zoning here, so in other words
19 through a Commercial Planned Development you look at
20 the proposed project and the type of uses that are
21 along with this. This will give us guidance, also,
22 with the intent.

23 Q. Well, let me go back. I infer from your last
24 answer that 34-3021 has some application even in
25 planned development, is that a correct reading of your

1 position?

2 A. Yes.

3 Q. All right. Now, I wonder if you could find
4 for me anywhere else in the Land Development Code a
5 statement to the effect that 34-3021 is supposed to be
6 interpreted by reference to some other provision,
7 specifically some other provision relating to
8 commercial planned developments.

9 A. Off the top of my head I don't think I can
10 answer that question.

11 Q. All right. Well, assuming for the sake of
12 discussion that we were to presume that this section,
13 34-3021, and only this section, was the one that we
14 should be looking at to measure whether the
15 subordinate uses as requested in this application are
16 legal; in other words, consistent with the Land
17 Development Code. To make that assumption my question
18 is, if we were to apply this section, would we find in
19 fact that these requested subordinate uses are legal?

20 I'm going to help you out. Don't answer the
21 question. I'm going to help you out by asking you to
22 look at how this section is divided. You see a
23 subsection B?

24 A. That's correct.

25 Q. That applies to commercial uses in mobile

1 home or recreational vehicle developments.

2 A. That's correct.

3 Q. This is obviously not one of those, so that
4 means that the only subsection it could apply to would
5 be C, which talks about other subordinate commercial
6 uses. Is that correct?

7 A. Yes.

8 Q. Okay. And amazingly enough right below that
9 it says this subsection applies to subordinate
10 commercial uses for hotels/motels. You see that
11 sentence there?

12 A. Yes.

13 Q. And then it says the uses listed in
14 subsection C.2, which is right below that, will be
15 permitted when clearly subordinate to the principal
16 use, subject to the following requirements: And
17 before we get into the following requirements, let's
18 just look at two words. If I'm reading this
19 correctly, before we even look at a specific
20 subordinate use we have to determine that it's clearly
21 subordinate. You read that?

22 A. Yes.

23 Q. It can't be a little bit subordinate, it
24 can't be equal, it can't even be subordinate, it has
25 to be clearly subordinate. Am I reading that

1 correctly?

2 A. That's correct.

3 Q. All right. And then if it's clearly
4 subordinate, as I read this, we now jump down to C.2,
5 uses permitted are. Do you see that?

6 A. Yes.

7 Q. Now, I see under Restaurant Group 2, you see
8 that?

9 A. Yes.

10 Q. This application is for Restaurant Group 2
11 and 3, am I correct?

12 A. Yes.

13 Q. Restaurant Group 3 is not included within the
14 list of permitted subordinate uses for a hotel/motel
15 in a commercial use zoning district, if I'm reading
16 this correctly. Am I reading it correctly?

17 A. Yes.

18 Q. So therefore the Staff recommendation
19 recommending approval of the Group 3 restaurant use
20 cannot be sustained, can it, because if that were to
21 be sustained it would violate 34-3021 as presuming
22 that 34-3021 is controlling?

23 A. Yes.

24 Q. Okay. Now then, presuming that 34-3021 is
25 controlling, and we are allowed a Group 2 restaurant

1 but not a Group 3 restaurant, I presume we would then
2 go under subsection 1, which tells us that we have to
3 meet three requirements. Do you see that?

4 A. Yes.

5 Q. All right. This use must be totally within
6 the building housing the principal use. Do you see
7 that?

8 A. Yes.

9 Q. That wouldn't apply here, would it, because
10 this restaurant is all by itself, separate and apart
11 from the hotel units, isn't it?

12 A. Well, if you're using the summation, but I
13 think what we have to look here again is with regard
14 to the CPD. To just use your theoretical --

15 Q. Hang on. Well, I'm asking under the
16 assumption that 34-3021 and only 34-3021 applies in
17 this case. I'm asking you if you're reading it the
18 way I am reading it, which is to say that the
19 restaurant use that's being requested here would be
20 inconsistent with the requirement that it must be
21 totally within the building housing the principal use.
22 Do you read it the same way I do?

23 A. It says commercial uses for hotels and
24 motels, and of course what we have here is we're
25 referring to the principal use or the principal use

1 would be looked at at the subject property as a
2 hotel/motel use.

3 Q. Correct.

4 A. And therefore I think in this particular
5 situation we got -- the cabins are part of this and
6 that the lodge also would be part of the hotel/motel,
7 even though it's not under one building. In other
8 words, it's still part of that particular property and
9 that particular use.

10 Q. All right. Well then let's jump down to B
11 where it says the retail use may not occupy more than
12 ten percent of the total floor area of the principal
13 use. Now, as I'm looking at the application, and I
14 think I'm giving it a correct reading based upon the
15 Applicant's language, the principal use -- that's the
16 use when you add up all of these units -- is five
17 thousand, seven hundred and forty-two square feet --
18 it hasn't changed, I don't believe, from the original
19 site plan to the new site plan. The number of
20 buildings are the same, it's the number of bedrooms
21 that have changed, is that right?

22 Have you added up the number of square feet
23 of hotel/motel use that would be in those cabins?

24 A. Yes, I have yes.

25 Q. Is my number correct, five thousand, seven

1 hundred and forty-two?

2 A. I can check for you.

3 Q. Go ahead, please. It's important.

4 A. The ground floor here is a total of three
5 thousand square feet.

6 Q. Well, that's the building, I believe, that is
7 separate and apart from the cabins itself. I'm asking
8 you for the total square footage of the cabins.

9 A. I can calculate that very quickly here. My
10 math is not that good.

11 Q. Mine either.

12 A. Four thousand, three hundred and fifty square
13 feet. Some of them were slightly smaller, I think,
14 seven forty-eight rather than seven fifty.

15 Q. Well, presuming that that number is correct,
16 four thousand some odd some hundred square feet, and
17 again, presuming that 34-3021 and only 34-3021 speaks
18 to the question of how we measure the legality of
19 subordinate uses, even in a Commercial Planned
20 Development, I'm going to have to assume from the
21 answer you just gave me that the maximum size of the
22 proposed restaurant would have to be ten percent of
23 four thousand, whatever the number is?

24 A. That's correct.

25 Q. Is that a correct reading? Now of course

1 retail use is not limited just to restaurants, is it?

2 A. No.

3 Q. So we would have to add up all of the other
4 requested subordinate uses which might qualify as
5 retail uses, and I presume then that the ten percent
6 cap would apply to the total of those square feet, is
7 that correct?

8 A. Yes.

9 Q. So that the specialty retail store, the
10 Restaurant Group 2, possibly the rental or leasing
11 establishment, all that combined could not exceed a
12 total of four hundred some-odd square feet in size, if
13 I'm reading this regulation correctly. Do you agree
14 with that statement?

15 A. Yes, I think you're correct with what you're
16 saying, just the total numbers, though, you're talking
17 about just the cabins, right, the total square footage
18 and not the lodge itself as part of the motel/hotel,
19 which I believe is three thousand plus another -- the
20 second floor. I think there's another one thousand,
21 and of course if you total all of the square footage
22 up and then take a percent of that, that would be a
23 different figure again.

24 Q. Well, let me see if I understand what you
25 just said. We're talking now about a percentage of

1 the principal use, correct, so we can't very well
2 include within the principal use the square footage of
3 the subordinate use also, can we?

4 A. Well, I think when you look at it, when you
5 calculate it out, I'm just trying to look at it from
6 the standpoint of one building, if you have one large
7 hotel building it's ten thousand square feet, that's
8 what it is, and you take ten percent of that would be
9 a thousand square feet which would be dedicated to it.
10 So in other words you took everything.

11 Q. So of the ten thousand square feet total, in
12 this case a thousand square feet could be the
13 restaurant. So if I understand your testimony,
14 presuming that my reading of 34-3021 is correct, then
15 you would take the total of all the uses, that would
16 be the principal use and then you would limit the
17 total of all of the subordinate uses to ten percent of
18 that?

19 A. Just my looking at a normal situation; of
20 course here we're not, this is different.

21 Q. Well, I didn't ask you that question.

22 A. I know that.

23 Q. Nor am I going to. All right. Let me ask
24 you -- and this is in no particular order, so don't
25 make too much of the order here. Just a couple of

1 things in the staff report that I would like to
2 clarify, if I could. If you would, go to page 2 of
3 12. This is the old staff report, but I don't think
4 it's going to change in the new one.

5 A. Yes, okay.

6 Q. I believe under schedule of uses,
7 hotel/motel --

8 A. Yes.

9 Q. -- where it talks about 15 cabins, I
10 understand it's now 10. Then I see including the
11 following ancillary uses.

12 A. Yes.

13 Q. You see that word, ancillary?

14 A. Yes.

15 Q. I presume that that also means subordinate
16 uses?

17 A. Yes.

18 Q. All right. Now, I believe in your historical
19 narrative -- I apologize, I thought I had it marked
20 better. Well, here it is. I'm sorry. Go to page 3
21 of 12, consumption on premises.

22 A. Yes.

23 Q. Under B.

24 A. Yes.

25 Q. Background music may be piped in at a reduced

1 volume. You see that?

2 A. Yes.

3 Q. Reduced from what?

4 A. Just basically what we're referring to is
5 reduced volume as so the patrons may maintain a normal
6 level of conversation. In other words, that that
7 volume is low enough so that people can communicate
8 and talk to one another without being interrupted by
9 the noise or music that's being played.

10 Q. And that means talk to one another within the
11 premises itself?

12 A. That's right. If we're at a table and
13 eating, the music should be low enough that it would
14 not interrupt a normal conversation.

15 Q. Do you know what the normal decibel limit is
16 for human conversation?

17 A. No, I don't.

18 Q. Your understanding of what the intent of this
19 condition is that whatever this decibel limit is, the
20 music should be less than that decibel limit?

21 A. Well, it should be so it wouldn't interfere
22 with normal conversation. In other words, people are
23 talking to one another, they shouldn't have to be
24 shouting to overcome the music.

25 Q. Well, let's assume that one of the neighbors

1 thinks that the music is too loud and so our code
2 enforcement staff goes out to check and the music is
3 playing and they're standing there with the state of
4 the art decibel meter, trying to figure out whether it
5 is or is not a code violation. What do they do?

6 A. Well, this is a standard type of condition
7 that we have in other applications, also, so I'm
8 assuming when code enforcement comes they will have to
9 deal with it at that particular time. But, you know,
10 to put a number on it --

11 Q. Well, would you have any objection if the
12 proposed condition were revised as to say may be piped
13 in at a volume that would not interfere with normal
14 human conversation at the location where the music is
15 being piped in?

16 A. No, not at all.

17 Q. Would you recommend that so that we have
18 something a little more objective than what we have
19 here?

20 A. Yes, I do. If it would help clarify it, yes.

21 Q. All right. May I consider that then an
22 amendment to the staff recommendations to the Hearing
23 Examiner?

24 A. Yes.

25 Q. Thank you. Now, I'm going to delve a little

1 bit into something that I believe you testified to
2 earlier, and that was the site location standards, and
3 I believe you referred to Lee Plan Policy 6.1.2.

4 A. Yes.

5 Q. If my notes are correct. Am I reading the
6 Comprehensive Plan correctly as you understand it if I
7 assume that all the commercial land uses everywhere
8 within Lee County have to be consistent with Policy
9 6.1.2 unless there is some other policy which would
10 exempt them?

11 A. That's correct.

12 Q. All right. Now, presuming for the sake of
13 discussion that this particular application had to
14 meet Policy 6.1.2, I presume it would have to fit
15 within one of the first four categories of types of
16 commercial, minor commercial, neighborhood commercial,
17 community commercial, regional commercial?

18 A. Yes.

19 Q. Is that the way you would do it?

20 A. Right.

21 Q. And again, presuming that this actually meets
22 the standard, which one would it most logically fall
23 within?

24 A. I don't have my copy of the plan here, so --

25 Q. Well, let me suggest that if you look at --

1 oh, you don't have your plan here?

2 A. Well, it's in the --

3 THE HEARING EXAMINER: There's one on that
4 table if you get it.

5 MR. CICCARONE: I'm sorry, I don't want you
6 to testify without the book. Why don't you go
7 ahead and get it?

8 I didn't mean to make it hard for him, I just
9 assumed he had it there.

10 I believe it's on 2-25.

11 BY MR. CICCARONE:

12 Q. All right. Now, I think if you go to the
13 next page, if I'm reading this correctly, the site
14 can't be more than two acres and this site is less
15 than two acres, correct?

16 A. Uh-huh.

17 Q. The gross floor area has to be less than
18 thirty thousand square feet and this request is less
19 than thirty thousand square feet, correct?

20 A. Correct.

21 Q. So we would meet those two, so then we'd have
22 to go back to location on the previous page and it
23 talks about it having to be on or near the
24 intersection of at the very least a local and a
25 collector road. Do you see that?

1 A. That's correct.

2 Q. Now, we understand that there are literally
3 no local roads, let alone collector roads, on Upper
4 Captiva, is that correct?

5 A. That's correct.

6 Q. So that if this section were to apply, this
7 commercial development would not qualify as a minor
8 commercial development, is that right?

9 A. Well, the Policy 6.1.7 says that --

10 Q. Well, we're going to get there, just hang on.
11 What I'm asking you is if presuming that 6.1.7 doesn't
12 apply, then 6.1.2 I presume would be conclusive, and
13 if that's the case then this application as presented
14 would be inconsistent with the Comprehensive Plan if
15 6.1.2 is applied; again, presuming that it's not
16 exempted out by 6.1.7.

17 Are you reading it the way I'm reading it?

18 A. Yes.

19 Q. So now the question I presume is does 6.1.7
20 apply? Now I see two things in 6.1.7 that appear to
21 be contradictory, but I'm sure you saw it too and you
22 resolved it, so I'm going to ask you how you resolved
23 it. I see a statement that says that the location
24 standards specified in subsections 1 through 4 will
25 apply to the following commercial developments:

1 Restaurants. And then later it says these location
2 standards will not apply to the following: Hotels or
3 motels. Do you see that?

4 A. That's correct.

5 Q. So am I correct in assuming that you resolved
6 this apparent inconsistency by concluding that this
7 request is not for a restaurant, it's for a
8 hotel/motel with a restaurant as a subordinate use?

9 A. That's correct, in this particular case.

10 Q. All right. Well, just stop for a second. Am
11 I correct that if this request were for a restaurant
12 with a few hotel/motel units as a subordinate use of
13 the restaurant, that you would have to reach the
14 opposite conclusion, which is to say that it doesn't
15 meet the site location standards that it's required to
16 meet?

17 A. But also it states that on Lee County islands
18 where there is no intersecting network or collector or
19 arterials neighborhood commercial centers may be
20 located using the standards for minor commercial uses.
21 So in other words the site location standards wouldn't
22 apply to barrier islands.

23 Q. And where does it say that?

24 A. If you look on page 2 of 26.

25 Q. 2-26?

1 A. Yes. Under 2, neighborhood commercial
2 location.

3 Q. Well, yes, it says on Lee County's islands
4 where there is no intersecting network of collectors
5 and arterials neighborhood commercial centers may be
6 located using the standards for minor commercial
7 standards.

8 A. That's right.

9 Q. Well, I think we earlier decided that if this
10 was anything at all it was a minor commercial center,
11 and I think we just decided that if it's a minor
12 commercial center that it doesn't meet the site
13 location standards if what we have of the principal
14 use is the restaurant as opposed to the hotel/motel.

15 A. Well, I think the principal use here is a
16 hotel/motel.

17 Q. Well, I'm asking you if I were to reverse
18 those, I want you to assume I have reversed those,
19 then you would have to conclude that the proposed
20 request is inconsistent with the Comprehensive Plan,
21 would you not?

22 A. Well, if it is a minor commercial then you
23 could have thirty thousand square feet of commercial
24 retail uses.

25 Q. I'm not arguing with that, but I'm asking you

1 if the principal use is a restaurant, and pick any big
2 restaurant you can -- Iguana Mia -- and I happen to
3 have two cabins in the back that I'm calling a
4 hotel/motel, and I rent them out whenever I'm lucky,
5 all right, you would agree that's not a hotel/motel,
6 that's a restaurant?

7 A. Well, you have two uses on the property,
8 you've got a restaurant and you've got your
9 hotel/motel use.

10 Q. How do you know which one is the principal
11 use?

12 A. Well, in regard to this particular property
13 here I think the hotel/motel is your principal use.

14 Q. And you came to that conclusion how?

15 A. In that the other uses that are to it are
16 subordinate to or similar to that particular
17 hotel/motel.

18 Q. And you came to that conclusion based upon
19 what objective standard?

20 A. That it's consistent with the Comprehensive
21 Plan.

22 Q. Without intending to be argumentative, does
23 that not seem a bit circular to you? My question is
24 how do you determine if it's consistent with the
25 Comprehensive Plan if you're confronted with the

1 problem of resolving whether it's the restaurant or
2 the hotel that's the principal use? Where would I go
3 to find the answer to that problem? That's what I'm
4 trying to determine.

5 A. Well, you can have more -- in a commercial
6 property you can have more than just one use on the
7 property. In other words, you could have a restaurant
8 and you could have a commercial -- another commercial
9 use on the property.

10 Q. Let me try it this way. I'm not trying to
11 trick you, I'm just trying to understand how the staff
12 applies it.

13 Let's assume in this case that we have -- I'm
14 going to use hypothetical numbers. We have five
15 thousand square feet devoted to living space and we
16 have one thousand square feet devoted to uses that
17 we'll call subordinate. That ratio I presume is one
18 you're comfortable with, am I correct?

19 A. You're saying the principal use is the
20 residential component?

21 Q. Yes. Are you comfortable with that sort of
22 approach? All right. Now, suppose that I increase
23 the subordinate use by four thousand feet, so now it's
24 four thousand feet out of a nine thousand foot total
25 development. Is that still a subordinate use?

1 A. Uh-huh.

2 Q. Suppose I make it six thousand square feet,
3 so now it's six thousand square feet out of a total of
4 eleven thousand square feet. Is that still
5 subordinate?

6 A. Well, you've changed it now where you get the
7 six thousand square feet is greater than the
8 residential, so I guess in this particular case, yes,
9 you would say that it's no longer the principal use.

10 Q. All right. Now, in this case in the original
11 application the Applicant identified a restaurant use
12 of an undetermined size within the lodge. Do you
13 recall that?

14 A. Yes.

15 Q. Now, in the revision that we saw today the
16 Applicant's representative has stated that they would
17 not object to a condition limiting the restaurant to
18 seven hundred and fifty square feet.

19 A. Yes.

20 Q. Am I correct? And you would consider seven
21 hundred and fifty square feet of restaurant clearly
22 subordinate to the hotel/motel use?

23 A. Yes.

24 Q. What if I add in the outside seating of one
25 thousand, one hundred and fifty square feet and all of

1 the area around the pool and I allow tables and chairs
2 and food service, alcoholic beverage service at those
3 locations. What do I have now? How big is my
4 restaurant in that case?

5 A. Well, I think your restaurant itself, the
6 indoor portion of it is still the same size, but now
7 what you have to provide is additional outdoor seating
8 to it, and that's not ^{usual} ~~unusual~~ to add it.

9 Q. Well, let's presume that as one of the
10 neighbors said earlier that this location is so great
11 it will bring people all over the island to it on a
12 regular basis as a dining alternative, and the owner,
13 being a smart businessman, takes advantage of that and
14 basically puts tables and chairs wherever he can fit
15 them, hires three or four waiters and does a
16 tremendous food service business.

17 Is there anything that would prohibit that in
18 this application as it stands before us today?

19 A. Well, the square footage is limited, of
20 course, but as far as the numbers, I believe they
21 talked about five hundred and sixty square feet on the
22 outside for outdoor seating for the restaurant itself.

23 Q. All right. And as a practical matter how
24 would that be enforced? How do I know where those
25 five hundred and sixty square feet are?

1 A. Well, I think that's where code enforcement
2 comes into effect. You have to determine that.

3 Q. What if code enforcement goes out there and
4 they see that there are nothing but tables and chairs
5 from one end to the other and they talk to the manager
6 and the manager says only these five hundred and sixty
7 square feet here are the restaurant. Does that strike
8 you as an unrealistic way to enforce that restriction?

9 A. Well, it becomes difficult, there's no
10 question about it, but it's not unusual, we deal with
11 a number of outdoor areas for consumption on premises
12 that have a number of additional seats for them, as
13 long as we have the parking that goes along with this.
14 In this particular case parking is not a problem.

15 Q. Do you recall just a little while ago sitting
16 through the cross-examination of the project engineer?

17 A. Yes.

18 Q. And do you recall him testifying that if as
19 few as six extra restaurant seats were added that he
20 would no longer be able to meet the state regulations
21 for an on-site septic? Do you recall that?

22 A. Yes.

23 Q. Can you point to me anywhere in the staff
24 report and recommendations anything that is going to
25 limit this operation to thirty restaurant seats and as

1 I recall six and only six pool bar seats? I mean I
2 couldn't find it, but I want to be fair to you. Am I
3 missing something?

4 A. No, you're not.

5 Q. All right. So if the Applicant decided at
6 some point that if he could get more than thirty seats
7 within his seven hundred and fifty square foot
8 restaurant inside and his five hundred and sixty
9 square foot restaurant space outside -- I think I'm up
10 over twelve hundred now, and within the massive area
11 around the pool, if he could squeeze in six more seats
12 but not exceed those geographic limits, then we would
13 find that the septic -- on-site septic requirements
14 could not be met, is that right?

15 A. That's correct.

16 Q. All right. Let me ask you, in the course of
17 developing a project like this, whether the
18 development review staff is to require as a condition
19 of approval that there be a permit issued I believe by
20 the Department of Health permitting an on-site septic
21 system of whatever the capacity is. Is that how it's
22 done?

23 A. Yes.

24 Q. All right. And I presume that the Staff,
25 when doing that, would simply look at the permit, they

1 either have it or they don't have it?

2 A. That's correct.

3 Q. So to your knowledge would this permit then
4 limit the number of restaurant seats and pool bar
5 seats?

6 A. It depends on the development order and how
7 it would be worded on the number of seats.

8 Q. Well, if --

9 A. When they come in for the DO they're going to
10 have to --

11 Q. When they come in for development order does
12 somebody limit the number of seats? How is that done?

13 A. Well, what they'll have to do is they'll have
14 to look at the DO and the difference there so that
15 they don't exceed the capacity that they have for the
16 site and the amount of sewage that can be created on
17 the site, so it means they'll have to do a calculation
18 in some way on how much sewage is being created and I
19 think part of the study said, you know, how many
20 gallons there were.

21 THE HEARING EXAMINER: Well, will the
22 development order limit the number of seats they
23 can have if it's not contained in a condition
24 here?

25 MR. KELNER: That I would want to check to be

1 absolutely sure whether that would be when they do
2 the development order, and I couldn't say for
3 certain.

4 BY MR. CICCARONE:

5 Q. Well, let me ask this question: Giving every
6 deference to the expertise of the Applicant's engineer
7 as to the capacity of this area to absorb any more
8 sewage than what's proposed, I assume that at the
9 worst we would be creating a redundancy by requiring
10 in the rezoning application an approval, a condition
11 that would limit the number of seats to thirty and six
12 or maybe up to thirty-five and six or some combination
13 that wouldn't exceed the total gallonage that the
14 Applicant's very expert engineer has said is the
15 maximum that this property can handle.

16 Is there any reason why we shouldn't do that
17 in this application?

18 A. No. You could do that.

19 Q. May I take that as a staff amendment of its
20 recommendation to the Hearing Examiner that such a
21 condition be included?

22 A. Yes.

23 Q. Okay. Thank you.

24 Now --

25 THE HEARING EXAMINER: You going to go to a

1 different set of questions?

2 MR. CICCARONE: Nope. I'm not going to let
3 you off that easy.

4 THE HEARING EXAMINER: No, I was going to say
5 take a break.

6 MR. CICCARONE: Oh, well, I can take a break
7 anytime.

8 THE HEARING EXAMINER: Why don't we take a
9 break for ten minutes before we go to the next
10 question?

11 MR. CICCARONE: Sure.

12 MR. UHLE: It's obvious we're not going to
13 finish.

14 THE HEARING EXAMINER: I have dates.

15 MR. CICCARONE: I'm not dragging this out for
16 the sake of it, either.

17 THE HEARING EXAMINER: I understand that. I
18 have a list here for people who need to look at
19 the calendar. I've got it.

20 (A break was taken at this time, after which
21 the proceedings continued.)

22 THE HEARING EXAMINER: We're back on the
23 record. How many people want to speak today
24 before we finish? We're going to be coming back,
25 so if you want to speak, you'll be able to come

1 back and speak as well. What I want to do is
2 maybe have Mr. Ciccarone ask a few more questions
3 of Mr. Kelner and then we'll go to the public and
4 call it a day. We have to come back, I think we
5 realize by this time, and what we're going to be
6 doing is coming back July 14th at nine o'clock in
7 this room, and that's a Wednesday, and I hope we
8 can finish it that day.

9 Again, anyone who speaks here today will be
10 able to come back and speak at that hearing as
11 well, but I hope again that you confine yourselves
12 on what's gone on in that particular hearing
13 rather than rehashing things because we'll never
14 finish the case, but you're certainly welcome to
15 come back, even if you do speak today.

16 Mr. Ciccarone, you want to continue?

17 MR. CICCARONE: In connection with that, at
18 the moment in time you want me to stop, I'll be
19 happy to do it.

20 THE HEARING EXAMINER: If we didn't stop you,
21 how long would you go?

22 MR. CICCARONE: Well, I don't know that I'll
23 finish today, so that's why I'm saying anytime you
24 want me to stop so you can hear from the public,
25 just let me know and I'll stop.

1 THE HEARING EXAMINER: Why don't we go
2 another fifteen, twenty minutes with you and then
3 we'll go to the public.

4 MR. CICCARONE: Okay. All right. Brian, are
5 you ready?

6 MR. KELNER: Sure.

7 MR. CICCARONE: Are we back on the record?

8 THE HEARING EXAMINER: Yes, we are.

9 CONTINUED EXAMINATION

10 BY MR. CICCARONE:

11 Q. Mr. Kelner, when we stopped I was about to
12 ask you to revisit the ancillary use issue with me
13 just to check my numbers are correct. Let me get out
14 the correct file to do that. I'm trying to determine
15 from the amendment that was submitted today whether
16 the total square footage of the development has
17 increased. I saw that you had increased the number of
18 the lodge building I think up to four thousand square
19 feet.

20 A. That's correct.

21 Q. All right. And it was three thousand, now
22 it's four thousand.

23 THE HEARING EXAMINER: I think it's forty-two
24 something.

25 MR. SCOTT: It's two-story.

1 THE HEARING EXAMINER: Please, if he can't
2 answer it, let him answer it.

3 BY MR. CICCARONE:

4 Q. So is the increase one thousand or one
5 thousand two hundred and something? Because it's
6 relevant to the question I'm about to ask you.

7 A. Sure. On the plan here it says lodge
8 building, three thousand feet on the ground floor and
9 it says caretaker's unit, second floor, one thousand,
10 two hundred square feet.

11 Q. Previously the whole building had been three
12 thousand?

13 A. Just three thousand, that's correct.

14 Q. Now, when we're looking at the lodge building
15 and we're trying to make a determination as to what's
16 an accessory use or a subordinate use as opposed to
17 the principal use, all right, I think we're forced to
18 go down the list of scheduled uses and put it in one
19 category or the other, so I wonder if you would go
20 over there or pull the site plan up, whichever is
21 easier, and go down that list for me and tell me which
22 category you'd put these in. Do you have it there?

23 A. Yes. This is the revised Master Concept
24 Plan.

25 Q. Yeah. And what I'm suggesting is let's just

1 look at this lodge building and go down the list. We
2 have lobby and administrative office. Now, when we
3 talk about administrative office, is it your
4 understanding this is the administrative office for
5 the hotel operation?

6 A. Yes.

7 Q. All right. And the lobby is the guest lobby
8 for the hotel operation?

9 A. Yes.

10 Q. All right. So if I understand your earlier
11 testimony, you would take that thousand square feet,
12 even though it's in the lodge building, and you would
13 say no, that's a principal use?

14 A. No, I would say that is ancillary as we have
15 it here to the hotel/motel.

16 Q. Oh, okay. All right. Now when I look at the
17 kitchen, five hundred, and the restaurant, I presume
18 that would be ancillary?

19 A. That's correct.

20 Q. I presume the real estate office and store
21 would be ancillary?

22 A. That's correct.

23 Q. All right. The caretaker's unit, what would
24 that be?

25 A. That would be ancillary.

1 Q. Okay. Now, I'm not sure what to do with the
2 covered porch and the pool. The covered porch is one
3 thousand, one hundred and twenty square feet and we've
4 indicated I believe earlier that you would recommend a
5 condition limiting the seating on it to five hundred
6 and sixty square feet, so is this covered porch, all
7 or part of it, a principal use or an ancillary use?

8 A. I think you still look at that as ancillary
9 to the overall hotel/motel.

10 Q. All right. Okay. Now, let's look at the
11 pool deck for a minute. Does the pool deck count in
12 the calculations?

13 A. No, it doesn't.

14 Q. All right. So that's neither ancillary nor
15 principal?

16 A. Well, I think you look at it as ancillary to
17 the overall hotel/motel.

18 Q. All right. Does the pool bar count within
19 the --

20 A. Yes, we have a square footage there for the
21 pool bar ancillary.

22 Q. Okay.

23 A. So there is a square footage for that.

24 Q. Let's locate that if we could.

25 A. Sure. That's on Condition Number 3.

1 Q. Okay. What's the square footage?

2 A. Three hundred square foot pool bar.

3 Q. Three hundred square foot. All right.

4 Now, I think you had testified earlier, and I
5 think maybe in error, that the number of square feet
6 of the cabins was four thousand, two hundred or
7 something. I had been using a five thousand, seven
8 hundred forty-two. It might be worthwhile to take a
9 moment and add that up so that we're using the correct
10 number.

11 A. Sure.

12 MR. DEPEW: I have a calculator.

13 MR. CICCARONE: That would make it too easy.
14 We're giving the Applicant a hard enough time as
15 it is, I hate to cut him on his principal use,
16 too.

17 MR. KELNER: Five thousand, seven hundred and
18 fifty. I'm just using seven fifty, rounding it
19 off. Seven forty-eight.

20 THE HEARING EXAMINER: I got lost somewhere
21 along the way. We're talking about ancillary
22 uses. Are we talking about an ancillary use to
23 being limited to no more than ten percent of the
24 principal use or are we saying commercial use?
25 The reason I ask the question is you're saying in

1 effect the lobby area for a hotel/motel and the
2 office for a hotel/motel is not figured as part of
3 the principal use, that's an ancillary or
4 subordinate use? I need to know that myself. I
5 think he's getting at the same area. It seems
6 different to me.

7 MR. KELNER: I guess the uniqueness comes
8 that we don't want to have everything in one
9 building. We have cottages outside and we have
10 the main building here where we have a lobby, and
11 I guess as part of the hotel itself you went into
12 the lobby for the use of the guest cottage and
13 you'd say yes, that would be part of the principal
14 use.

15 THE HEARING EXAMINER: Well, using that same
16 rationale then, if you're going to have a
17 restaurant are you saying that you have to have a
18 restaurant in each of the hotel rooms to make it
19 part of the ten percent because it's in a
20 different building? At some point the analogy
21 doesn't work. I'm not trying to correct you, I'm
22 not trying to get into Mr. Ciccarone's area, I
23 need to be clear in my own mind. If you're
24 starting to call the registration area for the
25 hotel/motel use that happens to be in a different

1 structure as an ancillary structure, that's
2 getting a bit far afield.

3 MR. KELNER: And I would agree with you on
4 that, yes, that when you look at it from that
5 standpoint the lobby -- and if you wanted to look
6 at the administrative office then I guess you
7 would say yes, those would be part of and
8 functioning for the overall use.

9 THE HEARING EXAMINER: The reason I say that
10 is again, I'm not trying to bias anybody, but it
11 seems to me when we're talking about ancillary
12 uses we're talking about a use, and an office use
13 that is supporting the main -- the hotel/motel to
14 me doesn't seem to be a different use. Now, if
15 it's an office for the restaurant, I can see it.

16 MR. KELNER: Yes.

17 BY MR. CICCARONE:

18 Q. Maybe I could help by asking the question
19 this way: Regardless of whether you're right or wrong
20 or who you agree with, in your analysis of whether the
21 principal use was being eaten up by the accessory use,
22 which I presume you had to do at some point, I'm just
23 trying to figure out where you put what as you were
24 doing the calculations, and I think you said --
25 notwithstanding what the Hearing Examiner said, that

1 you put the -- basically you put everything in the
2 lodge building in accessory use is what I think I
3 heard you say, and I think you included the porch but
4 not the pool deck. Is that right?

5 A. Well, the pool deck would be ancillary and I
6 think the porch, like I say, when it comes to the
7 lodge building itself, it functions also as part of
8 the hotel/motel unit themselves, so I don't think you
9 can --

10 THE HEARING EXAMINER: If you had a
11 stand-alone hotel/motel that had a swimming pool,
12 how ~~old~~ ^{would} you count the swimming pool?

13 MR. KELNER: It would be ancillary to it.

14 THE HEARING EXAMINER: Okay. That helps.
15 It's not any different here then.

16 MR. KELNER: You have to look at it as one
17 building for the sake of simplicity and easier to
18 understand it instead of two different buildings.

19 THE HEARING EXAMINER: Why does the
20 separation of the building make a difference? I
21 know that there's that provision in the code that
22 talks about if they're not in the same building
23 then it gets a different status, but in this
24 particular case why are you treating them
25 separately?

1 MR. KELNER: No, I don't want to treat them
2 separately.

3 THE HEARING EXAMINER: But you are.

4 MR. KELNER: Well, only from the standpoint
5 that we have all these cabins and we also have the
6 lodge building, which is part of the hotel/motel
7 itself. Now, within that building there's going
8 to be certain things that are going to be
9 ancillary to the operation of that hotel/motel;
10 the pool is one of them.

11 THE HEARING EXAMINER: But by being ancillary
12 to the hotel/motel, does that fall under the ten
13 percent calculation? And I think that's where Mr.
14 Ciccarone is coming from. He's adding up all of
15 the primary uses and he's saying in effect if we
16 have ancillary uses we've got to deduct those and
17 add those as part of the ten percent and at what
18 point does that come, and he's trying to get you
19 to say what it is you're looking at.

20 MR. CICCARONE: To be fair to Mr. Kelner, his
21 answer to the ten percent question was based on
22 the assumption that I was correct in applying the
23 ten percent rule, which I don't believe he agreed
24 to, he merely said if he were to apply it this is
25 how he would apply it.

1 But my question I think is still valid,
2 notwithstanding that, and the position my client
3 advocates is not the one the Hearing Examiner is
4 advocating, I think it's the one that the Staff
5 has used in its analysis which is to say you took
6 the --

7 THE HEARING EXAMINER: The reason I say that
8 is I don't think the Staff used that in the
9 analysis, because had they used it -- I'm not
10 saying they shouldn't be using it, I'm not saying
11 you are not correct, but had they used that we
12 wouldn't be here because the restaurant wouldn't
13 have been included in the square footage because
14 it would be too large.

15 MR. CICCARONE: Well, not just that. If I
16 may, let me state it this way and see if you would
17 disagree with me. When I added up the lodge, the
18 porch and the pool deck and the pool bar under the
19 earlier site plan I came up with seven thousand,
20 fifty-nine square feet, which is one thousand, two
21 hundred and fifty square feet more than the
22 so-called principal use. And now that's increased
23 by another twelve hundred feet, so now I'm up to
24 eight thousand, two hundred and fifty-nine square
25 feet of what I think the Staff is trying to tell

1 me, the Hearing Examiner notwithstanding, is
2 ancillary or accessory or, if you will,
3 subordinate, and I'm trying to reconcile those
4 numbers.

5 THE HEARING EXAMINER: You're saying how can
6 the ancillary use be larger than the primary use.

7 MR. CICCARONE: Precisely.

8 THE HEARING EXAMINER: I understand that.
9 I'm not saying that's not the way you're going,
10 but clearly that wasn't the way the staff report
11 was prepared. If it had been prepared that way,
12 we would have a different case. You may be
13 changing his mind, which is fine, and if you can
14 get him to say that, I'm not arguing that point,
15 but that's not how we got here.

16 BY MR. CICCARONE:

17 Q. Well, I'm going to respectfully suggest that
18 I already have changed his mind because earlier when
19 we were talking, Mr. Kelner, and I asked you about
20 square footages, I think I threw several examples and
21 I believe your testimony was at the point when the
22 accessory uses get bigger in size than the principal
23 uses we have now, if you will, flipped the principal
24 use with the accessory use so that the hotel and motel
25 is no longer the principal use, if in fact my numbers

1 are correct.

2 That's what I think you testified to. I just
3 want to see if in fact that's your testimony.

4 A. I think only on the basis of we're talking
5 about theoretical, if you change that they would be
6 the same.

7 Q. Again, not to be argumentative, but I'm not
8 talking about ten percent. What I asked you earlier
9 was when you are looking at how to characterize a use
10 as principal or ancillary, the one thing we could
11 agree on was that size mattered; whether you're
12 looking at one provision in the Land Development Code
13 or another I think your testimony was that the common
14 understanding of subordinate encompasses size, if you
15 will, and when I took you through the examples I think
16 we reached the point when the size of the ancillary
17 use exceeded the principal use, at which point I
18 thought your testimony was that's no longer an
19 ancillary use.

20 And if I understood your testimony correctly
21 and I'm applying the math as I'm getting it from the
22 site plan, I wind up with the accessory uses being two
23 thousand, five hundred square feet more than the
24 principal use.

25 I'm just trying to confirm if my math is

1 correct using the breakdown you just gave me between
2 accessory and principal. Am I missing something?

3 A. No. The only thing with regard to that is
4 that we are also talking here of planned development.

5 Q. Correct. And I think I had asked you earlier
6 if you could point to me anywhere in the Land
7 Development Code where it says that the concept of
8 accessory is different for planned development as
9 opposed to a conventional zoning and whether 34-3021
10 did or did not apply to both types of rezonings, and
11 your answer at the time was no, you could not. Have
12 you been able to find such a provision since I asked
13 you that?

14 A. No, I haven't, no.

15 Q. To be fair to you, I will invite you between
16 now and July 14th to see if you can find such a
17 provision, and if so I'll give you the opportunity to
18 tell us what that is if you can find it. I haven't
19 been able to find it, that's the only reason I ask.

20 MR. CICCARONE: Okay. That's probably
21 fifteen minutes and a good place to break.

22 THE HEARING EXAMINER: Okay. Thank you.

23 MR. CICCARONE: Thank you very much. Thank
24 you, Bryan.

25 THE HEARING EXAMINER: Who in the audience

1 would like to speak? I believe I've sworn you in
2 the last time.

3 MS. BAKHTIAN: Yeah.

4 THE HEARING EXAMINER: I don't need to do it
5 again with you. Give your name for the record.

6 MS. BAKHTIAN: Thank you. Mitra Bakhtian.

7 THE HEARING EXAMINER: Thank you.

8 MS. BAKHTIAN: Customarily I guess you have
9 to show where your home is. We're here somewhere,
10 (indicating) away from this site. May I sit down?
11 Thank you.

12 May I ask a question that I was supposed to
13 ask earlier?

14 THE HEARING EXAMINER: Certainly.
15 Pull the microphone closer to yourself also,
16 please. Thank you.

17 MS. BAKHTIAN: One of the questions I had was
18 you were referring again to the aesthetic sense of
19 the building. Have you come up with a new design
20 that was different than the last one, an
21 allegation of the design?

22 MR. KELNER: No, the same submittal is there,
23 it's the last one with regard to the designs. Oh,
24 here it is right here. These are the submittals
25 and that would be part of the exhibit in the

1 proposed project, so it would have to be in
2 substantial compliance with these type of
3 cottages?

4 MS. BAKHTIAN: I see. They'll have the
5 chimneys and the fireplaces and shingles and
6 shutters?

7 MR. KELNER: Yes. We're saying substantial
8 compliance; the ^{interior} ~~exterior~~ I assume could be
9 different, but generally that's what we'd be
10 looking at.

11 MR. BAKHTIAN: Because my background in
12 design tells me these are done beautiful and they
13 are reminiscent of old Florida, but the details on
14 that to recreate that would be very costly, so it
15 would be nice to know, you know, what direction
16 that's going to take.

17 MR. KELNER: Possibly the Applicant could
18 answer that question for you also.

19 MS. BAKHTIAN: Thank you. Maybe that could
20 be presented at the next hearing.

21 I have a letter here from Howard Cullen.
22 He's a resident on Gulf Lane and he wanted me to
23 read this, please.

24 MR. BROOKES: Mitra, I have already put that
25 in.

1 MS. BAKHTIAN: You don't want me to read
2 this?

3 MR. BROOKS: No, I've already put it in, it
4 was attached to my notice of appearance from Mr.
5 Cullen.

6 MS. BAKHTIAN: Okay. Very good. Thank you.
7 That makes it easier.

8 I just wanted to say Mr. Scott has quite a
9 following of a fan club. Unfortunately because I
10 don't know him I think my focus is going to be
11 more on what would be the best for the island
12 rather than trying to not hurt your feelings, and
13 I hope I'm not. Please don't jump up at me after
14 I read what I'm going to say.

15 Most of the homes on Upper Captiva are owned
16 as vacation or second homes. During recent years
17 when the island realtors and their sellers have
18 driven prices higher and higher and have reaped
19 the economic benefits, they should feel
20 responsible for attracting and bringing in a new
21 generation of buyers that have come here, but
22 unlike other exclusive islands who started out
23 this way, there's still a great mix of people who
24 either have been here for years or just recently
25 acquired ownership.

1 At least one thing we all have in common, a
2 true love for what this place offers each of us.
3 We were mostly drawn here for the same things,
4 solitude and noncommercialism and no crowds. It's
5 true that those who have worked hard and invested
6 well are feeling privileged to own what's now
7 starting to become exclusive in values. Still,
8 the average person who buys here rents out their
9 property to pay for their expenses and taxes which
10 helps maintain their home.

11 One of the Applicant's reasons to build this
12 lodge is to provide a service to our island. What
13 I understand is that the occupancy rate of the
14 rental properties on this island average about
15 eight to twelve weeks per year with high vacancy
16 rates for the remaining forty-two weeks. There
17 would be other service rendering venues that can
18 be provided through this very valuable commercial
19 lot that would render harmony with the
20 surroundings.

21 These options wouldn't be considered island
22 evils as wrongly termed by a nonenvironmentally
23 minded counsel who has helped other speculators
24 get approved on cases that were also against our
25 island's best interests. The only business that

1 would benefit from this lodge would be Grady's
2 Lodge restaurant and bar. The profile of renters
3 who come to this island for longer than just
4 overnight is they get here by taxi boat, which
5 supports the water taxi service, they may dine and
6 drink at the two restaurants or shop at the two
7 stories because of the length of time they're
8 here. They support rental market that depends on
9 them by staying at over 140 home units that are
10 available on this island already for rentals for
11 three days or longer.

12 For those owners that count on these rentals,
13 it's considered an economical system that's
14 co-dependent and can be easily disrupted by this
15 new factor that wouldn't add to, but detract from
16 the system. There are some, however, who would
17 rather not profit from the rent or facilities,
18 stay low key, that's what this island is about,
19 and have those who impact this island for profit
20 give back to the community for their uses. But as
21 someone said, we can't kill the goose that lays
22 the golden egg. If the island starts suffering
23 because of a character change, we will all suffer.

24 Regarding the densities that will affect this
25 island, according to a Captiva motel manager that

1 this lodge would like to emulate, their occupancy
2 rate is normally sixty-five percent to seventy
3 percent. Of those rented out, thirty to forty
4 percent of the time there are more guests in the
5 rooms than it's set up for. I don't know what
6 quota Grady's Lodge would have to fill to make a
7 profit, but a conservative estimation of fifty
8 percent rate of occupancy at two guests per room,
9 there would be about five thousand forty extra
10 visitors impacting this island per year, as
11 comparison to other densities that are surrounding
12 this site. The average rental property would have
13 six hundred and seventy-two visitors per year.

14 After all, this is a private island with
15 private roads. Day trippers that are considered
16 discriminated against come to this island already.
17 Out of Pine Island you can take an inexpensive
18 cruise to this and other islands and even stop for
19 lunch at one of the restaurants. The endless
20 state beaches provide enjoyment for everyone.

21 Again, because this is a private island, the
22 property owners should decide about the drastic
23 changes that can be implemented that will
24 ultimately impact this island. It should not be
25 in the hands of the county or the state government

1 that rule with narrow sighted interpretations that
2 are detrimental to the long-term well-being of
3 these fragile communities across Florida.

4 This system has been overlooking good sense
5 and letting little bits of what's needed to be
6 preserved slip. You can't look at this simply at
7 what's legal or illegal from the standpoint of
8 jurisdiction. The question has to be does it make
9 sense to put this motel on this island. As proven
10 before on other islands, when you open the doors
11 to additional visitors on top of what's already
12 anticipated to be developed, which is about three
13 hundred more lots and potentially each as rentals,
14 we'll lose the essence of what we came here for,
15 not to mention tax and the infrastructure that
16 supports it.

17 Being considered exclusive may be acceptable,
18 for that's what it takes to prevent all of us from
19 becoming another Sanibel Captiva or even worse,
20 Key West.

21 Thank you.

22 THE HEARING EXAMINER: You're welcome. Any
23 questions for Ms. Bakhtian? Okay, thank you.

24 Anyone else like to speak? Yes please.

25 (Ms. Paul was placed under oath by Mr. Territo.)

1 THE HEARING EXAMINER: Please state your name
2 and address for the record.

3 MS. PAUL: My name is Rosella Renaldo Paul.
4 My primary residence is at 3823 Corona Street,
5 Tampa, Florida, and my secondary residence is on
6 North Captiva at 540 Longboat Circle. I'm a
7 fourth generation Floridian, born and raised
8 around the Tampa bay area and I'm now a CPA and I
9 specialize in tax preparation.

10 My husband and I occasionally rent our
11 property at the present to help defray some of our
12 expenses, as we have mentioned before. We do
13 limit it to six adults at this time. In fact we
14 mostly rent during the time that I can't use it,
15 which is tax season. I anticipate the day that I
16 can experience tax season from my Captiva home.

17 At this point in time family obligations
18 require us to live in Tampa, but we have always
19 planned to make our home on the island. We try to
20 make our way to the island as often as possible.
21 In fact, we're going to be there for the next five
22 days letting some of the cobwebs out.

23 We've been coming out to North Captiva for a
24 number of years. The island reminds me so much of
25 what old Florida used to look like before the

great growth explosion of the past thirty years.

When I was a little girl my family used to have picnics on the beaches of Pass-a-Grille and Pinellas, which is -- Pass-a-Grille is a beach along the Pinellas way. In fact my great grandmother had a house on Pass-a-Grille Beach before they even built the bridge. They also had to ferry over to that island for their supplies, just as my husband and I now ferry over to Captiva.

This parallel is quite beautiful, but it also is quite frightening to me. My concerns here today are the unforeseen effects that are sometimes overlooked in initial development planning. The immense growth the Pinellas beaches have experienced in the past thirty years has brought great benefits and also horrendous problems: Traffic congestion, elevated crime levels, serious flooding problems, waste management issues and hurricane evacuation problems, to name a few.

This beautiful little island that we have today is like the Pass-a-Grille of my great grandparents. My grave concern is that the runaway growth that Pass-a-Grille has experienced,

1 one result of the development process, were not
2 thoroughly addressed and planned for, can only be
3 magnified in a small island system such as we
4 have.

5 Mr. Scott, as a long time resident of the
6 island I know that you have a great love for it.
7 I also understand the potential advantages you're
8 entitled to in your island dealings and I
9 appreciate the changes that you have made so far
10 in this process and I have all hope that the plans
11 you eventually put in place will be good for the
12 island.

13 However, I still have some very real concerns
14 and would like to see them objectively addressed
15 and planned for now at this stage when we can
16 still do something about them. These concerns
17 include the increased density and the problems
18 inherent. Buffering the noise, extremely limited
19 beach access, limited to non-existent beach or
20 boat dockage, the dueling pool situation, sewage
21 problems, water quality and availability, the
22 infectious process of development and the fact
23 that once zoning changes are made justification
24 for additional changes become that much easier.

25 My concern as a homeowner only two homes away

1 from the proposed development is that any zoning
2 changes have the propensity to begin creeping up
3 on us quickly and insidiously unless we address
4 these very real concerns now.

5 Strict conditions must be in place that say
6 whoever may come after Mr. Scott in this project
7 will have to maintain the feel and ambiance of
8 this special place.

9 As my family saw and experienced at
10 Pass-a-Grille Beach, unrestricted development can
11 be a creeping monster that may eventually devour
12 the character and beauty of what we find so
13 special about our little island.

14 Thank you.

15 THE HEARING EXAMINER: You're very welcome.

16 Mr. Powell, you want to come up? Anyone
17 else? Mr. Powell. Yes. I'm not sure if I swore
18 you in.

19 MR. POWELL: You did.

20 THE HEARING EXAMINER: I did. Okay. You've
21 been sworn.

22 MR. POWELL: William Powell, 4430 Schooner
23 Drive in North Captiva.

24 I just have a couple of things I would like
25 to clarify on the record. There seems to have

1 been -- I believe it was part of the record of the
2 last session where Mr. Uhle, you indicated to Mr.
3 Hutcherson in a transcript, "Are there -- from a
4 planning perspective would there be reasons --"
5 and this is on page 9, by the way. "Would there
6 be reasons to treat hotel densities different than
7 residential densities? Are they the same
8 phenomena or are they different?"

9 And Mr. Hutcherson's response was, "They are
10 different and the impacts aren't the same. These
11 units won't have any kitchens, they're much, much
12 smaller than a single family home."

13 And then Mr. Uhle indicated, "So are there
14 other differences in terms of the impacts?"

15 Mr. Hutcherson's response to that was Mr.
16 Hutcherson: "Well, traffic, water, sewer, all are
17 going to be less. We don't have traffic,
18 obviously, on the island, but water, sewer, all
19 the impacts that are measurable are going to be
20 less for a hotel room compared to a single-family
21 home."

22 That's a little bit -- are we talking about a
23 single-family unit versus a single-family home? I
24 assume that's what you're talking about. You're
25 not talking about the complex as a whole because

1 the testimony has already been given that the
2 impacts on sewer are much greater than they would
3 be on any single-family home.

4 THE HEARING EXAMINER: You want to explain
5 your answer? If you want to you certainly may.

6 MR. HUTCHERSON: Yeah. You were asking me I
7 thought dwelling unit to hotel unit.

8 MR. POWELL: Dwelling unit to a hotel unit.
9 How many residential units could you get on that
10 piece of property if you were to put it on that
11 piece of property?

12 MR. UHLE: I thought this was public input.

13 THE HEARING EXAMINER: Yeah. This is really
14 more of a chance for you to make your comments and
15 concerns rather than ask questions.

16 MR. POWELL: All right, then let me just make
17 a comment that I believe that Mr. Uhle had made an
18 analogy earlier that the surrounding homes were in
19 fact -- had a greater usage and therefore that the
20 impact of this particular piece of property would
21 show a lesser impact or lesser usage, and to that
22 degree I believe that that was something that Mr.
23 Uhle wanted to prove some compatibility with the
24 surrounding areas, that this particular project
25 was more compatible with the surrounding areas

1 wherein the usage numbers that were used in this
2 particular instance were based on numbers of so
3 many occupants on a rental basis per unit house
4 that surrounded this proposed development.

5 What wasn't said is that the houses that
6 surrounded this proposed development that are part
7 of the North Captiva Club are not rented but on
8 the average of six to ten weeks out of the year,
9 whereas the proposed development would be rented
10 for the most part three hundred and sixty-five
11 days out of the year and the occupancy rate, if it
12 would be profitable, should be anywhere between
13 the sixty and seventy-five percent range.

14 So the impact with regard to the surrounding
15 properties would be incompatible with regard to
16 that kind of analogy, if one looked at the real
17 numbers.

18 I believe also that there was some comments
19 made that these numbers were arrived by certain
20 documents that were achieved from the North
21 Captiva club showing the various houses that
22 surround this particular piece of property, and in
23 light of that the information gleaned from that
24 was used to achieve these numbers, and I believe
25 that to be true, I haven't seen the documents, but

1 I know they are part of the evidence and I do
2 believe that to be true.

3 What wasn't asked for was a list from the
4 North Captiva club, which they do have, by the
5 way, of the times that these properties have been
6 rented over the course of a year, in which case
7 one could then use factual information about the
8 number of times that each one of these houses that
9 are referenced to in this -- in prior testimony,
10 that surround this particular development, each
11 one, it would give the information as to the time
12 and the amount that these houses have been rented,
13 how many weeks they have been rented during the
14 course of the year.

15 And given that information one would have
16 found that the average rental in these homes would
17 have been six to ten weeks. I think my house for
18 the record has been rented six weeks during the
19 course of this entire year and for the most part
20 I'll be living in it during the course of the
21 summer and for the most part probably twenty to
22 twenty-two weeks out of the year I will be living
23 in that house.

24 But it hasn't been rented any more than that,
25 nor do we have any rentals further on during the

1 course of the year. We have one rental next
2 month, which I counted in these six. These
3 records can be obtained from the North Captiva
4 club and the number of times that people have
5 rented these particular houses.

6 So the analysis that these are somewhat
7 compatible to each other I think is just a
8 misconception. And that's all I have to say.

9 THE HEARING EXAMINER: Okay. Thank you.
10 (Mr. Tant was placed under oath by Mr. Territo.)

11 THE HEARING EXAMINER: Please give your name
12 and address.

13 MR. TANT: My name is Donald Tant and I own
14 two houses on North Captiva and one of them is
15 about five hundred feet from this property from
16 Brady's cut at 810 Rum Road, and I just want to go
17 on the record as I do approve for Grady to develop
18 this property. And that's about it.

19 THE HEARING EXAMINER: Spell your last name,
20 please.

21 MR. TANT: T-A-N-T.

22 THE HEARING EXAMINER: Thank you.

23 MR. HENSLEY: I was sworn in the last time.

24 THE HEARING EXAMINER: Okay. I won't do it
25 again then.

1 MR. HENSLEY: My name is Craig Hensley. I
2 live at 12124 Matlacha Boulevard, also a homeowner
3 on North Captiva Island. I have a brand new house
4 that is on the corner of Rum Road and Longboat
5 Circle. I might be the house that's a hundred and
6 fifteen away, I'm not sure, but probably if not
7 the closest one, the second closest one to the
8 proposed project.

9 There were a couple of things today that I'd
10 like to give my opinion on. First of all, I think
11 they've made some good proposed changes if the
12 project is approved, the height restrictions in
13 particular will help alleviate a lot of problems
14 with the view amenity of the single-family homes;
15 when you block out the view amenities of your
16 single-family homes you're going to hurt those
17 property values. And I'm speaking as a state
18 certified residential appraiser who does a lot of
19 work on North Captiva, so keeping these down to
20 twenty feet, if they were approved, is going to
21 help a lot.

22 Now I am concerned somewhat with the large
23 building being over four thousand square feet and
24 the thirty-five feet, that's going to be a pretty
25 large structure there. If that could be maybe

1 held down as much as possible, that would be an
2 excellent thing to try to do as well.

3 But some the things I'd like to hit on, a lot
4 of talk has been made today about this intensive
5 commercial use of the North Captiva Island Club,
6 of which I'm a member, and when I'm out there I'm
7 trying to -- when I look at US 41 to my mind I see
8 intensive commercial use. When I look at the
9 North Captiva Island Club I see two swimming
10 pools, a hot tub and a small restaurant and maybe
11 six or eight people in the pools.

12 Now, I'm trying to figure out where all this
13 intensive commercial activity that we're going to
14 be similar to is really at out there, because, you
15 know, I don't see it. There's been comparisons
16 made to North Captiva Island Club homes, how many
17 bedrooms does this house have, if you've got four
18 houses, five houses you've got fifteen units on
19 this much square footage. And so the motel would
20 have approximately the same amount of units at the
21 same square footage, so it would be equal is the
22 argument. But here's the difference: When you
23 rent out a house on North Captiva you've got one
24 house with one family in there, typically you've
25 got a husband, wife, a couple of kids and they've

1 got one golf cart and they are there for a week.

2 Now, these units, you know, times four
3 houses, times five houses is five golf carts.
4 These units you've got fifteen units with fifteen
5 golf carts being used daily, it's three times the
6 traffic.

7 So it's not a fair comparison to say we've
8 got this many bedrooms compared to this many units
9 and say it's equal, because it's not. The golf
10 cart traffic itself is triple.

11 Additionally, the boat traffic to get out to
12 the island, these people that come out and rent a
13 house, ride the ferry out one time, they stay
14 there three days or their seven days and they ride
15 the ferry back one time. And in a fishing lodge
16 situation or day trippers are going to be in the
17 boat, out in the boat back, then the next day
18 another one out and back; you've got fifteen
19 people coming out and back every day instead of
20 one trip out and one trip back in the week. So
21 the boat traffic is higher, the golf cart traffic
22 is higher and it's just going to be a congested
23 situation.

24 I like the fact that the total units were
25 reduced from fifteen to ten, but, you know, if I'm

1 understanding this right the units were increased
2 in size so the density actually increased for the
3 use, so I'm not sure that -- the density increased
4 on the cottages and the clubhouse is bigger, so I
5 don't see where we gain really anything there. We
6 played with some numbers, but density wise we went
7 in the wrong direction, if I'm understanding these
8 calculations.

9 One last item I'd like to mention that, you
10 know, is a different can of worms and I'm
11 surprised it hasn't been brought up by someone,
12 but, you know, there are some other residents of
13 North Captiva that requires some consideration and
14 protection, and it's the manatee issue and
15 increased boat traffic that this may cause. The
16 Save the Manatee Club informs me that there were
17 three deaths in Safety Harbor last year, an
18 additional three deaths on the west side of Pine
19 Island, which is where the ferry boats would run
20 back and forth bringing people.

21 Lee County does not presently have a manatee
22 plan in place to protect the manatee, the
23 protection plan is not in place and to approve a
24 higher density in a very sensitive manatee area in
25 my opinion would be irresponsible right now until

1 we have a plan in place for these animals as well.

2 So that's all I would have to say today
3 unless there's questions.

4 THE HEARING EXAMINER: Okay. Thank you. Any
5 questions of this gentleman? Okay. Thank you.

6 Anything from anyone else? All right. So we
7 have nothing else, then what we'll do is we'll be
8 coming back here on July the 14th at nine o'clock
9 in this room and maybe we can finish that day.

10 Thank you. The hearing is in recess.

11 (Proceedings concluded.)
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1 STATE OF FLORIDA)

2 COUNTY OF LEE)

3
4 I, Elizabeth Barnes, RPR, Contract Court
5 Reporter, 20th Judicial Circuit of Florida, do certify
6 that I was authorized to and did stenographically
7 report the foregoing proceedings and that the
8 typewritten transcript of proceedings, consisting of
9 pages numbered 1 through 195, is a true record.

10 Dated this 31st day of May, 2004.

11
12
13 
14 _____
15 Elizabeth Barnes

LEE COUNTY HEARING EXAMINER MEETING

RE: DCI2003-00080

IN RE: Graydon W. Scott in reg to Grady's Lodge

Transcript of Proceedings

Before Salvatore Territo, Lee County Hearing Examiner, held at the Hearing Examiner's Hearing Room, 1500 Monroe Street, Fort Myers, Florida, on April 22, 2004.

PRESENT:

Kim Trebatoski, M.S., Principal Environmental Planner

Bryan Kelner, Principal Planner

Joan C. Henry, Assistant County Attorney

Matthew Uhli, Attorney for the Applicant

David Depew, Attorney for Kathryn Powell

Ralf Brookes, Attorney for Mike and Sarah Rapp and

Rosella and Henry Paul

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1 HEARING EXAMINER: Good afternoon.

2 I'm Sal Territo, Lee County Hearing Examiner.
3 We're here for case DCI2003-00080, Graydon W. Scott in
4 regard to Grady's Lodge.

5 Let me explain the process for people who have
6 not been to one of these hearings before. The way the
7 process works is the applicants will make their
8 presentation first. When they are finished, the staff
9 will make his presentation or their, if there's anyone
10 else here, and when he's finished, then anyone in the
11 audience who would like to speak or ask questions, I'll
12 have you come to the microphone, I'll swear you in, get
13 your name and address, and you can ask whatever questions
14 you might have at that particular time or make whatever
15 statement you'd like to make.

16 If you have questions, I prefer that you wait
17 until both sides have finished. Often the question that
18 you ask will be answered by one of the other witnesses
19 rather than by the person who just finished speaking.

20 If you intend to speak before the Board of County
21 Commissioners, it will be necessary for you to speak here
22 today. If you do not speak here, they will not let you
23 speak there. So this is the place that you have to get
24 your comments on the record.

25 If all you want is a copy of my recommendation,

1 filling out one of the sheets that is sitting back there
2 will get you a copy of my recommendation, but it will not
3 give you the right to speak before the Board of County
4 Commissioners.

5 If you are represented by an attorney or some
6 other agent here today, you and they may both speak at
7 this hearing, but the Board's rules are that only one or
8 the other may speak at their hearing. So that's the way
9 the process works. I know people object to that
10 particular process, but that's how it works, so I will not
11 stop anyone from speaking here, even if they are
12 represented, but they will not get a chance to speak at
13 the Board unless they fire their lawyer, which they don't
14 want to do.

15 All right. Any questions about the process so
16 far?

17 All right. If we go long enough, I will take
18 breaks about every hour and 15 minutes or so. The
19 restrooms are on that side of the building. And if we go
20 longer than today, then we will continue the hearing and
21 I'll announce the continuance date today before we close
22 the hearing.

23 Okay. Who is testifying at the table so I may
24 swear you in.

25 (A discussion was had off the record.)

1 HEARING EXAMINER: Mr. Brookes.

2 MR. BROOKES: Your Honor, we have an expert
3 witness, David Depew, who has to leave at 3:30. I don't
4 want to send him now, but if we get to around 2:30 if we
5 could stop and take him out of order if possible.

6 HEARING EXAMINER: Unless there's an objection by
7 the applicant, I will do that.

8 MR. UHLI: I think we can probably do that.

9 HEARING EXAMINER: Remind me if I lose track of
10 the time, let me know. Okay. Thank you.

11 Okay. Who will be testifying so I can swear you
12 in.

13 (The witness were sworn.)

14 HEARING EXAMINER: If I missed anyone, I'll get
15 them when they come up to speak.

16 Mr. Uhli.

17 MR. UHLI: For the record, Matt Uhli,
18 representing the applicant.

19 We do not have any issues with the Staff Report
20 in this case and in light of that, in light of the fact
21 that I have an obvious disincentive not to talk too much,
22 we'll not be making a long presentation.

23 Mr. Hutcherson will be testifying on all the
24 various planning aspects of this particular application,
25 and when he's done, I have a few closing comments to make

1 about a couple of the more important issues.

2 HEARING EXAMINER: Thank you.

3 Mr. Hutcherson.

4 Thereupon,

5 ROBERT D. HUTCHERSON,

6 called as a witness by the Applicant, having been
7 previously duly sworn, was examined and testified as
8 follows:

9 MR. HUTCHERSON: For the record, Robert
10 Hutcherson with Wilson Miller, Incorporated, representing
11 the applicant Grady's Lodge.

12 MR. UHLI: We would ask that he be accepted as an
13 expert in land use planning based on his well known
14 credentials.

15 HEARING EXAMINER: All right. Any objections?

16 MR. KELNER: No objection.

17 HEARING EXAMINER: Without objection you are
18 accepted.

19 MR. HUTCHERSON: This is a request for rezoning
20 from C-1 to CPD to permit a 15 unit lodge. Subject
21 property is located on northern Captiva Island,
22 immediately adjacent to the southern boundary of the
23 Island Club, North Captiva Island Club. So on the south
24 end of Safety Harbor off an access canal, that becomes
25 southerly off of Safety Harbor and it abuts up to the

1 single family areas south and west going to the island.

2 HEARING EXAMINER: Can you hear in the back? Go
3 ahead.

4 MR. HUTCHERSON: This property was originally
5 zoned to C-1 in 1964 for a marina and related uses and
6 there's an attachment on the Staff Report that actually
7 has the minutes and if you look into the minutes, there's
8 a reflection of a discussion for a future hotel on this
9 property. But again the remainder of the property was
10 rezoned to C-1 in '65, to give you the difference, we have
11 now 1.59 acres C-1 zoning classification.

12 Inasmuch as this happened in '64 and '65, the
13 regulations have changed over the years making this
14 rezoning necessary in order to accommodate the intended
15 use of the hotel.

16 As far as the area itself goes, these photographs
17 just from the island itself, this view here is coming
18 down --

19 HEARING EXAMINER: Why don't you grab the
20 microphone up there. There's a butterfly clip that will
21 come off.

22 MR. HUTCHERSON: This particular photo coming
23 down the mouth of the boat basin right into here, you're
24 looking across, you'll see the building on the corner.
25 This is the Island Club and then the edge of the corner of

1 the boat basin here (indicating).

2 The next photograph is actually of Mango's, it's
3 the restaurant in association with the North Captiva
4 Island Club. It's adjacent to the subject property,
5 backed up to the back of our property.

6 The next picture is actually standing on the
7 adjacent property, Two Mango's, looking through basically
8 the fenced area and Rum Road where it comes into the
9 subject property, right back in here (indicating) In
10 other words, Rum Road comes down this way, continues south
11 and then also bends around, according to the addresses on
12 the property appraiser.

13 The next picture is the house immediately
14 adjacent to and across Rum Road to the east from subject
15 property. It's a combination residence and real estate
16 office.

17 The next picture is -- we're in the northwest
18 corner of the property now up in here, adjacent to the
19 Island Club. This is their basic golf cart storage,
20 maintenance area. This is to our north property line.
21 This is again a picture of the same area, looking toward
22 the corner. You'll see the tennis courts, storage area,
23 cell tower.

24 And, again, this is another photograph just down
25 the north property line, probably halfway, abutting North

1 Captiva Island, looking across the fence at their pool
2 area, the cabana, again the cell tower.

3 And, lastly, this last picture is looking from
4 the subject property towards the back of Mango's
5 Restaurant, right here from this point (indicating). Just
6 to give you an idea what the area is like.

7 This aerial is just a little bit more of a
8 closeup. Basically, what we're showing here is you see
9 the airstrip on the property. You see North Captiva
10 Island Club fairly plainly. See the beginning of the
11 single-family neighborhood over to the south and west.
12 This would be Safety Harbor Club. More residential. And
13 then the only other commercial node or area on the island
14 to the north with Barnacle Bill's and some of the other
15 more industrial type land uses.

16 Going back to Bryan's aerial, what this shows is
17 basically the Captiva Palma subdivision, and I can't
18 recall the name of the other platted subdivision in here.
19 But if you look at the lot sizes, and most of the lot
20 sizes in here are in the area of 9,000 square feet or a
21 quarter of an acre, not all but the majority, and the
22 equation is based on a density of four units per acre over
23 this area surrounding the property.

24 If you look closer, what we've done here is we
25 just took a look at the houses closest to our property.

1 You'll see it marked in little red dots. You've got one,
2 two, three, four, five, basically the six closest right in
3 here. They are all listed with the North Captiva Island
4 Club rental properties. They rent out, it's mostly by the
5 week, some for three day portions. They have maximum
6 occupancies listed at anywhere from six to ten people, and
7 it basically, you know, speaks to the compatibility of the
8 issue.

9 In other words, that's a 40 acre -- four units to
10 the acre single-family subdivision, basically developed
11 with large single-family homes that occupy more than one
12 family, six, eight, ten people. If you look at these
13 closest lots --

14 UNIDENTIFIED PERSON: Can't hear you.

15 HEARING EXAMINER: Take the mike again if you
16 would.

17 MR. HUTCHERSON: Basically, these ones I just
18 mentioned, the maximum occupancy is a total of 41 people
19 maximum occupancy in those closest homes to Grady's, and
20 our 15 cabins would be hard pressed to put that many
21 people. So it speaks to the compatibility to the
22 neighborhood. The fact that it's a resort type area,
23 there are visitors there constantly, lots of activity,
24 not a standard gated subdivision.

25 Again, I pointed out there are commercial areas

1 on the island. There's only two. There's an existing C-1
2 area and there is the Island Club and again some more C-1
3 zoning up here that supports another restaurant, marina
4 and that's heavily with the water taxi as well which
5 stops.

6 As far as the compatibility of the neighborhood,
7 again we have pointed out that what we did was we took the
8 neighborhood, and we determined it was roughly a density
9 of four units to the acre. And in light of Land
10 Development Code which has some -- the property
11 development regulations for C-1 and CPD, C-1 zoning is a
12 conventional zoning category, a setback of 20, 25 feet.
13 Lot coverages are standard 40. Maximum building height
14 35. Lot sizes of 7,500 square feet, 75 feet width, depth
15 of 100, minimum open space of 20. So it would be a small
16 project if it was developed under the Land Development
17 Code. Under proposed CPD again we have the same --
18 roughly the same setbacks, same lot coverage. We left the
19 maximum building height at 35 feet because that's what
20 basically the conventional zoning district requires.

21 We picked a minimal lot size of up to 20,000
22 square feet which we're required -- even though we don't
23 intend on subdividing, we're required to provide a number.
24 And, again, a depth and width of 100 and the minimum open
25 space as shown on this site plan is roughly 50 percent and

1 that's going to be what it is because one of the
2 conditions in the Staff Report limits our buildings to the
3 exact sizes they are shown as is. So, in essence, you're
4 getting from a 20 percent minimum and 50 percent is what
5 we're showing there.

6 HEARING EXAMINER: For open space?

7 MR. HUTCHERSON: For open space.

8 And, again, with the rezoning, we can limit the
9 uses. What you see in these charts as the C-1 zoning
10 matrix, everything highlighted in blue is now permitted in
11 the zoning district. What we're asking for are basically
12 one primary use and the rest accessory uses under that. So
13 we're preparing to use -- provide the limitations called
14 for and we believe we're basically restricting development
15 in the area.

16 HEARING EXAMINER: Does that list reflect the
17 fact that an incinerator was dropped?

18 MR. HUTCHERSON: This list, yes, sir, we withdrew
19 that last week. It was added after inception of the plan
20 at the advice of some of the staff we've been talking to.
21 They thought it didn't present a problem any longer, we
22 added it. But it does present a problem, so we have
23 withdrawn it.

24 HEARING EXAMINER: The reason I raised that, I
25 got a couple of letters dealing with the incinerator. So

1 if anyone's here for that issue, the incinerator has been
2 deleted as one of the uses, it will not be allowed.

3 Excuse me. Go ahead.

4 MR. HUTCHERSON: The use itself provides a good
5 transition from the commercial and pretty intense aspects
6 of North Captiva Island Club to the more spread out units
7 to the south and the west. It's basically multi-family
8 use, it's a hotel use. It's less intense than the Island
9 Club itself. And, basically, this provides a transition
10 from commercial to quasi commercial to a residential, and
11 again limiting uses as you go, taking away some of the
12 more noxious uses that the C-1 zoning category allows.

13 Lastly, again speaking to the compatibility,
14 building heights out here are measured from the finished
15 floor elevation, which is the minimum floor elevation out
16 there, depending on where you are. On this site it's
17 going to be anywhere from nine to ten. And that's where
18 your building heights are measured from. So most of these
19 homes you'll find out here are all measured from there.
20 They're at least two stories on pilings up to the maximum
21 of 35 feet allowed out there.

22 So what we're planning, even though we have a
23 maximum height of 35 feet generally, it's simply because
24 we haven't developed the architecture yet. You will see
25 from our cabins and what we're trying to do here, they're

1 all single story, but pitch roof. They will be on pilings
2 because we have to meet the minimum flood elevations,
3 however, they won't approach 35 feet maximum height that's
4 specified in the ordinance.

5 As far as the Lee Plan goes, we believe we are
6 compatible or consistent with the Lee Plan. The outer
7 islands are sparsely settled, have minimal existing or
8 planned infrastructure, approved for major shopping
9 centers or employment centers, and I expect for it to be
10 programmed to receive urban type capital improvements in
11 the concept of this plan and as such can continue --
12 anticipate a continued level of services below that of
13 other land use categories.

14 Continuation of the Outer Islands essentially in
15 their present character, which is intended to provide for
16 a rural character and lifestyle, and conserve open space
17 and important natural resources. Maximum density is one
18 unit per acre.

19 We obviously can't do the one unit per acre. It
20 doesn't work out as a hotel because a hotel has to be ten
21 units to comply with the definition of hotel.

22 We have since applied the, like I said, the
23 density requirements for the adjacent properties. We came
24 in under that at three units to the acre. Did the
25 equivalency tables and came up with 15 cabins,

1 understanding we would be underneath the required
2 density -- excuse me -- the existing density for the
3 abutting development. Although this calls for one unit
4 per acre, it's really not one unit per acre, it's four
5 units to acre developed out. There are at least 100 more
6 lots left, all of which are eligible for single family
7 determination. So the island -- these single family lots
8 will develop out at approximately four units an acre. It
9 doesn't make any sense to stick a one unit to the acre
10 development basically in the middle of single family at
11 that density adjacent to commercial.

12 So we believe that by providing the necessary
13 number of units, we are fulfilling a service on the
14 island, we have the necessary infrastructure, we have an
15 existing public water supply well on the adjacent property
16 permitted in accordance with the Water Management
17 District, the DP, we will provide septic systems in
18 accordance with the Department of Health. We've spoken
19 with them, with existing drafting points for the fire
20 department adjacent, and we're served by the existing road
21 system on the island.

22 By basically providing for the cottages and style
23 you see here, and preserving as much of the existing
24 vegetation on the island as we can or on our property,
25 that we believe that's going to be the impetus or the --

1 that's how we're going to maintain the rural character and
2 lifestyle on the island, basically we're trying to fit in
3 with what's out there already.

4 Policy 4.1.1, development designs will be
5 evaluated to ensure that land uses and structures are well
6 integrated, properly oriented, and functionally related to
7 the topographic and natural features of the site, and that
8 the placement of uses or structures within the development
9 minimizes the expansion and construction of street and
10 utility improvements.

11 Again, that's what we've done here. Got the
12 road, basically Rum Road wraps around the site. Adjacent
13 to Captiva Island, buffering along here that's required.
14 Again, we worked with the fire department and the staff to
15 provide staggered buffering along the road here that they
16 want to get some of the access.

17 The cabins and everything is oriented to the
18 interior of the site, so we believe that it is
19 functionally related to the topographic features on the
20 site, therefore, complies with that standard as well.

21 It is not subject to the site location criteria
22 found in the Lee Plan. Strictly put, hotels aren't
23 required to comply with those.

24 And Policy 6.1.4 says commercial development
25 will be compatible with adjacent existing and proposed

1 land uses with existing and programmed public facilities
2 and services. I believe we've been able to demonstrate
3 that our density is equal to or less than that of the
4 surrounding area, intensity less than that of the Island
5 Club as well, so we believe we fit that category.

6 We don't believe that this is opening a new area
7 to scatter premature strip development. It's basically
8 infill on a small parcel where existing commercial
9 business is reasonably the only thing you can do here.
10 The location of the property directly adjacent to the
11 restaurant, maintenance area and outdoor pool area, bar
12 and activity area of the club make it susceptible to all
13 the noises that come from that, making residential uses
14 not a viable option.

15 Lastly, commercial development may take place
16 when properly zoned and when meeting the standards of
17 6.1.2 within future urban areas. Minor or rural
18 commercial uses which serve rural residents or marine
19 traffic, neighborhood and commercial uses which serve not
20 commercial public attractions, limited agricultural and
21 commercial uses which serve rural areas and agriculture
22 and limited commercial marinas may be permitted in
23 non-urban areas, and we believe that's what we have here.
24 We have a use that's situated such that it can serve the
25 island and serve marine traffic, and we believe it also

1 complies with that policy.

2 Last goal, protection of life and property in
3 coastal high hazard areas, Policy 75.1.2.

4 Rezoning to allow higher densities will not be
5 permitted on barrier and coastal islands if the capacity
6 of critical evacuation times would thereby be exceeded,
7 Objective 79.1. We have discussed this matter with Terry
8 Kelly with ^{Emergency} ~~Mercy~~ Management. Because this is a hotel, we
9 don't add to the population density as they see it. We
10 don't add to the evacuation time because they didn't drive
11 to get to the island, we would simply close in the event
12 of a hurricane.

13 MR. DEPEW: Objection, hearsay in that the
14 hurricane person isn't here for me to cross-examine on
15 that issue.

16 HEARING EXAMINER: Your objection is noted. It's
17 overruled because we ^{can} ~~can't~~ accept hearsay.

18 MR. HUTCHERSON: Thank you. I can supply a
19 letter that I have from Mr. Kelly saying the same.

20 HEARING EXAMINER: It will have the same hearsay
21 objection, but I'll accept it as well.

22 MR. HUTCHERSON: Okay. Basically, that's the
23 gist of our presentation. We believe we comply with the
24 Lee Plan, all the applicable policies, and we look to you
25 to look favorably upon our request. I'll be happy to

1 answer any questions.

2 HEARING EXAMINER: Mr. Uhli, any questions?

3 MR. UHLI: Yes, just a few.

4 Hutch, just to make this clear, the renderings
5 that you have up there as an exhibit, those are included
6 in the application, are they not?

7 MR. HUTCHERSON: Yes, they are and attached to
8 the Staff Report.

9 MR. UHLI: And there's a condition that would
10 require the project to be built in substantial compliance
11 with those renderings?

12 MR. HUTCHERSON: That's correct.

13 MR. UHLI: Can you tell me what the zoning use
14 matrix tells you about restaurants and hotels in the C-1
15 district?

16 MR. HUTCHERSON: They're both permitted.

17 HEARING EXAMINER: Get the microphone, please.

18 MR. HUTCHERSON: Okay. Restaurants are
19 permitted, I believe, all groups, 1, 2, 3 and 4, hotels
20 are permitted as well. Let's see. Hotel/motel permitted.

21 MR. UHLI: With regard to the Lee Plan, Hutch, to
22 your knowledge, are there any Lee Plan goals, objectives
23 or policies which specifically address hotel densities on
24 undeveloped barrier islands or anywhere else in Lee
25 County?

1 MR. HUTCHERSON: No.

2 MR. UHLI: Are there -- from a planning
3 perspective, would there be reasons to treat hotel
4 densities differently than residential densities? Are
5 they the same phenomenon or are they different?

6 MR. HUTCHERSON: They are different and the
7 impacts aren't the same. These units won't have any
8 kitchens. They're much, much smaller than a single-family
9 home.

10 MR. UHLI: So are there other differences in the
11 terms of the impacts?

12 MR. HUTCHERSON: Well, traffic, water, sewer, all
13 are going to be less. We don't have traffic, obviously,
14 on the island, but water, sewer, all the impacts that are
15 measurable are going to be less for a hotel room compared
16 to a single-family home.

17 MR. UHLI: And there's also a difference, in your
18 opinion, for hurricane evacuation purposes?

19 MR. HUTCHERSON: Yes.

20 MR. UHLI: No further questions.

21 HEARING EXAMINER: Mr. Kelner, any questions?

22 MR. KELNER: Yes. ^{Brian}~~Frank~~ Kelner for the record.

23 To the east of your property, the zoning on there
24 is what?

25 MR. HUTCHERSON: East. C-1.

1 MR. KELNER: Is there commercial property uses on
2 those properties now?

3 MR. HUTCHERSON: Yes, there is. Actually it's --
4 I believe it's an actual residence and a real estate
5 office in the same building. There's a picture of the
6 same, I believe, right here (indicating).

7 HEARING EXAMINER: Anything else?

8 MR. KELNER: No.

9 HEARING EXAMINER: That's it? Okay. Thank you.
10 What I'm going to do is I think I may make Mr.
11 Hutcherson stay up there for a second. It may make sense
12 if Mr. Brookes or anyone else has questions to ask at this
13 time rather than have him sit down, get up, sit down, get
14 up. If you have any questions, Mr. Brookes, certainly you
15 may ask him now.

16 MR. BROOKES: Thank you.

17 HEARING EXAMINER: Identify yourself for the
18 record and who you represent.

19 MR. BROOKES: Good afternoon. My name is Ralf
20 Brookes. I represent Mr. and Mrs. Rapp and Mr. and Mrs.
21 Paul who live near the proposed project at 540 Longboat
22 Circle and 546 Longboat Circle.

23 How do you propose to manage all of the waste
24 water generated by the proposed hotel units, restaurant,
25 caretaker's unit?

1 MR. HUTCHERSON: We have talked with State
2 Department of Health. We seem to be in line to receive a
3 septic tank permit upon demonstration of the engineering.

4 MR. BROOKES: Do you have anything in writing
5 from the Department of Health?

6 MR. HUTCHERSON: No I don't.

7 MR. BROOKES: Have you reviewed the local Lee
8 County Comprehensive Plan and Lee County Land Development
9 Regulations as to when a septic tank is no longer allowed?

10 MR. HUTCHERSON: Yes, sir.

11 MR. BROOKES: And what are those criteria?

12 MR. HUTCHERSON: The trajectory is less than
13 5,000 gallons per day.

14 MR. BROOKES: And the other criteria?

15 MR. HUTCHERSON: Just have to have received State
16 Department of health septic tank permit.

17 MR. BROOKES: Isn't there a criteria that says
18 you cannot have more than 2.5 units per acre and still be
19 on a septic tank?

20 MR. HUTCHERSON: Again, here we're not subject to
21 the density requirements. It's specifically excluded in
22 the Land Development Code, Chapter 34.

23 MR. BROOKES: Why would that make sense when
24 you're talking about loading of septic tanks to exclude
25 you from a density requirement which would consider how

1 many units are discharging how much sewage to a particular
2 size of parcel?

3 MR. HUTCHERSON: Well, in this case, our rooms
4 generate 100 gallons per day according to the standard. A
5 typical single-family home is, depending on the number of
6 bedrooms, anywhere from one to four hundred gallons per
7 day.

8 MR. BROOKES: What is the standard that you're
9 quoting from? Is that from a book or a --

10 MR. HUTCHERSON: That is from the Florida
11 Administrative Code.

12 MR. BROOKES: Do you have the section number for
13 that?

14 MR. HUTCHERSON: Yes, I do. I believe it's 34,
15 34(d), I believe. I don't have the entire thing. Chapter
16 62, I don't remember if it's 64(d) or (e).

17 MR. BROOKES: I'm sorry, could you show me your
18 restaurant while I'm here? I'm having trouble reading
19 this. Doctor's office, bowling alley.

20 MR. HUTCHERSON: I don't -- it's not in here. I
21 don't see it myself. There seems to be an error in the
22 table. It lists the uses from A to Z, does not list
23 restaurants.

24 MR. BROOKES: How much total --

25 MR. HUTCHERSON: Well, they have restaurants in

1 here, but it seems to be under the side category of flea
2 markets for some reason. They have restaurants, bar,
3 cocktail lounges to be operating at the same --

4 MR. BROOKES: That is per seat?

5 MR. HUTCHERSON: Right. That's the calculation
6 that we had intended to use when the restaurant was to
7 open. That's how it's done typically.

8 MR. BROOKES: And what do you estimate your flow
9 to be then?

10 MR. HUTCHERSON: At this early stage, we did a
11 calculation for Mr. Kelner just to demonstrate that we're
12 running at 5,000 gallons per day and we're roughly at
13 2,500.

14 MR. BROOKES: At this point in time, then, you
15 have nothing from the Department of Health that says you
16 would be authorized to have a septic tank on this property
17 for these uses, correct?

18 MR. HUTCHERSON: No, we weren't required to
19 provide anything at this time.

20 MR. BROOKES: What type of soil type is on this
21 parcel?

22 MR. HUTCHERSON: I can get you that information.
23 It's not something the county requires as part of this
24 application so it's not something we've judged at this
25 point.

1 MR. BROOKES: Would that be applicable with the
2 Department of Health or at the septic tank location?

3 MR. HUTCHERSON: It was when you start to do your
4 engineering for that permit.

5 MR. BROOKES: Okay. And does sand have less
6 absorption of bacteria and nutrients in the soil?

7 MR. HUTCHERSON: You're getting a little bit out
8 of my area of expertise. I'm a planner, not an
9 environmental engineer.

10 MR. BROOKES: Okay. You're not capable or
11 qualified to testify that this septic tank is adequate or
12 will be adequate to manage all the waste without causing
13 any degradation to the ground water quality or to the near
14 shore surface water quality, are you?

15 MR. HUTCHERSON: It's not part of my expertise,
16 no. We haven't been asked to provide that permit.

17 MR. BROOKES: Thank you. Let's get into the
18 density. You said that there was a hotel/motel
19 equivalency that you applied?

20 MR. HUTCHERSON: Yes, sir.

21 MR. BROOKES: And that's from the Land
22 Development Code, correct?

23 MR. HUTCHERSON: Yes, sir.

24 MR. BROOKES: 32-1802, is that it?

25 MR. HUTCHERSON: I don't have the direct quote in

1 front of me. It's Chapter 34, I believe.

2 MR. BROOKES: Okay. If you could grab your code,
3 34-1802. Are you looking at the entire code?

4 MR. HUTCHERSON: Oh, no, I'm just looking at this
5 citation.

6 HEARING EXAMINER: There should be one in that
7 first cabinet on the right.

8 MR. HUTCHERSON: 34-1802?

9 MR. BROOKES: Yes. Is that what you used to get
10 the equivalency rates of the density of the units, the
11 rental units permitted in I believe it's Subsection 4?

12 MR. HUTCHERSON: Yes, sir.

13 MR. BROOKES: Okay. Would you turn to 34-1805
14 just below that. Could you read us what that says?

15 MR. HUTCHERSON: The permitted density for hotels
16 and motels as set forth in this division and occupied in
17 any hotel or motel units on Captiva Island.

18 MR. BROOKES: And can you keep reading?

19 MR. HUTCHERSON: The maximum permitted density
20 for hotels and motels on Captiva Island may not exceed
21 three units per gross acre. The redevelopment of
22 non-conforming hotels and motels on Captiva Island will be
23 covered by provisions of 34-1545. That section will be
24 interpreted to prohibit an increase in the total number of
25 rental units and to establish a now maximum rental size of

1 550 square feet.

2 MR. BROOKES: Okay. So the section that you were
3 applying above, 34-1802, does not apply to Captiva Island,
4 correct?

5 MR. HUTCHERSON: Well, this particular section,
6 34-1805, applies to Captiva Island and not going to
7 Captiva Island.

8 MR. BROOKES: Let me have you go to the Lee
9 County Comprehensive Plan.

10 HEARING EXAMINER: That should be in one of the
11 other books in there.

12 MR. BROOKES: And before we go there, the Land
13 Development Code does not have a definition for Captiva
14 Island, does it?

15 MR. HUTCHERSON: I believe it has a legal
16 description.

17 MR. BROOKES: Did you want to pull that out and
18 show it to me?

19 MR. HUTCHERSON: Yes, it references several
20 ordinances that have the legal description provided.

21 MR. BROOKES: Okay. Let's go to the
22 Comprehensive Plan, page Roman numeral I-IV. Can you read
23 us No. 7?

24 MR. HUTCHERSON: This community includes the --

25 MR. BROOKES: What's the title for that?

1 MR. HUTCHERSON: Captiva.

2 MR. BROOKES: Okay.

3 MR. HUTCHERSON: This community includes the
4 major islands of Captiva Island, Upper Captiva Island,
5 Cayo Casta Island, Useppa Island, Buck Key and Cabbage Key
6 and the surrounding smaller islands. Although Captiva
7 itself is a seasonal resort community, in comparison to
8 the other islands in this community, it is the center of
9 activity. Due to the nature of this community, residents
10 must satisfy their major commercial and industrial needs
11 outside of this community. Conversely, the commercial
12 aspects of the Captiva community are utilized by many
13 residents and tourists from outside of the community. The
14 population of Captiva is not expected to greatly change by
15 2020. Furthermore, the area will look much as it does
16 today in the absence of a major hurricane or other natural
17 disaster.

18 MR. BROOKES: Okay. And then Policy 1.4.2, it's
19 Roman numeral II-1.

20 MR. HUTCHERSON: The Outer Islands are sparsely
21 settled, have minimal existing or planned infrastructure,
22 and are very distant from major shopping and employment
23 centers. They are not expected to be programmed to
24 receive urban-type capital improvements in the time frame
25 of this plan, and as such can anticipate a continued level

1 of public services below that of other land use
2 categories. The continuation of Outer Islands essentially
3 in their present character is intended to provide for a
4 rural character and lifestyle, and conserve open space and
5 important natural upland resources. Maximum density is
6 one dwelling unit per acre.

7 MR. BROOKES: Okay. And then as part of your
8 application you turned in this map, looks like a plat --
9 correction, plateau on Upper Captiva.

10 MR. HUTCHERSON: Oh, that's the property owners'
11 list.

12 MR. BROOKES: Okay. And surrounding the subject
13 property, there's a number of smaller lots, correct,
14 Captiva Palma and another subdivision?

15 MR. HUTCHERSON: Yes.

16 MR. BROOKES: And, in fact, those subdivisions
17 don't meet the Outer Island's maximum density of one
18 dwelling in a per acre required under Policy 1.4.2, do
19 they?

20 MR. HUTCHERSON: No. As a matter of fact, part
21 of the presentation, your existing is roughly 9,000 square
22 feet, the majority of them, and that equates to a density
23 of four units per acre over that area.

24 MR. BROOKES: And so to get approval to build a
25 house on a lot that is substandard in size or density,

1 these houses all had to go through a minimum use
2 determination, correct?

3 MR. HUTCHERSON: Yes, sir. Single-family use
4 provision.

5 MR. BROOKES: And that minimum use determination,
6 single-family use provision said that if a lot was platted
7 and created prior to this one unit per acre density
8 requirement, you could still build a house on it anyway if
9 you could meet all the other public, safety, welfare and
10 land development regulations?

11 MR. HUTCHERSON: Yes.

12 MR. BROOKES: Okay. And do you have a minimum
13 use determination for this particular parcel?

14 MR. HUTCHERSON: No, sir.

15 MR. BROOKES: And could that help explain why
16 some of these houses are built at a density that exceeds
17 the Comprehensive Plan requirements for one dwelling unit
18 per acre?

19 MR. HUTCHERSON: I'm not following.

20 MR. BROOKES: Okay. And how many hotel units are
21 going to be placed on your parcel?

22 MR. HUTCHERSON: Fifteen is what the request is.

23 MR. BROOKES: And how many other occupiable units
24 are going to be on the project?

25 MR. HUTCHERSON: There's a caretaker's residence

1 and a lodge building.

2 MR. BROOKES: Okay. So that's another one?

3 MR. HUTCHERSON: That's an actual residence, yes,
4 sir.

5 MR. BROOKES: Okay. So there will be one actual
6 dwelling?

7 MR. HUTCHERSON: Caretaker's residence.

8 MR. BROOKES: And 15 hotel units?

9 MR. HUTCHERSON: Yes, sir.

10 MR. BROOKES: Okay. The one caretaker's
11 residence, doesn't that qualify as a dwelling unit that
12 would be part of the calculation of maximum density?

13 MR. HUTCHERSON: We're going to have to look that
14 up to be honest. I don't know the whole works in my any
15 head, and I ~~hate~~ ^{have} to look it up.

16 MR. BROOKES: That's okay. We'll go on.

17 How many acres total does your project involve?

18 MR. HUTCHERSON: 1.59.

19 MR. BROOKES: You have a 1.59 acre parcel with
20 one caretaker dwelling unit on it and 15 hotel or motel
21 units on it for a total of 16 total units. If you were
22 not applying the equivalency factors, what would your
23 density be?

24 MR. HUTCHERSON: If they were actual dwelling
25 units, 16 divided by 1 1/2, what is that, eight, nine? I

1 guess I'll have to do this in my head. Probably seven to
2 eight units per acre.

3 MR. BROOKES: Okay. What public infrastructure
4 is provided and what is private infrastructure in terms of
5 this development? Do you have public roads?

6 MR. HUTCHERSON: Yes, sir. The roads are public,
7 I believe they are in the plat. They're obviously open to
8 the public. We have private commercial water supply, I
9 would assume that is private, it's public water supply
10 system but DE permit. Septic tanks would be private
11 utilities. Stand pipe again is available to the public.

12 MR. BROOKES: Just first ask you about the roads
13 because in all my other North Captiva cases, and I've had
14 a few of them now, my understanding is roads are all
15 private roads and the county does not maintain them or
16 claim ownership or maintenance over these roads. Could
17 you be mistaken?

18 MR. HUTCHERSON: I said I thought they were open
19 to the public.

20 MR. BROOKES: Okay. Does that make them private
21 roads or public roads?

22 MR. HUTCHERSON: Well, I'm not sure that the
23 county maintains them. I believe they are maintained
24 privately by property owners.

25 MR. BROOKES: Okay. Is Rum Road narrower than

1 the other roads or -- Rum Road, I guess you said it wraps
2 around, Rum Road, the part that is to the east between the
3 real estate office and your property, is that a narrower
4 road than the other roads?

5 MR. HUTCHERSON: Well, this one is --

6 HEARING EXAMINER: Don't shelve questions, answer
7 that, please.

8 MR. HUTCHERSON: The easement itself -- or excuse
9 me -- to the west -- east, rather, would be 20 feet. It's
10 shown as Rum Road. Of course, Rum Road is also shown
11 winding around this way (indicating), where it's a 40 foot
12 right-of-way and then proceeding on up and turning into a
13 50 foot right-of-way where it goes on up this way.

14 MR. BROOKES: Your water supply, where will that
15 come from?

16 MR. HUTCHERSON: There's an existing public water
17 supply well permitted on the adjacent property also owned
18 by Mr. Scott.

19 MR. BROOKES: Tell me about the existing public
20 water supply well, does it have a well number, or how is
21 it designated in the state system?

22 MR. HUTCHERSON: Yes, sir, it has a state DEE
23 permit and it's been permitted in accordance with the
24 regulations and tested over the time according to the
25 quarterly sample that they're required to take.

1 MR. BROOKES: And who does it serve now?

2 MR. HUTCHERSON: To be honest, I'm not sure that
3 it serves anyone. It may serve one-third of its capacity
4 to Mango's. I believe that's the way it's set up.

5 MR. BROOKES: Where does the other two-thirds of
6 its capacity go to currently?

7 MR. HUTCHERSON: It's reserved for this parcel.

8 MR. BROOKES: Okay. Do you have the letter from
9 the hurricane person that you referenced?

10 MR. HUTCHERSON: Yes, I do.

11 MR. BROOKES: While you're looking for that, did
12 you have any modeling or evidence that the use of that
13 water well would not lower the ground water table or cause
14 salt water intrusion to occur?

15 MR. HUTCHERSON: No, we haven't been required to
16 provide any engineering or any analysis of that at all.

17 MR. BROOKES: Okay. Have you been required to
18 provide an environmental assessment?

19 MR. HUTCHERSON: As to?

20 MR. BROOKES: Here's the code section. Let me
21 get it.

22 MR. HUTCHERSON: Do you need the letter right
23 now?

24 MR. BROOKES: At some point I want to ask you
25 about it.

1 HEARING EXAMINER: If you can't find it now, we
2 can do it during one of the breaks.

3 MR. BROOKES: We can look for it during a break.

4 Let me have you turn to 34-373. It's
5 Applications For Planned Development Zoning, Master
6 Concept Plan Approval. In that Section 34-373, minimum
7 required information for all planned development zoning
8 applications, A-1, 4-E, talks about maps of all the soils.
9 Have you turned that in?

10 MR. HUTCHERSON: Those are not required for minor
11 planned development.

12 MR. BROOKES: Let me go back. It says, "Minimum
13 required information for all planned development zoning
14 applications, rezoning applications for planned
15 development must include the following." I don't see in
16 here where it limits it to anything different.

17 MR. HUTCHERSON: I believe there's a clause that
18 basically says that it's up to the director to come up
19 with the application, and that's what asks for the
20 information.

21 MR. BROOKES: Okay. Let's go on. 4.E.2, the
22 vegetation and ground cover in accordance with the Florida
23 land use and cover classification in the FLUCCS maps.

24 MR. HUTCHERSON: They're not required for a small
25 planned development.

1 MR. BROOKES: You didn't turn that in either?

2 MR. HUTCHERSON: No, sir.

3 MR. BROOKES: And on the aerial that you have up
4 there, is a majority of the site covered with native
5 vegetation?

6 MR. HUTCHERSON: Probably not a majority. If you
7 look at the pictures --

8 MR. BROOKES: Certainly from an aerial view --

9 MR. HUTCHERSON: There's vegetation, it just
10 happens to be mostly exotic Brazilian pepper, that type of
11 thing.

12 MR. BROOKES: Are you a biologist?

13 MR. HUTCHERSON: No. But I have had occasion to
14 study certain species.

15 MR. BROOKES: And has a biologist given us a
16 FLUCCS map that shows the percentages of Brazilian pepper
17 and what native plants are there?

18 MR. HUTCHERSON: No. You asked for my opinion.
19 Sorry.

20 MR. BROOKES: Okay. But I believe you're not
21 qualified to give that opinion. I guess I'm asking was
22 that turned in as part of this application?

23 MR. HUTCHERSON: No.

24 MR. BROOKES: Okay. So you don't have a
25 biologist that has turned in a report?

1 MR. HUTCHERSON: No.

2 MR. BROOKES: Okay. And then 4.F, it says,
3 "Florida land use cover classification system map at the
4 same scale as the Master Concept Plan prepared by an
5 environmental consultant." You're not an environmental
6 consultant?

7 MR. HUTCHERSON: No, sir.

8 MR. BROOKES: Okay. The Comprehensive Plan in
9 standard 11.4, environmental review factors, it's on Page
10 Roman numeral 237. Could you read what's the title and
11 what's required there?

12 MR. HUTCHERSON: Standard 11.4. "Environmental
13 review factors. In any case where there exists or there
14 is a probability of environmentally sensitive areas as
15 identified by the county Corps of Engineers, DEP, South
16 Florida Water management District or any other applicable
17 regulatory agency, the developer applicant must prepare an
18 environmental assessment that examines existing
19 conditions, addresses the environmental problems and
20 proposes the means and mechanism to protect and/or
21 preserve the environmental and natural resources."

22 MR. BROOKES: Okay. And you haven't prepared
23 that for this application, correct?

24 MR. HUTCHERSON: Well, it looks like it has to be
25 as identified by the county corps, and nobody has asked us

1 to identify those types of things or prepare this type of
2 assessment.

3 MR. BROOKES: So you didn't prepare it?

4 MR. HUTCHERSON: No.

5 MR. BROOKES: If you could turn to Page VII,
6 Roman numeral VII-17, Policy 83.1.2.

7 MR. HUTCHERSON: Policy 83.1.2, all development
8 within coastal planning areas must be compatible with the
9 protection of natural systems.

10 MR. BROOKES: Okay. And you're not qualified as
11 an environmental consultant as to whether or not this
12 proposed development is compatible with the natural system
13 and land cover that is on the site, are you?

14 MR. HUTCHERSON: I am not a biologist, no.

15 MR. BROOKES: Okay. And no such report has been
16 turned in with the application, correct?

17 MR. HUTCHERSON: It was not turned in with the
18 application, but the county biologist has reviewed the
19 application in accordance with the -- the application, the
20 zoning application.

21 MR. BROOKES: But you never turned in the FLUCCS
22 map or the environmental assessments?

23 MR. HUTCHERSON: No.

24 MR. BROOKES: So the county did that for you?

25 MR. HUTCHERSON: That's part of their review as I

1 understand it.

2 MR. BROOKES: They're suppose to review what you
3 turn in, right?

4 MR. HUTCHERSON: Everything that I do turn in,
5 yes. It's up to them to look after their own --

6 MR. BROOKES: Is there any particular reason why
7 the county in this particular case would do this work for
8 the developer?

9 MR. HUTCHERSON: As I said, it's a small planned
10 development so those things aren't required.

11 MR. BROOKES: Policy 85.1.5, was that required?

12 MR. HUTCHERSON: "No garbage or untreated sewage
13 will be discharged into coastal and interior surface
14 waters."

15 MR. BROOKES: Are you qualified to testify that
16 none of the waste water that's put in the septic tank
17 system will enter the coastal surface waters without
18 adequate treatment?

19 MR. HUTCHERSON: I don't believe I'm qualified.
20 That's not our intention.

21 MR. BROOKES: And if we go to the glossary, it's
22 Roman numeral XII-2, and definition of density.

23 MR. HUTCHERSON: "Number of residential dwelling
24 or housing units per gross acre. Densities specified in
25 this plan are gross residential acres. For the purpose of

1 calculating gross residential densities, the total acres
2 of the development residential and includes those lands
3 within the development proposed to be used as streets,
4 rights-of-way, utility rights-of-way, public and private
5 parks, recreation and open space, schools and community
6 centers and facilities such as police, fire and emergency
7 services, sewage and water drainage and existing manmade
8 water bodies contained within the residential area. Lands
9 for commercial, office, industrial uses, natural water
10 bodies known as non-residential uses must not be
11 included."

12 MR. BROOKES: And in the map section, Lee Plan
13 map No. 5, this shows North Captiva or Upper Captiva to be
14 in the coastal high hazard area?

15 MR. HUTCHERSON: Yes.

16 MR. BROOKES: And then in Lee Plan map 16. And
17 does this show Upper Captiva to be in No. 7 Captiva?

18 MR. HUTCHERSON: Yes. Captiva planning
19 community.

20 MR. BROOKES: The depiction of the Florida
21 Vernacular Cottages that are shown, will your units be
22 placed at a similar level to the ground as these units?

23 MR. HUTCHERSON: No. I testified earlier they
24 will be raised to the minimum flood elevation.

25 MR. BROOKES: Which is how high in this

1 particular subject property?

2 MR. HUTCHERSON: It's anywhere from ten at the
3 lower corner to nine in the other corner.

4 MR. BROOKES: So these particular homes will be
5 raised ten, maybe ten feet up in the air or more before
6 you begin construction of the actual first habitable floor
7 of the cottage, correct?

8 MR. HUTCHERSON: Yes, sir.

9 MR. BROOKES: And will your cottages be limited
10 to one story?

11 MR. HUTCHERSON: Yes.

12 MR. BROOKES: Okay. Will you make that a
13 condition of your approval, that they be limited to one
14 story?

15 MR. HUTCHERSON: I --

16 HEARING EXAMINER: Wait a second. If you don't
17 know the answer, say you don't know and then we'll go on.

18 MR. HUTCHERSON: I don't know the answer. I
19 don't believe they're two stories.

20 MR. BROOKES: But that could be made a condition
21 of the approval.

22 HEARING EXAMINER: He says he doesn't know at
23 this point.

24 MR. BROOKES: Okay. If the developer or
25 applicant agreed, that could be made a condition --

1 theoretically it could be made a condition of the land
2 development approval, correct?

3 MR. HUTCHERSON: Theoretically.

4 MR. BROOKES: Okay. Have you applied for a
5 liquor license?

6 MR. HUTCHERSON: No, sir.

7 MR. BROOKES: Have you applied for approval for
8 the service of alcoholic beverage in the planned
9 development application?

10 MR. HUTCHERSON: Say that again.

11 MR. BROOKES: Yes. The planned development that
12 is before us today, in the scheduled uses, would it allow
13 the service of alcoholic beverages?

14 MR. HUTCHERSON: Yes, sir, COP has been
15 requested.

16 MR. BROOKES: COP.

17 MR. HUTCHERSON: Right.

18 MR. BROOKES: And what does that acronym stand
19 for?

20 MR. HUTCHERSON: Consumption on premises.

21 MR. BROOKES: Okay. And is there a residence
22 near your particular property?

23 MR. HUTCHERSON: There are several. Here, here,
24 here and here (indicating).

25 MR. BROOKES: And are you within 500 feet of a

1 residence?

2 MR. HUTCHERSON: Yes.

3 MR. BROOKES: You said on your table there,
4 property development, existing C-1 zoning and then your
5 CPD zoning, you said minimum lot size of 20,000 square
6 feet?

7 MR. HUTCHERSON: Yes, sir.

8 MR. BROOKES: Show me how you have calculated --
9 or where your lot sizes go on this particular development
10 if it's split up into condominium unit or subdivided lots,
11 how do you have a minimum lot size?

12 MR. HUTCHERSON: Well, you have to -- it's the
13 same requirement of 373, you provide property development
14 regulations when you change your development category.
15 And when you change the zoning category, the 10,000 square
16 feet that would have been in C-1 went away, so we had to
17 come up with a new one that basically makes the lot sizes
18 double.

19 MR. BROOKES: Show me where they are.

20 MR. HUTCHERSON: There are no lots. We don't
21 intend on subdividing. We're required to provide a
22 property development regulation.

23 MR. BROOKES: Explain how that would work then.
24 You said there are 20,000 square feet from where to where?
25 Where would you draw that around, the boundaries of each

1 of those --

2 MR. HUTCHERSON: At this time I couldn't say.
3 There's not one intended. Each zoning district has
4 property development regulations that depict minimum lot
5 sizes, widths and depths. When you go to such a planned
6 development, you have to come up with your own in
7 accordance with that.

8 MR. BROOKES: Show me how you've calculated your
9 minimum lot size to be 20,000 square feet.

10 MR. HUTCHERSON: We didn't really calculate it to
11 be 20,000 square feet. That's what we have proposed as
12 our minimum lot size if such time this plan were ever to
13 vacate the zoning, would say CPD, I would assume the
14 property development regulations, I don't know this for a
15 fact, but we haven't ever had this happen, but whoever
16 retains the CPD zoning could only be split into 20,000
17 square foot chunks. That's basically the gist of it.

18 MR. BROOKES: So if you are going to take a
19 hotel, for example, and convert it to condominiums, if
20 that were allowed, and I understand there may be a
21 condition that prohibits that and that may or may not be
22 legal under Florida law to prohibit that, your -- is that
23 when the lot sizes would kick in because condominium does
24 not establish lots either? I don't understand how you get
25 a minimum lot size unless you're considering the entire

1 1.59 acre parcel as your lot.

2 MR. HUTCHERSON: That is my lot. I'm providing a
3 zoning category for that 1.59.

4 HEARING EXAMINER: Are you saying, in effect,
5 that if this plat were vacated, then you'd have minimum
6 20,000 foot lots, but you're not having 20,000 foot lots
7 in this plan?

8 MR. HUTCHERSON: No. But the staff always
9 requires us to provide them with a number.

10 HEARING EXAMINER: I guess the implication was,
11 not that it's misleading on purpose, but it implicates
12 you're going to have 20,000 foot lots on this property and
13 you're really not?

14 MR. HUTCHERSON: No. We've been required to
15 provide that whether we intend on subdividing or not.

16 HEARING EXAMINER: Okay. So if you don't
17 subdivide, you're not going to have 20,000 square foot
18 lots?

19 MR. HUTCHERSON: No.

20 HEARING EXAMINER: If you do, that's the minimum
21 lot size that you'll be required to have under this plan?

22 MR. HUTCHERSON: Right. And, again, that would
23 require different zoning because we don't propose any
24 subdivision under this plan.

25 MR. BROOKES: How many square feet are in an

1 acre?

2 MR. HUTCHERSON: 23,560.

3 MR. BROOKES: So you would have two lots per
4 acre?

5 MR. HUTCHERSON: 20,000 square foot, yes.

6 MR. BROOKES: So you would have approximately
7 three lots on this parcel?

8 MR. HUTCHERSON: That's roughly what it's split
9 into, yes.

10 MR. BROOKES: And if it was to then apply current
11 densities, you would have somewhat much, much less in
12 terms of units out here than you do now?

13 MR. HUTCHERSON: I haven't examined that to be
14 honest.

15 MR. BROOKES: Okay. On Section 34-1495 of the
16 Land Development Code, could you tell us what's required
17 there and what that's about, what the title says?

18 MR. HUTCHERSON: 34-1495, density limitations for
19 specific areas.

20 MR. BROOKES: And could you read the beginning
21 and then No. 1?

22 MR. HUTCHERSON: "Except as specifically
23 permitted by the Lee County, maximum densities are hereby
24 limited as follows: 1. Captiva Island. Maximum density
25 permitted on Captiva Island is three dwelling units per

1 gross residential acre."

2 MR. BROOKES: Okay. And then again back to
3 34-1805, is that a compliance with the section you just
4 read? Seems like they go together, correct? Could you
5 read that again for us one more time?

6 MR. HUTCHERSON: "Density limitations for Captiva
7 Island. Permitted densities for hotels and motels as set
8 forth in this division shall not apply to any hotel or
9 motel units on Captiva Island. The maximum permitted
10 density for hotels or motels on Captiva Island may not
11 exceed three units per gross acre."

12 MR. BROOKES: Okay. No further questions, Your
13 Honor, except for the hurricane letter which we can get
14 later. I do want to remind you that we're getting close
15 to the time if we could get David Depew out of order.

16 HEARING EXAMINER: Okay. Let me take a ten-
17 minute break and then we'll bring David back and then I'll
18 give Mr. Uhli a chance to redirect.

19 (A recess was taken.)

20 HEARING EXAMINER: We're back on the record.

21 Mr. Depew.

22 MR. DEPEW: Mr. Hutcherson, if you would like to
23 go back up there, please.

24 I guess I'm going to try to clear a few things up
25 in my mind about this application. You said the water

1 supply well is not on the subject property. Could you go
2 up there and point out where that is?

3 MR. HUTCHERSON: Right there (indicating).

4 MR. DEPEW: But then you said that Mr. Scott owns
5 that property as well?

6 MR. HUTCHERSON: He owns this in conjunction with
7 Mr. Bill Hart, dual ownership.

8 MR. DEPEW: I see. So it's not the case that you
9 didn't include it since it was under his ownership,
10 actually it's under different ownership?

11 MR. HUTCHERSON: Separate ownership
12 altogether, special permitted marina.

13 MR. DEPEW: And there's no agreement between the
14 two properties to utilize each other's, there's no cross
15 easements or anything like that?

16 MR. HUTCHERSON: Not that I'm aware of. That
17 was between the two parties.

18 MR. DEPEW: Well, I guess I still don't
19 completely understand this request then, because you've
20 indicated in your testimony that it was somehow a fishing
21 lodge, but there's no waterfront on that, is there?

22 MR. HUTCHERSON: No.

23 MR. DEPEW: Where are the guests at the fishing
24 lodge going to dock their boats?

25 MR. HUTCHERSON: Well, they can either dock their

1 boat down on slips to the left or down below, or they can
2 take the water taxi out, get over to the lodge where they
3 can be picked up.

4 MR. DEPEW: And there's no agreement that you're
5 aware of that allows the lodge guests to dock boats
6 somewhere at some other docking facility?

7 MR. HUTCHERSON: No. Mr. Scott is part owner of
8 the adjacent property. It's -- according to Lee County
9 staff, it's an existing marina, obtained a special permit
10 in 1964.

11 MR. DEPEW: Okay. But you just said that you're
12 not aware of any agreement in the cross easements or
13 anything that exists to allow boat dockage?

14 MR. HUTCHERSON: I'm not aware that any are
15 required.

16 MR. DEPEW: Okay. You indicated this was a
17 transitional use between the Island Club and the
18 activities to the south and to the west. Can you
19 elaborate more on that, please? What, in your mind,
20 constitutes a transitional use?

21 MR. HUTCHERSON: The Island Club is commercial
22 recreation. They've got tennis courts, pools, loud
23 speakers, piped in music, quite a bit of activity going on
24 here. Then out to the south you've got the neighborhoods
25 with the tourists, the houses for rent to the south. And

1 then in between we're doing basically a rental facility at
2 a different scale than what these are, more of a
3 commercial scale adjacent to this, provide more of a
4 stepping down from this intensity to this intensity.

5 MR. DEPEW: Well, I guess I'm still missing
6 something here. The Island Club has a pool?

7 MR. HUTCHERSON: Two.

8 MR. DEPEW: It has two pools. You only have one
9 pool and that's a transition?

10 MR. HUTCHERSON: Yes. Ours is in.

11 MR. DEPEW: The Island Club has outside music?

12 MR. HUTCHERSON: Yes.

13 MR. DEPEW: But you have outside music?

14 MR. HUTCHERSON: No.

15 MR. DEPEW: Excuse me, but I think one of the
16 staff conditions says that you're allowed to have
17 background music.

18 MR. HUTCHERSON: We were allowed, we haven't
19 proposed anything like that.

20 MR. DEPEW: You would agree that it's permitted
21 on your zoning?

22 MR. HUTCHERSON: By virtue of their Staff Report,
23 right, it could be.

24 MR. DEPEW: Are you willing to agree to a
25 condition that would say no outside music whatsoever?

1 MR. HUTCHERSON: I'll have to give it to my
2 client. We haven't had that concern come up.

3 MR. DEPEW: So you don't really know whether
4 you're able to agree to that condition?

5 MR. HUTCHERSON: I don't know if I'm able to
6 agree to it. I know it's possible.

7 MR. DEPEW: But you'd agree that the conditions
8 would allow on-site music?

9 MR. HUTCHERSON: Yes.

10 MR. DEPEW: Okay. So I think the other thing you
11 mentioned was tennis courts. We don't have a tennis court
12 here on this project. Do you think that's characteristic
13 of the transitional use?

14 MR. HUTCHERSON: It's the general intensity of
15 the maintenance area, tennis courts, pools, jet ski
16 operations, kayak rentals. It's a daily -- it's a club
17 where people come as a destination to play during the day,
18 more or less. I assume that some of those people actually
19 rent the houses that are on that website so that they can
20 utilize that as their recreation facility.

21 MR. DEPEW: But you've rental and leasing
22 establishments as a use on this property, don't you?

23 MR. HUTCHERSON: Yes, we do, to allow our guests
24 to have golf carts.

25 MR. DEPEW: Let me ask about the golf carts for

1 just a minute. How many golf carts are you planning to
2 rent?

3 MR. HUTCHERSON: We haven't established that, but
4 it's strictly accessory to the hotel the way we have it
5 set up.

6 MR. DEPEW: And where are the patrons who are at
7 this resort going to drive their golf carts?

8 MR. HUTCHERSON: Well, in the background that we
9 submitted, we talked about the fishing lodge aspect of
10 it. There's another commercial enterprise on the island
11 and there's also a state park to the south providing
12 opportunities for people to explore the state park.

13 MR. DEPEW: Do you know if these are going to be
14 electric carts or whether they're going to be gas carts?

15 MR. HUTCHERSON: The detail that we have is for
16 easy-go electric.

17 MR. DEPEW: Okay. And so you'll be having things
18 like electric batteries, automobile batteries, things like
19 that out there to power these carts?

20 MR. HUTCHERSON: They will be inside the
21 building. We don't have an outside area for that type of
22 use.

23 MR. DEPEW: Okay. But the carts will have
24 batteries?

25 MR. HUTCHERSON: Oh, the carts will have

1 batteries in them, yes.

2 MR. DEPEW: And there will be batteries stored on
3 the site for when those batteries in the carts go bad?

4 MR. HUTCHERSON: I don't know enough about the
5 operation to say that.

6 MR. DEPEW: Would you anticipate these patrons
7 are going to be using these golf carts to go over to the
8 beach?

9 MR. HUTCHERSON: I suspect they could, depending
10 on where they would have legal access. I mean, they can
11 always go to the state park and proceed out there. I
12 mean, I guess everybody interior of the beach would have
13 the same situation.

14 MR. DEPEW: Do you know where they would be
15 parking once they get over to the beach?

16 MR. HUTCHERSON: Like I said, I don't know that
17 they have legal access to get to the beach or a parking
18 area there. That's not what we emphasized.

19 MR. DEPEW: But there's no restriction on doing
20 that --

21 MR. HUTCHERSON: No.

22 MR. DEPEW: -- sort of thing? I mean, you've got
23 that as a use, right?

24 MR. HUTCHERSON: Across the island there's no
25 restriction on utilizing the beaches.

1 MR. DEPEW: Is the restaurant intended to be open
2 only for the patrons?

3 MR. HUTCHERSON: No.

4 MR. DEPEW: So it's open to the public?

5 MR. HUTCHERSON: Yes.

6 MR. DEPEW: How is it that the restaurant then
7 wouldn't be subject to the Lee Plan site location
8 standards?

9 MR. HUTCHERSON: Because it's within a hotel.

10 MR. DEPEW: But it's open to the public, it's not
11 just open to the hotel.

12 MR. HUTCHERSON: Well, I mean, site location
13 standards out here are -- it's even questionable as to
14 whether they apply. There's no parking, there's no roads.

15 MR. DEPEW: So your testimony is that the Lee
16 Plan commercial site locations do not apply on Upper
17 Captiva?

18 MR. HUTCHERSON: They do not apply to this
19 property is what my testimony was.

20 MR. DEPEW: You say you haven't really done any
21 studies of the golf cart traffic on these roadways out on
22 Upper Captiva?

23 MR. HUTCHERSON: No.

24 MR. DEPEW: But you've been out to Upper Captiva.
25 Would you classify these roadways as normal county

1 roadways?

2 MR. HUTCHERSON: Basically, dirt shell roads.

3 MR. DEPEW: So they're substandard?

4 MR. HUTCHERSON: Yes. From the county
5 standpoint, they're Category A, B, C, D and they're cross
6 sections.

7 MR. DEPEW: Where are the employees going to come
8 for this facility?

9 MR. HUTCHERSON: I don't know that Mr. Scott has
10 hired anybody yet.

11 MR. DEPEW: Would you anticipate they would be
12 living on Upper Captiva?

13 MR. HUTCHERSON: I honestly would have to defer
14 to Mr. Scott on that one. I really don't know.

15 MR. DEPEW: Let me just ask kind of a general
16 planning question. Is it your -- in your experience as a
17 planner, would you think that service workers as a rule
18 could afford to live on Upper Captiva?

19 MR. HUTCHERSON: Well, I know Safety Harbor has a
20 residence dormitory housing, whatnot, in close proximity
21 to the Island Club.

22 MR. DEPEW: So you would anticipate that Safety
23 Harbor would provide some housing in their dormitory?

24 MR. HUTCHERSON: Well, you asked me a general
25 question about people living on the island and working

1 there.

2 MR. DEPEW: But you don't have any such
3 provisions --

4 MR. HUTCHERSON: No, I have already stated that,
5 no, we don't. We have a caretaker's residence for the
6 caretaker. And whether there's any additional employees,
7 I can't say.

8 MR. DEPEW: Let me ask a little bit about that,
9 because I guess you gave Mr. Brookes this copy out of the
10 Florida Administrative Code. And your testimony is that
11 you're not going to generate more than 5,000 gallons per
12 day of waste water; is that correct?

13 MR. HUTCHERSON: That was the figure that we went
14 through the calculations with Mr. Kelner early on.

15 MR. DEPEW: Let's just kind of walk through that
16 a second, because, I mean, I'm not sure I understand. How
17 many seats are going to be in the restaurant?

18 MR. HUTCHERSON: I believe we have, for purpose
19 of this calculation, we have 14.

20 MR. DEPEW: 14 seats in the restaurant?

21 MR. HUTCHERSON: It's only a 3,000 square foot
22 building. It's a small scale.

23 MR. DEPEW: You think a 14 seat restaurant is all
24 you would assign to a 3,000 square foot building?

25 MR. HUTCHERSON: Well, no, in addition to the

1 restaurant, there's a caretaker's facility, administrative
2 office, desk for the rental and leasing establishment.
3 It's all in that one building.

4 MR. DEPEW: You don't really have anything in
5 here that says how much each of those uses are limited to
6 in the structure, do you?

7 MR. HUTCHERSON: I don't know if that's in there
8 or not. We limited the entire building to 3,000 square
9 feet. And I believe all the accessory uses are limited to
10 inside the building.

11 MR. DEPEW: That's not completely true either, is
12 it, because you've got an 1,125 square foot covered porch
13 and you've got an outside 300 square foot pool bar, don't
14 you?

15 MR. HUTCHERSON: Oh, I'm sorry. Main lot
16 building is how it's worded.

17 MR. DEPEW: Okay. Well, the way I calculate
18 that, that's 4,425 square feet.

19 MR. HUTCHERSON: Oh, the outside porch is not
20 within surrounding exterior walls. That's is just a
21 reception area where -- it's a porch.

22 MR. DEPEW: I guess I don't understand how you're
23 calculating the 14 seat restaurant then. You have 4,425
24 square feet. I mean, let's just say for the sake of
25 discussion, your caretaker's residence is 1,200 square

1 foot, two bedroom. That leaves you another -- let's say
2 1,425 square, that leaves you another 3,000 square feet
3 for restaurant operations potentially, and you're saying
4 you're only going to have 14 seats in there; is that your
5 testimony?

6 MR. HUTCHERSON: I believe we're limited to 3,000
7 square feet total by condition.

8 MR. DEPEW: Well, that's within the building, but
9 you also are limited to a 1,125 square floor porch and a
10 300 square foot pool bar. Are you telling me that you
11 believe Florida Administrative Code would not have you
12 calculate the seats around the pool bar or on the covered
13 porch as part of your waste water flow?

14 MR. HUTCHERSON: If we had proposed them there.
15 This is what we proposed.

16 MR. DEPEW: Well, no one is going to be sitting
17 around the pool bar or on the porch; that's your
18 testimony?

19 MR. HUTCHERSON: Not at a restaurant, no.

20 MR. DEPEW: So they're not going to have service
21 on the covered porch for the restaurant?

22 MR. HUTCHERSON: It's my understanding the
23 covered porch was a reception area. Regardless, we
24 haven't got into that permit yet, it's not required at
25 this level.

1 MR. DEPEW: There's really nothing to stop -- in
2 this zoning to stop you from having a 100 seat restaurant
3 there, is there?

4 MR. HUTCHERSON: I would say probably just the
5 size of the -- I mean, I'm not a restaurant designer. I
6 couldn't tell you the spacial --

7 MR. DEPEW: Use some common sense. I mean, how
8 many square feet does a four top take, 10 x 10, 8 x 8,
9 7 x 7?

10 MR. HUTCHERSON: It depends on the table size I
11 imagine.

12 MR. DEPEW: All right. Well, let's leave that
13 for a moment and go over here to hotels and motels. You
14 suggested that the waste water generation rate is 100
15 gallons per day per room?

16 MR. HUTCHERSON: Right.

17 MR. DEPEW: But do you see right under that where
18 it says resort hotel, camps, cottages per room?

19 MR. HUTCHERSON: Right. We discussed that with
20 the Department of Health, and they advised me to use the
21 100 gallons per day criteria per room.

22 MR. DEPEW: There's no restriction in here,
23 though, that says you're only going to have a 100 gallon
24 per day hotel room, is there? You could easily go up and
25 have cottages that would be 200 gallons per day?

1 MR. HUTCHERSON: There's 400 square feet we have,
2 I believe, committed to one bedroom on the small ones. I
3 mean, it goes 100 per bedroom or less. For instance, the
4 house across the street is 400 gallons per day, it's a
5 four-bedroom house. It goes two people per if you go
6 extra.

7 MR. DEPEW: Is that what this code says?

8 MR. HUTCHERSON: I'm not sure what you're
9 reading, to be honest.

10 MR. DEPEW: I'm reading what you gave Mr.
11 Brookes.

12 MR. HUTCHERSON: Yes. That would be --

13 MR. DEPEW: You just read what it says there.

14 MR. HUTCHERSON: "Hotels and motels, regular
15 room, per room 100. Resorts and cottages 200."

16 MR. DEPEW: Excuse me. I don't think you read
17 all that last one. Resort, cottages?

18 MR. HUTCHERSON: Camps per rooms.

19 MR. DEPEW: Per room, okay. It's not per
20 bedroom, is it, it's per room?

21 MR. HUTCHERSON: At times -- this is what the
22 Department of Health -- even at that --

23 MR. DEPEW: What restriction is there in the
24 zoning that would restrict you to the type of dwelling
25 unit that would only generate 100 gallons per day of waste

1 water?

2 MR. HUTCHERSON: I don't know that there is a
3 restriction in the zoning that would.

4 MR. DEPEW: So if you chose to develop something
5 that would generate 200 gallons of waste water per day for
6 the 15 rooms, you would actually generate 3,000 gallons
7 per day; is that correct?

8 MR. HUTCHERSON: If we chose to pursue something
9 that generated that amount of gallons, yes.

10 MR. DEPEW: And if you had a 100 seat restaurant
11 at 40 gallons per seat, that would add 4,000 gallons per
12 day of waste water generation, wouldn't it?

13 MR. HUTCHERSON: Straight math equation, yes,
14 that would add that.

15 MR. DEPEW: Is there anything in this zoning
16 approval that would restrict you to less than 100 seats in
17 the restaurant?

18 MR. HUTCHERSON: Basically, just the size of the
19 development, the scope of things. The island is rural in
20 nature. We're trying to keep it that way. It's a small
21 scale development.

22 MR. DEPEW: So your testimony is that these
23 conditions restrict you to less than 100 seats in the
24 restaurant?

25 MR. HUTCHERSON: Well, I don't know if they

1 restrict us to less than 100 seats. We have no intention
2 of doing 100 seats, and we'd be happy to entertain a
3 condition to that effect.

4 MR. DEPEW: How many seats do you intend to do?

5 MR. HUTCHERSON: I haven't added them up to this
6 point, but I can get with the applicant in the break and
7 I'd be happy to --

8 MR. DEPEW: Well, you said you don't -- you know
9 it's not 100, but you don't know how many it is.

10 MR. HUTCHERSON: Well, I have been in a
11 restaurant with 25 tables. There's not room for 25
12 tables, if you're saying four seats to a table, if that's
13 how you're calculating it. Like I said, I'm not a
14 restaurant designer, but common sense.

15 MR. DEPEW: In the space of 4,425 square feet,
16 less 1,425 square feet, so in space of 3,000 square feet
17 inside and outside, you think there's not room for 25
18 tables?

19 MR. HUTCHERSON: Not with an administrative
20 office, real estate office and a rental establishment as
21 well as it all has to happen within the lodge building
22 according to our plan.

23 MR. DEPEW: I think your testimony was a minute
24 ago that you don't know how big those other facilities
25 are, or whether they're even going to be constructed, do

1 you?

2 MR. HUTCHERSON: I didn't say that. I said I
3 don't know how big they are inside of the building. I
4 said the lodge building is limited to 3,000 square feet by
5 condition.

6 MR. DEPEW: Okay. And we've got a caretaker's
7 residence that's going to generate how many gallons of
8 waste water per day?

9 MR. HUTCHERSON: One bedroom. Let's see here.

10 MR. DEPEW: It's a one bedroom caretaker's
11 residence?

12 MR. HUTCHERSON: Yes.

13 MR. DEPEW: Where does it say that in the
14 proposed --

15 MR. HUTCHERSON: At one bedroom. We only intend
16 to have one caretaker, so --

17 MR. DEPEW: And he's not going to have any
18 children or she's not going to have any children?

19 MR. HUTCHERSON: Not living with them apparently.
20 One bedroom at 750 square feet or less building area is
21 100 gallons per day.

22 MR. DEPEW: Where does it say in here that the
23 caretaker's residence is limited to one building, and it's
24 limited to how many square feet? How many square feet did
25 you just say there?

1 MR. HUTCHERSON: We did not limit it to square
2 footage. We limited it to one caretaker's residence,
3 again everything has a unit of 3,000 square feet.

4 MR. DEPEW: But that calculation you just gave me
5 is limited to square footage.

6 MR. HUTCHERSON: Well, I'm not following you.

7 MR. DEPEW: Right out of the Florida
8 Administrative Code, what did you just read me?

9 MR. HUTCHERSON: One bedroom equals 100 gallons
10 per day.

11 MR. DEPEW: There was a square footage thing
12 connected to that, wasn't there?

13 MR. HUTCHERSON: No. Oh, of 750 square feet or
14 less building of the bedroom area -- I'm sorry, of
15 building area.

16 MR. DEPEW: Building area, right. So now you're
17 telling me the caretaker's residence is only 750 square
18 feet, and I was giving you double that almost before, so
19 -- we'll leave that.

20 MR. HUTCHERSON: You seem to be counting the same
21 numbers twice. You're going to have a 100 restaurant
22 capacity, you're going to have a fantastically large lot.
23 You can't have it all ways, David.

24 MR. DEPEW: I don't understand how the
25 calculation is done, that's what I'm trying to find out.

1 I don't understand if we have -- we have 4,425 square feet
2 between the pool bar, the porch and the building, and I'm
3 being told they're going to have a 14 seat restaurant.
4 The numbers aren't adding up, especially if we're only
5 having a 750 square foot caretaker's residence. We've got
6 a lot of square footage there that's not being calculated
7 here, and I don't see any of these conditions that we're
8 being told are what their intention is included in any of
9 the staff's conditions. I'm just trying to find out
10 what's going on.

11 Now, admittedly, I've just gotten into this in
12 the last couple of days, but I do not see what's happening
13 with this. I do not understand what's being requested
14 here, and that's really what I'm trying to find out.

15 Let me leave that for the moment because that's a
16 morass that we're never going to get out of. Let me go to
17 the lot size restrictions under the property development
18 regulations. If you're not asking for 20,000 square foot
19 lots, would you have a problem with a minimum lot size of
20 one acre? If you don't know --

21 MR. HUTCHERSON: I'd have to evaluate that. I
22 really can't say.

23 MR. DEPEW: What's the density restriction for
24 the Outer Island land use category?

25 MR. HUTCHERSON: One unit per acre.

1 MR. DEPEW: So, I guess what I'm asking you is,
2 would you have a problem with a lot size restriction that
3 complies with the Lee Plan?

4 MR. HUTCHERSON: In this case, it's a commercial
5 zoning category, so I really don't see the -- again, we
6 don't propose any subdivision. It's a number we have been
7 asked to plug in on each and every application.

8 MR. DEPEW: Do you have an objection to a
9 condition that restricts condominium style ownership of
10 the units?

11 MR. HUTCHERSON: I believe we already have a
12 similar condition in the Staff Report, don't we?

13 HEARING EXAMINER: It's a new condition that was
14 made and added that you didn't know about, Condition 11.

15 MR. DEPEW: Okay. Let me go over to the --
16 direct your attention, and I don't know if you need to go
17 over there, but to the blue highlights that you've got up
18 on the board. Tell me again what those blue highlights
19 were supposed to signify.

20 MR. HUTCHERSON: Those are the permitted uses in
21 the C-1 zoning classification.

22 MR. DEPEW: And your testimony is that all those
23 uses would be permitted on the subject property as it
24 stands today?

25 MR. HUTCHERSON: No. I said these are the uses

1 that are applicable to C-1 zoning category which we are
2 currently today, and that these are the uses that we are
3 asking for in the CPD category that we're seeking.

4 MR. DEPEW: But you recognize that all those uses
5 you've got in blue would not be permitted on this subject
6 property as it stands today?

7 MR. HUTCHERSON: I haven't evaluated each and
8 every use, but, I mean, there are some that are probably
9 inappropriate. I mean, I don't know that you'd have a
10 used merchandise store there. But, again, these are
11 limitations of uses that we're trying to stress.

12 MR. DEPEW: Okay. So you would agree it's -- not
13 all those uses are permitted on this property even though
14 it's zoned C-1 today?

15 MR. HUTCHERSON: It's probably the case for every
16 C-1 zoned parcel.

17 MR. DEPEW: What sort of uses would you
18 anticipate on this property if it was zoned C-1 today,
19 just under its current zoning?

20 MR. HUTCHERSON: Well, there's a restaurant
21 adjacent to it currently, so it's not out the realm of
22 possibilities that could end up there. There are boat
23 storage. Specialty retail of all kinds. I guess
24 automobile service wouldn't really go out there. Bait and
25 tackle shop, boat parts stores, boat sales, that type of

1 thing. Convenient food and beverage store. Just a
2 general commercial use category out there permits quite a
3 few commercial uses.

4 MR. DEPEW: Mr. Hutcherson, you're familiar with
5 the code enforcement process, aren't you?

6 MR. HUTCHERSON: To a certain extent.

7 MR. DEPEW: Are you familiar with the fact that
8 it's in essence complaint driven?

9 MR. HUTCHERSON: Sure.

10 MR. DEPEW: And in order to be cited, a code
11 enforcement officer has to show up during the period of a
12 violation and cite the owner of the property for the
13 violation?

14 MR. HUTCHERSON: Well, now you're -- I haven't
15 done much testimony in code enforcement so don't know.

16 MR. DEPEW: How would you anticipate that these
17 timings for use of the property as contained on the Staff
18 Report are going to be enforced? Do you have any idea how
19 the county is going to enforce that, the 11 o'clock timing
20 for consumption on premises with a ten o'clock for the
21 outdoor seating area?

22 MR. HUTCHERSON: Well, quite frankly, we expect
23 the applicant to adhere to those.

24 MR. DEPEW: I'm sure that Mr. Scott would, but
25 what if Mr. Scott sells it to another --

1 MR. HUTCHERSON: I guess -- I suppose that's what
2 you're indicating, then code enforcement option would take
3 place.

4 MR. DEPEW: Let me just check here. I think I'm
5 done.

6 Oh, your testimony I believe that -- was that
7 hotels have lesser impacts than a single-family home; is
8 that correct?

9 MR. HUTCHERSON: Yes.

10 MR. DEPEW: And I believe you included waste
11 water impacts, right?

12 MR. HUTCHERSON: I simply stated out of the
13 ordinance that the calculation that we had been provided
14 with by the Department of Health at 100 gallons per day
15 per room are exceeded in each and every home basically
16 surrounding our property, if you go through the
17 calculations based on the number of bedrooms and size of
18 the house.

19 MR. DEPEW: I'm not going to go back in that
20 waste water thing again. Thank you.

21 Let me just check here. You've made some
22 assumptions about the surrounding land uses with regard to
23 rentals, is that correct, in your -- the very beginning of
24 your testimony?

25 MR. HUTCHERSON: You mean that they were on the

1 market for rental?

2 MR. DEPEW: About the capacity of folks that are
3 permitted in each house.

4 MR. HUTCHERSON: Yes.

5 MR. DEPEW: And what the maximum could be at any
6 given time on those houses?

7 MR. HUTCHERSON: Yes.

8 MR. DEPEW: So you basically calculated out
9 maximum capacity, right, maximum impact?

10 MR. HUTCHERSON: No. Actually, what we did is we
11 went to -- I'll submit this for the record -- this is the
12 North Captiva Rental Island. Each of these properties has
13 a fax sheet attached to them.

14 MR. DEPEW: Okay.

15 MR. HUTCHERSON: Occupancy, ten people on this
16 one.

17 MR. DEPEW: Okay. I wasn't actually going to ask
18 this, but that's fine. I'll just get a copy from the
19 Hearing Examiner if I need it.

20 MR. HEARING EXAMINER: I don't know the number
21 I'm going to be up to, but I'll mark this as an
22 applicant's composite exhibit, and I'll number it when I
23 get all my exhibits together.

24 MR. DEPEW: Thank you. That's not -- all I'm
25 saying is, when you did that calculation, you calculated

1 out a maximum utilization of those houses; is that
2 correct?

3 MR. HUTCHERSON: Well --

4 MR. DEPEW: Maximum theoretical --

5 MR. HUTCHERSON: Maximum occupancy. They rent
6 them out. That's the way you determine it.

7 MR. DEPEW: And then you said if they're all
8 rented at the same time, it's the maximum?

9 MR. HUTCHERSON: Right.

10 MR. DEPEW: So it's certainly within the realm of
11 reasonableness to calculate maximum impacts on the
12 development that you're proposing here for the subject
13 property, isn't it?

14 MR. HUTCHERSON: Well, I have taken written
15 materials that they have asked for -- I mean, they're
16 trying to rent to. I don't know that we've actually
17 established a maximum occupancy per unit. I mean, I'm not
18 following what you --

19 MR. DEPEW: Well, when you normally evaluate the
20 zoning impact, you evaluate them as if you're developing
21 this property to the maximum that your zoning allows. So
22 if you have a series of conditions here in the Staff
23 Report, you're going to evaluate the impacts of that
24 property in its developed condition based on the maximum
25 intensity that can be constructed under those conditions;

1 is that correct?

2 MR. HUTCHERSON: Right.

3 MR. DEPEW: Okay. So if we were to evaluate the
4 impact, the maximum impacts of your development, that
5 would be consistent with the general practice for Lee
6 County zoning, shall we say?

7 MR. HUTCHERSON: That's my understanding.

8 MR. DEPEW: Your Honor, I believe I'm done with
9 my questions.

10 HEARING EXAMINER: All right. Again, I want to
11 give everybody a chance to redirect, but do you want to
12 make your presentation so you can leave?

13 MR. DEPEW: I'll just tell you, there's no way I
14 can get done in 35 minutes and I don't know how you all
15 want to do this. I would generally tell you, I'm
16 relatively comfortable that I think Mr. Uhli is going to
17 ask for a continuance at this point. We discussed that
18 in the break. He's nodding his head, so I'm perfectly
19 willing to try and start if you don't mind breaking my
20 presentation, but I will not be done in 35 minutes and I
21 must get to Boca Grande. It's an advertised community
22 panel meeting, so I have to break for that.

23 MR. UHLI: We have some out of town people too.

24 HEARING EXAMINER: Okay. Why don't we take about
25 a five-minute break, so if you're going to do a

1 continuance, we can figure out when the continuance would
2 be and then I'll give any -- I'm not going to cut the
3 meeting off. Anybody who cannot come back, I'll have you
4 do your testimony today. You can come back also when we
5 do continue the case to the other date, but I want to give
6 anybody a chance who can't come back a chance to speak
7 today.

8 It's a little unfair to you because you're not
9 going to have heard the entire presentation, but you'll
10 certainly get a chance to speak today and speak again the
11 next time.

12 We'll take a five-minute break and if you need a
13 continuance, I'll have some dates.

14 (A recess was taken.)

15 HEARING EXAMINER: All right, we're back on the
16 record.

17 We're looking for a May 14th at 10 a.m. in this
18 room. Everybody that has to be here, can everyone be here
19 May 14th, Friday, at 10 a.m. Okay.

20 So we will continue this -- I'm not cutting the
21 public off. Anyone who wants to speak, I'll allow to
22 speak today, but I'm just writing down that we will
23 continue this case eventually to May 14th, 2004, 10 a.m.
24 in this building, this room.

25 Okay. Did you want to do any redirect today or

1 do you want to wait until --

2 MR. UHLI: No, I just -- what I think will
3 probably happen is sort of in lieu of redirect, we're
4 going to be presenting a slightly revised plan and go from
5 there.

6 HEARING EXAMINER: Okay. Is there anyone in the
7 audience that would like to speak today? You can speak
8 today and I will not cut you off if you want to come back
9 on the 14th and speak again after you've heard the entire
10 presentation. But I certainly don't want anybody to not
11 have the opportunity to speak here today if they can't
12 make that date. Does anyone want to speak?

13 UNIDENTIFIED SPEAKER: If we speak today for one
14 minute, can we speak again on the 14th?

15 HEARING EXAMINER: You can speak an hour today
16 and an hour then, whatever you want to do, absolutely.

17 UNIDENTIFIED SPEAKER: Okay.

18 HEARING EXAMINER: Sure. Come on up, please.

19 UNIDENTIFIED SPEAKER: Your Honor, if we don't
20 speak today, can we speak on the --

21 HEARING EXAMINER: Any combination is okay. If
22 you speak at any one of these hearings, today, next time,
23 it's fine, but you've got to speak at one of them before
24 you will be allowed to speak before the County
25 Commissioners.

1 Would you raise your right hand, please?

2 Thereupon,

3 CRAIG HENSLEY,

4 called as a witness, having been first duly sworn, was
5 examined and testified as follows:

6 HEARING EXAMINER: Please give your name for the
7 record.

8 MR. HENSLEY: My name is Craig Hensley. I'm a
9 property owner on North Captiva Island, actually of two
10 houses out there with two partners. I'm also a state
11 certified appraiser, qualified as an expert witness in Lee
12 County on a couple of occasions. And I have done most of
13 the appraisal work on North Captiva for the past five or
14 six years, probably more than any other appraiser in the
15 area.

16 I just want to go on record today, I will save my
17 talk for the next time since we're on time restraints
18 today.

19 One thing I would like to point out about these
20 aerials, and they're obviously dated and they do not
21 reflect the single-family development that is on North
22 Captiva in very close proximity to this proposed project.

23 My house is right across the street. It's not
24 shown on any of this. It's a \$500,000 home that's going
25 to be very impacted by this project. These pictures don't

1 reflect Mike Graff's new house less than a year old with
2 pool, \$670,000 house right beside me.

3 So there are going to be a lot of single-family
4 homes if this is permitted to be adversely affected.
5 People paid two and three hundred thousand dollars for
6 lots, it's because of the view amenity and what this
7 island is, the mystique of this island. It's a one of a
8 kind. I hope that we're not going to destroy it with this
9 over development and doubling densities.

10 That's all I'll say today.

11 HEARING EXAMINER: Okay. Thank you.

12 Anyone else like to speak?

13 Yes, ma'am. Please.

14 UNIDENTIFIED SPEAKER: May I sit right here?

15 HEARING EXAMINER: Certainly.

16 Thereupon,

17 MITRA BAKHTIAN,

18 called as a witness, having been first duly sworn, was
19 examined and testified as follows:

20 HEARING EXAMINER: Please give your name and
21 address for the record.

22 MS. BAKHTIAN: Mitra Bakhtian, 1200 Logan Lane,
23 Fort Myers.

24 Again, I'm only speaking right now just to go on
25 record. If I am present next time, I'd like to present

1 some more things. I'm just going to read something from
2 two of the island owners that have submitted letters.

3 One of them is by William and Kathryn Powell.
4 Upper Captiva Island is a small pristine island wherein a
5 good portion of which is set aside as a Florida state
6 sanctuary. There are approximately -- there's
7 approximately 300 homes with about the same number of
8 buildable lots still available and not built.

9 In addition, there are several small clubs with
10 related convenience stores and two restaurants that meet
11 the needs of the residents and the visiting tourists who
12 arrive by small ferry or boat.

13 All homes have individual septic systems for
14 waste disposal, and potable water is secured by each
15 property owner's individual well which is fed by an
16 underground aquifer. While orderly growth is the
17 preferred and generally accepted practice in most counties
18 and municipalities, it is well recognized that continued
19 growth and in some cases over building has a direct impact
20 on underground wells and their respective aquifers as
21 well as the ability of existing septic systems to function
22 properly.

23 Having said this, there are very deep concerns
24 with the above application, some which are as follows. A
25 development of this size on such a small island detracts

1 from the natural island scenic resources and does not
2 preserve ecological integrity of the surface and
3 subsurface waters.

4 If rezoning is permitted, it will most assuredly
5 have a negative impact on both the wells and septic
6 systems of adjacent and surrounding homeowners.

7 Given the minimal front and side yard setbacks
8 that the county requires, homes are already being built
9 literally on top of one another, giving little room for
10 septic dispersals and well water discharge.

11 Additionally, there will be further degradation
12 to our primitive growth systems as well as impacting the
13 limited resources of our small fire department.

14 I do have a picture here that shows Rum Road and
15 exposed wires and how primitive these are if you'd like --

16 HEARING EXAMINER: Yes, thank you. I'll make
17 this Bakhtian Exhibit No. 1. Thank you.

18 (Bakhtian Exhibit No. 1 was marked for
19 identification.)

20 MS. BAKHTIAN: The sheer magnitude of the
21 development as requested in the application for rezoning
22 is totally out of character and inconsistent with the
23 densities and intensities of the adjacent and surrounding
24 properties, and any approval will result in the immediate
25 reduction of the value of these properties.

1 North Captiva residents pay the same tax rates as
2 our fellow citizens on the mainland though our homes are
3 appraised at much higher values, therefore, higher taxes
4 than they would be if they were located on the mainland.

5 We don't, however, enjoy the same county and
6 state services with regard to road maintenance and garbage
7 removal.

8 As of today, the roads are in poor condition and
9 a collection is being taken up by the homeowners to
10 provide funds for the grading of all the roads.

11 The normal trash pickup at residences have been
12 spaced out for longer periods to compensate for the
13 increasing amounts of trash that need to be barged from
14 the island and disposed of. As a result, additional
15 storage bins at the residences are required to adequately
16 store the trash in addition to securing it from the animal
17 and rodent population.

18 Taking care of these services and their obvious
19 financial burden is left up to the island residents to
20 cope with and pay for. People who live on this island
21 have a vested interest in keeping it in a clean and
22 pristine condition for it is the very heart of the reason
23 why they moved here.

24 Thus, those three points proposed development
25 will substantially add to these already difficult road and

1 garbage conditions and burden the residents even further
2 without any recourse.

3 In short, this island does not have the
4 infrastructure to support this kind of development. It is
5 a known fact that tourists on vacation will produce more
6 waste, use more water and not have the same respect for
7 the environmental aspects as long-term residents would
8 and, in fact, do.

9 The applicant is well aware of this situation
10 which is why the original application included a request
11 for an outdoor incinerator.

12 While it is my understanding that the request for
13 an incinerator was subsequently withdrawn for sound safety
14 reasons, no further remedies were provided by the
15 applicant.

16 I recognize that a land owner who has been paying
17 taxes has a certain right to develop his property. In
18 this case, the developer purchased the property with the
19 full knowledge that it was zoned C-1 commercial. If the
20 developer wishes to develop the property using the current
21 C-1 zoning criteria, then let him apply for it.
22 Hopefully, his preliminary site plan and planned structure
23 will be consistent with existing character of the
24 surrounding community as well as meet all the state and
25 municipal ordinances and codes.

1 There is no hardship that the developer has
2 indicated as a reason or basis for rezoning this parcel,
3 and, if so, the first criteria for any approval should be
4 for the applicant to show that the change would be for the
5 public good.

6 The only reason for this application and request
7 for approval seems to be to get a higher density on the
8 property so as to increase the return on the applicant's
9 investment. In short, to make more money while increasing
10 the negative impact to the adjacent and surrounding
11 homeowners.

12 The amount of the financial gain, whether more or
13 less, by the applicant should not be the basis or
14 consideration for approving change of zoning.

15 The last letter, it's short, it's two paragraphs,
16 is by Christine and Dean Eisner, they live in Atlanta, and
17 like quite a few other homeowners could not attend this
18 and were not notified properly to be able to get any kind
19 of attorneys to represent them.

20 This is a letter that she submitted. Our home is
21 on the double lot on the southwestern most corner of the
22 developed land at the northern portion of the island. It
23 fronts the Gulf and is adjacent to the state land. The
24 eastern corridor of our property allows an easement for
25 the public access golf cart parking to the preserve. In

1 addition, we are about to close on a double lot behind
2 us. The western side of that property also offers an
3 easement that leads to the public access parking. In
4 other words, the access to the beach parking lot is
5 sandwiched between our existing property and the one which
6 we will be purchasing next month.

7 We have already experienced carts parking on the
8 easement instead of the designated parking lot. With this
9 type of development, this will bring more people without
10 their own beach access and will cause even more congestion
11 for the parking area and the easements that lead to it.

12 The carts could likely park even farther from
13 that lodge on the main road, the Gulf Lane and Panama
14 Shell Road which they are -- with already the poor
15 conditions that are there.

16 We feel that there should be no basis for zoning
17 changes unless it can be shown by the applicant that that
18 benefits public good. In this case it does not, and, in
19 fact, it's a detriment to the public who would be directly
20 affected.

21 We hope that you will take our objection into
22 possible consideration. There are very few places like
23 North Captiva Island that still remain in the United
24 States. It is a fragile environment and one which we and
25 many others on the island feel should be respected and

1 protected.

2 Thank you.

3 HEARING EXAMINER: You're very welcome. Thank
4 you.

5 Anyone else?

6 MR. BROOKES: You read other peoples' letters.

7 Do you agree with that testimony yourself?

8 MS. BAKHTIAN: Yes. I'm a resident there, and I
9 feel that already we are being threatened by over
10 population and we are only half built out. There are 600
11 lots on this island that are considered buildable, only
12 about 300 are developed at this time. And we are
13 experiencing salty water in our well -- salt intrusion in
14 our well water. Our roads are in bad condition. Some of
15 these private beach front properties that have -- we don't
16 have policing on this island, so people take it into their
17 own right to go park on private properties to access the
18 beaches out of convenience.

19 I don't understand how they're planning on
20 driving around on the private roads and going to the beach
21 when this is considered a private island and for the
22 county or the state to be participants to this.

23 HEARING EXAMINER: Thank you.

24 MR. KELNER: One question. Are those --

25 HEARING EXAMINER: Mr. Kelner, give your name.

1 MR. KELNER: Bryan Kelner for the record.

2 Are those letters on file?

3 MS. BAKHTIAN: Yes, they are. Thank you.

4 MR. BROOKES: You said there were wires in the
5 road. What do you mean by wires?

6 MS. BAKHTIAN: There are wires that run along the
7 roadway and due to constant wearing on them -- I believe
8 these are telephone wires and some of them have been
9 severed, but it's something that they have to come and
10 cover with sand and grade and constantly be maintained.

11 HEARING EXAMINER: Are they on the ground, are
12 they right-of-way, where are they located?

13 MS. BAKHTIAN: No, they're right on the ground,
14 on the road.

15 HEARING EXAMINER: Okay.

16 MS. BAKHTIAN: Under the sand, as the picture
17 shows.

18 HEARING EXAMINER: I see it. Thank you.

19 MR. BROOKES: Do you have service by the sheriff,
20 does the sheriff patrol on -- answer calls on Upper
21 Captiva?

22 MS. BAKHTIAN: I think the fire department takes
23 care of that. I'm not sure.

24 MR. BROOKES: If there's a criminal activity, is
25 there a sheriff there to --

1 MS. BAKHTIAN: No, there isn't.

2 HEARING EXAMINER: Any other questions, Mr.
3 Brookes?

4 MR. BROOKES: No.

5 HEARING EXAMINER: Okay. Thank you.

6 Mr. Kelner, any questions?

7 MR. KELNER: No questions.

8 HEARING EXAMINER: Okay. Thank you.

9 Anyone else like to speak? Yes, sir.

10 MR. POWELL: I'd like to ask question if I might.

11 HEARING EXAMINER: Certainly. Whom are you going
12 to ask the question?

13 MR. POWELL: Mr. --

14 HEARING EXAMINER: Yes, certainly. Give your
15 name for the record, please.

16 MR. POWELL: My name is William Powell. I own
17 the -- I'm an adjacent homeowner at 4430 Schooner Drive,
18 the location directly south of the proposed applicant's
19 development and situated between -- right on the corner of
20 Rum Road and Schooner.

21 HEARING EXAMINER: Okay. You may ask questions
22 if you wish.

23 MR. POWELL: I have a couple of questions. In
24 relation to the drawings that I just mentioned, which was
25 my home, where is the bar going to be located and how far

1 away is that in footage?

2 MR. HUTCHERSON: Robert Hutcherson for the
3 record. You're here?

4 MR. POWELL: Exactly.

5 MR. HUTCHERSON: I don't have a scale with me.

6 MR. POWELL: Give me an estimate.

7 MR. HUTCHERSON: It's in the neighborhood of 220,
8 230 feet.

9 MR. POWELL: Within 300 feet?

10 MR. HUTCHERSON: Yes, sir.

11 MR. POWELL: I want to go on the record to
12 vehemently object to any liquor license that is issued
13 within 300 feet of my home. I have two children who at
14 this point walk this island without fear, and as I
15 understand your testimony, Mr. Hutcherson, and I know you
16 just assume that's correct, it's going to be a fishing
17 lodge; is that correct?

18 MR. HUTCHERSON: Yes, sir.

19 MR. POWELL: That's the way I understand it. And
20 the occupancy of the rooms are going to be what?

21 MR. HUTCHERSON: One, two people. Single bed
22 bedrooms for what we had.

23 MR. POWELL: One person, two person?

24 MR. HUTCHERSON: Actually, two I would imagine.

25 MR. POWELL: Maximum of two. In both the same

1 and double units, correct?

2 MR. HUTCHERSON: Well, the double units, there's
3 two beds I imagine, two and two. There's a maximum
4 occupancy. I'm not saying that's what is going to show up
5 every time.

6 MR. POWELL: So you'll have a maximum occupancy
7 rating of 30 people, is that --

8 MR. HUTCHERSON: Roughly.

9 MR. POWELL: Roughly.

10 MR. HUTCHERSON: Yes, sir.

11 MR. POWELL: Would there be an extra person
12 allowed?

13 MR. HUTCHERSON: I'm sorry?

14 MR. POWELL: An extra person allowed in the room,
15 four people in the room?

16 MR. HUTCHERSON: I mean, typically, that's left
17 up to the operator of the hotel.

18 MR. POWELL: Might be the case is what I'm
19 saying?

20 MR. HUTCHERSON: We can't say.

21 MR. POWELL: You alluded to the fact that there
22 were six to ten people, I think that was the calculation
23 that you gave for the surrounding houses when rental is
24 applied; is that correct?

25 MR. HUTCHERSON: Yes, sir.

1 MR. POWELL: And how many of those six to ten
2 people could you tell me are children?

3 MR. HUTCHERSON: How many are children, I
4 wouldn't have any idea.

5 MR. POWELL: I think you need to recognize the
6 fact that the rentals of these houses are basically
7 families.

8 MR. HUTCHERSON: Several of them actually exclude
9 children.

10 MR. POWELL: Well, some of them do. But those
11 are the much smaller houses. Most of the houses that
12 surround this particular piece of property do allow
13 children. As a matter of fact, most of the houses that
14 are rented on the island do allow children. The fact that
15 you're going to have two establishments, and, in fact,
16 three counting the restaurant, because the restaurant
17 actually serves liquor as well, so we have three
18 establishments serving liquor, one being an
19 establishment -- as opposed to establishment in the sense
20 that do you think, and I think your testimony was that
21 they are people -- let's say that this provides a service
22 to the people who want to stay one night, two nights; is
23 that correct? Was that your testimony?

24 MR. HUTCHERSON: That would apply. That would be
25 applicable. I mean, that's part of it.

1 MR. POWELL: Would you consider that in the
2 common sense, practical world, that there's a difference
3 in people, the kinds -- elements of people who stay one
4 and two nights versus those who stay three days and a
5 week?

6 MR. HUTCHERSON: No.

7 MR. POWELL: You do not?

8 MR. HUTCHERSON: I have done it myself.

9 MR. POWELL: Well, then, let me ask it in a
10 different way. Would you say in common practical sense
11 that there's a different element of people who go to a
12 fishing lodge rather than go to a house that they rent for
13 a week or three days?

14 MR. HUTCHERSON: I mean, to a certain extent if
15 you're talking about fishermen coming down and getting off
16 the plane, going to Pine Land and taking a boat out --

17 MR. POWELL: If you're going fishing, and I'm
18 sure you have, I go fishing, too. I mean, I'm not trying
19 to catch you in anything.

20 MR. HUTCHERSON: I'm just trying to understand.

21 MR. POWELL: The basic point is that this
22 particular kind of establishment on this island brings
23 another element to the island. The element is the kind of
24 element that likes to party and drink and have a good
25 time. The purpose of having a bar and a particular

1 development like this, where you do one nighters on an
2 island like this which has never had that kind of
3 circumstance, not that you're not available by law to do
4 this, I understand that, I'm only pointing out there's a
5 different element there and that element, you know, may
6 create crime because you have people going from one bar to
7 the other, and there is no hours there by the way. I
8 don't know where you get the hours or the knowledge that
9 you can dictate hours because the bar at North Captiva
10 stays open well beyond midnight on many occasions,
11 depending upon the level of customers that they have.

12 MR. HUTCHERSON: You're talking about the
13 existing bar.

14 MR. POWELL: I'm talking about the existing bar,
15 that's correct. And there's no enforcement there.
16 Frankly, I don't know anybody that's on the island that
17 wants to go down to what might be an establishment of
18 fishermen where music continues on past the hours where
19 there is no enforcement officer that we can call. If you
20 expect me to go down there and tell the guys at the bar,
21 you know, maybe six or seven which have tattoos, that they
22 should shut the music down, you're badly mistaken, I'm not
23 going to do that. So I think that there is a different
24 element that is being asked or being asked through this
25 application to be entered into this island.

1 It does affect the current residents in the sense
2 that there's a safety issue that we feel is there, and you
3 would have to address that. I mean, there is no
4 enforcement on the island so, obviously, you know, to us
5 there is a degree of safety that we feel is necessary to
6 protect our children who right now can walk that island,
7 and in this particular case, and I am right adjacent to
8 your property, you know, I'd be very much afraid to send
9 my kids out at, you know, ten or eleven o'clock or 10:30
10 at night on the weekend with the -- perhaps the party
11 atmosphere that might be going on within 300 feet of where
12 I live. Now, you can say, well, that doesn't happen and
13 yet --

14 HEARING EXAMINER: Mr. Powell, let me ask you to
15 stick to your question. I'll give you a chance to make a
16 statement when you finish asking the questions, but you
17 certainly may ask the questions and then make a statement
18 because you're mixing the two and it's going to be hard to
19 try to sort through it.

20 MR. POWELL: Okay. I can address this at the
21 next meeting as well because I'd like to address at the
22 next meeting the fact how party places get started.

23 Have you ever been to Key West?

24 MR. HUTCHERSON: '84, I believe.

25 MR. POWELL: Have you been down there recently?

1 MR. HUTCHERSON: No, I haven't.

2 MR. POWELL: Okay. I went there for the first
3 time in 1958, very clean place, very quaint place, much
4 like what we have. You wouldn't want to go there anymore.
5 And there are other places like that. We have them up and
6 down the east and west coast of this state. So I'll
7 address that another time.

8 Let me ask you a couple of other questions. I
9 think I'm on the record about the liquor license as I
10 recall. The plan doesn't show any screening. Do you have
11 a plan that shows screening of the adjacent properties?

12 MR. HUTCHERSON: We don't have a cross section.
13 What we show is the typical buffers, the B type buffer.
14 It's a height that leaves the 24 foot continuous hedge.

15 HEARING EXAMINER: 24 inch.

16 MR. HUTCHERSON: Inch. What did I say, feet? 24
17 inch continuous hedge the fire department has asked us to
18 stagger in several places. I think we're going to
19 preserve the native vegetation. We actually intended on
20 staking the cabins in amongst the native trees once we get
21 the exotic vegetation removed.

22 MR. POWELL: So the code only requires 24 inches;
23 is that what I'm told?

24 MR. HUTCHERSON: On that particular hedge like
25 that, yes, sir, it requires a hedge.

1 MR. POWELL: At the property line right now, I
2 mean, it is completely dense foliage.

3 MR. HUTCHERSON: That's Brazilian pepper. It's
4 an exotic we're going to be required to remove.

5 MR. POWELL: You're going to be required to
6 remove all of it? I don't think it's all that. I
7 disagree with that.

8 MR. HUTCHERSON: Okay. Not all, but what you see
9 in the pictures.

10 MR. POWELL: So this is your -- is this your plan
11 for -- is that what that is?

12 MR. HUTCHERSON: Master Concept Plan. It depicts
13 the actual -- where the buffers are -- they call it
14 buffers, where they're going to be located. Here, here,
15 up the side and then a lesser one along the back against
16 the --

17 MR. POWELL: But it doesn't show in that plan how
18 high --

19 MR. HUTCHERSON: Oh, no, sir. No, sir. It
20 refers to a D type which is defined in the Land
21 Development Code.

22 MR. POWELL: And for a D type in this land, in
23 the state of Florida is what, 24 inches?

24 MR. HUTCHERSON: I'll get that out. I think it's
25 24. A D type buffer is 15 feet in width green area, has

1 five trees for every 100 linear feet and it has a hedge
2 planted and maintained at 36 inches, so I'm sorry, it's
3 36, not 24, hedge and trees.

4 MR. POWELL: So 36 inches of hedge and several
5 trees, is that it?

6 MR. HUTCHERSON: Yes, sir.

7 MR. POWELL: And would you tell me what the plan
8 shows as the elevation and grade with regard to this
9 particular depiction of the quaint lodges that we see
10 attached to the board? What's the elevation grade on your
11 plan?

12 MR. HUTCHERSON: Existing elevations on the
13 property --

14 MR. POWELL: I'm sure you have it on the plan,
15 don't you?

16 HEARING EXAMINER: What he's getting at is that
17 basically your building is going to be higher than the
18 hedge. I think that's what he's getting at.

19 MR. HUTCHERSON: Yes, I was just going to give
20 him the number. We're at nine feet up in the corner and
21 it's four down in this corner, so structures down in this
22 vicinity of the site will be raised up to ten feet, I
23 believe, is the minimum flood elevation. That's
24 approximately six feet. It's going to be more in the line
25 of one or two feet up in this end where it's higher.

1 MR. POWELL: Okay. So that the depiction that's
2 being shown on the board which was provided to some of the
3 people in this room who are adjacent homeowners or
4 interested parties on the other part of the island, is not
5 a true depiction?

6 MR. HUTCHERSON: Which depiction are you -- the
7 site plan or --

8 MR. POWELL: The depiction that's on the board
9 with regard to --

10 MR. HUTCHERSON: These?

11 MR. POWELL: Yes. -- with regard to the homes
12 are not true depiction of what this development might
13 begin to look like. Again I say only because I'm going to
14 ask you another question. It's not on 11 foot elevation?

15 MR. HUTCHERSON: No, they don't show the
16 elevations. In architectural style we were asked to show
17 -- to continue rural lifestyle on the island.

18 MR. POWELL: So we would have to put those
19 immediately on 11 foot posts for somebody to begin to
20 realize what this development is going to begin to look
21 like; is that right?

22 MR. HUTCHERSON: No, sir. They have to be
23 brought up to minimal flood elevation, which I believe is
24 ten feet, the existing elevation, and what would be the
25 bottom left corner is at five already, so they're going to

1 have to -- four or five, they're going to have to come up
2 four or five feet there. The other end of the property is
3 already up at eight or nine, so they won't have to come up
4 but a couple of feet right in here.

5 MR. POWELL: So we have -- and your testimony is
6 that it's anywhere from a couple of feet to maximum of --

7 MR. HUTCHERSON: Five I believe is what the --
8 flood elevation is ten and the minimum elevation here
9 is -- you got four and a quarter, so five and three-
10 quarter feet.

11 MR. POWELL: And what are your calculations based
12 on the fact that you are using these depictions as the
13 design, you obviously must know what the height of a one
14 story design like this is since you're using those
15 depictions and supplying it to the staff or to the county
16 planner in the Staff Report?

17 MR. HUTCHERSON: No, we were asked to provide
18 those strictly to show an architectural rendering of what
19 the theme or the style of the building was going to look
20 like. We were never asked to produce an exact replica of
21 what we were going to be doing on the site.

22 MR. POWELL: Well, this is within reasonable -- I
23 would think that within reason this is what you're
24 suggesting, so what's the ball park height within reason,
25 not knowing exactly what the structure is going to be that

1 you're going to choose? I mean, you're certainly giving
2 us a style that has a roof line, that's pretty well
3 standard out there, what do you think the height is going
4 to be above elevation?

5 MR. HUTCHERSON: You're going to have -- like I
6 said, they're measured from existing flood elevation,
7 that's how all buildings are measured out there. So it's
8 going to be probably 20 feet or less from that height.

9 MR. POWELL: 20 feet to?

10 MR. HUTCHERSON: From 10 up to 20 so a total of
11 30 feet in height.

12 MR. POWELL: To the roof line?

13 MR. HUTCHERSON: At the very maximum. And,
14 again, we haven't done the architects, we haven't done any
15 of the engineering on the architectural, those are just
16 simply renditions of the style that the county is looking
17 for.

18 HEARING EXAMINER: You're saying you're going to
19 stay under 35 but you don't know how far under 35?

20 MR. HUTCHERSON: That's our general recollection.
21 I mean, the flood elevation goes up to 20 -- excuse me --
22 up to 10, and then we start at that point. Typically, 20
23 feet is going to take in all the single-story units.

24 MR. POWELL: 20 feet would be to the roof line?

25 MR. HUTCHERSON: Like I said, it's not --

1 MR. POWELL: Just a ball park I'm asking you,
2 that's all I'm asking you for.

3 MR. HUTCHERSON: We don't know yet. Uppermost
4 extent, however you'd like to -- maximum height.

5 MR. POWELL: Maximum height to the roof line is
6 what I'm asking.

7 MR. HUTCHERSON: Okay.

8 MR. POWELL: So you think that --

9 MR. HUTCHERSON: 20 feet.

10 MR. POWELL: Approximately 20 feet. As I
11 understand the witness here, it's 35 feet?

12 HEARING EXAMINER: 35 feet maximum.

13 MR. POWELL: Maximum, yes, sir.

14 HEARING EXAMINER: In that location.

15 MR. POWELL: Does Your Honor have the ability
16 during the course of this hearing or at the end of the
17 hearing to put a cap on the height?

18 HEARING EXAMINER: We can limit the height if
19 there's a reason for doing so.

20 MR. POWELL: In your estimation, you have a 400
21 square foot footprint on five of these units; is that
22 correct?

23 MR. HUTCHERSON: Yes, sir, I believe so.

24 MR. POWELL: Okay. In a good planning analysis,
25 in a 400 foot footprint, going up 35 feet into the air,

1 having ten units, five being 400 foot footprint and five
2 being 750 feet footprint, would you consider that good
3 planning for a development like this, on an island like
4 this where you're 35 feet above the tree line?

5 MR. HUTCHERSON: I doubt very seriously it would
6 be 35 feet above the tree line.

7 MR. POWELL: You can go there.

8 MR. HUTCHERSON: I know a lot of the single
9 family houses and the theme of the development out there
10 is everything is much taller. I'm telling you that those
11 are, for the most part, 20 feet above the minimum flood
12 elevation.

13 MR. POWELL: And I appreciate that, you claim
14 that, that everything is much taller and everything is
15 much taller because the homes out there are anywhere from
16 2,200 to 2,800 square feet, and they're three floors to
17 some of them, so, therefore, they have to at least be able
18 to utilize that 35 foot maximum that we have in accordance
19 here; is that correct?

20 MR. HUTCHERSON: Yes, sir.

21 MR. POWELL: Okay. These are one-story buildings
22 so given the comparison between the one story and a three-
23 story building, I'm not so sure why you would need 35 feet
24 or where it's suggested that it's in an area compatible
25 with so that you could go 35 feet.

1 MR. HUTCHERSON: I mean, all the structures
2 around us are taller than that to begin with. You've got
3 a cell tower directly behind us that's in the neighborhood
4 of 80 to 100 feet. That's the maximum building height out
5 there now, and if we hadn't done the architectural and it
6 didn't come up to the end the building heights, we did not
7 put a limitation on the building heights.

8 MR. POWELL: Well, I mean, it's good planning.
9 Would you want ten stick houses coming up out of the woods
10 and you think that that is in accordance with 1.42 of the
11 Lee Plan, which is to stay basically -- I should read that
12 to you, because it's very specific, I don't know that I
13 had it in front of me. But I'm sure you do. It basically
14 discusses keeping the Outer Islands in the same character
15 and serenity that they're in now. Do you believe that
16 this particular development, going with these small
17 footprint units, 35 foot high, adheres to that particular
18 part of the Lee Plan?

19 MR. HUTCHERSON: I believe you can demonstrate
20 that it does simply based on the height of the other
21 structures around it.

22 MR. POWELL: But the other structures are
23 different, and they require that height because of the
24 number of stories they have.

25 MR. HUTCHERSON: Well, that's a choice when

1 you're building stories, you have a maximum height you can
2 build to.

3 MR. POWELL: We're talking about these structures
4 right here. I'm not talking about the surrounding
5 structures. The surrounding structures have a reason for
6 being as high as they are and they have to go to the
7 maximum because of the number of stories they have.
8 You're talking about the depiction here in front of this
9 board that shows basically what you're trying to do on
10 this development, and that depiction should be fairly
11 accurate, as I understand it, and in my discussions with
12 Mr. Kelner. If that is true, then you only have a one-
13 story structure and, you know, one story above grade, and
14 this board can have -- cap the height on this particular
15 project if they choose to do so.

16 Going beyond that I think is just poor planning,
17 because you're going above the tree line with stick houses
18 that don't really, you know, they're not really compatible
19 with anything in the surrounding area nor are they
20 compatible with the island itself and the way the island
21 is laid out because you'll be able to see that from every
22 single corner of the island. No matter where you're at on
23 the island, whether you're on the beach side, the north
24 side, the south side, you'll be able to see that cluster
25 of stick houses coming up from that 1.59 acre parcel, no

1 matter where you're at in the island.

2 And I think that it's very obtrusive and I think
3 that it's very poor planning to say that you need to go up
4 35 feet or you can go up 35 feet and leave it to the
5 degree that, yeah, I can put a deck underneath it, you
6 know, why because the deck isn't part of the square
7 footage as I understand it; is that correct?

8 MR. HUTCHERSON: I do not know to be honest. I
9 haven't studied the building code. I don't know that --
10 you talk about floor underneath a building and the deck.
11 I mean, that's obviously not part of our proposal. We
12 would have to set it forth on the Master Concept Plan if
13 that was something we were anticipating doing. We've been
14 asked to provide architectural renderings of styles that
15 are rural in character, in keeping with the island's rural
16 character. That's what we did, and the county accepted
17 it. No way, shape or form did we represent that these
18 will be the exact structures.

19 MR. POWELL: Well, is it your testimony that
20 going up 35 feet with a structure that's 400 square feet,
21 had a 400 square foot footprint, is it your testimony
22 that's staying with the island's character?

23 MR. HUTCHERSON: I believe it's compatible with
24 the existing homes out there. I mean, it's far from a
25 rural -- the structures out there are far from rural in

1 nature.

2 MR. POWELL: Are you comparing this to an island
3 home? Is it your testimony that it's compatible to the
4 island homes and you're comparing a 400 square foot
5 footprint structure going up to 35 feet and you're
6 comparing it to an island home that's perhaps 30 or 35
7 feet? That's being compatible?

8 MR. HUTCHERSON: Well, I mean, number one, we're
9 not building a single family home, we're building a
10 fishing lodge that we wouldn't anticipate it to be the
11 same. We have indicated the maximum height that the
12 zoning categories out there allow, and I don't see
13 anything on there -- I mean, none of those buildings are
14 two story and wouldn't approach the 35 feet to begin with.
15 I can speak with Mr. Scott between now and the next
16 hearing as to what height we can live with.

17 MR. POWELL: I don't want to belabor the point,
18 but I think there is a difference in what you consider
19 compatible with the surrounding area, obviously that's why
20 a lot of people are here.

21 As far as planning aspects of building a unit
22 like this, a development like this is partial plan and
23 using footprints that are relatively small and going up to
24 the height that you could go up them. I understand you're
25 saying you may not go there, but you obviously have the

1 right to do that if this application is approved. You
2 would have the right to do that; isn't that correct?

3 MR. HUTCHERSON: If it said minimum height of 35
4 feet, I probably could do that driving cost along the way,
5 but -- not particularly feasible but possible.

6 MR. POWELL: And I'll ask you this question again
7 only because I'm not sure whether I got an answer. I
8 think the answer was that you didn't know, and perhaps Mr.
9 Kelner would know. Is the decking part of the calculation
10 for square footage or not when you -- I believe decking
11 is not.

12 MR. HUTCHERSON: You're talking about the square
13 footage that we have labeled on there?

14 MR. POWELL: Yes.

15 MR. HUTCHERSON: It's not part of that square
16 footage, no, sir.

17 MR. POWELL: So the decking can be applied to
18 this unit in any way, shape or form? You can have a
19 screen around it, you can put decking out 10 x 20 perhaps;
20 is that not right?

21 MR. HUTCHERSON: You mean outside of the cottage
22 area?

23 MR. POWELL: Yes.

24 MR. HUTCHERSON: No, sir, we have a condition
25 eliminating --

1 MR. POWELL: Well, attached to the cottage area.

2 MR. HUTCHERSON: No, sir, not unless we show them
3 on that plan --

4 MR. POWELL: Well, that shows --

5 MR. HUTCHERSON: Oh, you're talking the porch,
6 the front porch. Yes, sir, we have optional front porches
7 for each and every unit.

8 MR. POWELL: And you haven't decided on how --
9 what the dimension calculations are on those porches?

10 MR. HUTCHERSON: They're 10 x 20 on these and
11 10 x 30, I believe, on these.

12 MR. POWELL: Are those estimates or are those --

13 MR. HUTCHERSON: I scaled them this morning, yes,
14 sir.

15 MR. POWELL: So they're going to be 10 x 20. Are
16 they going to be enclosed or optional?

17 MR. HUTCHERSON: Again, we haven't specified any
18 of the things. They would be screened.

19 MR. POWELL: They would be screened, enclosed and
20 they be -- people could just put a hammock out there and
21 that sort of thing, right?

22 MR. HUTCHERSON: I suppose.

23 MR. POWELL: So people could sleep out there if
24 they wanted to?

25 MR. HUTCHERSON: They could sleep by the pool if

1 they wanted.

2 MR. POWELL: I don't think so, not in a hotel. I
3 would have to disagree with that. I would hope not.
4 Because if they do that, I really have a problem sending
5 my kids out there.

6 Let's see if I had any other questions based on
7 that. There was a discussion -- testimony given on the
8 waste, loud speakers, that sort of thing, and as I recall
9 in the Staff Report, there was a request for piped -- I
10 say it was a request for piped in, but it's really piped
11 out music as I see it.

12 MR. HUTCHERSON: Well, it wasn't much of a
13 request. It was a limitation the staff placed on us
14 should we desire to come up with something like that.
15 That's, I believe, how that came about.

16 MR. POWELL: I think that I began to address this
17 before with regards to enforcement, and we already have
18 enough noise that travels in that island extensively. I
19 have taken a golf cart from one end of the island to the
20 other to see how far it's going to take me to hear the
21 music from the North Captiva bar which is directly
22 adjacent to that piece of property, no more than 350, to
23 400 feet -- 350 feet away from the proposed bar that you
24 have in your application. I have gone to the beach, which
25 is in the southwest corner of your map, and still heard

1 the music. It's incredible how sound travels.

2 Now, everybody has the right to play music. It's
3 unfortunate that other people have to listen to it. But,
4 you know, I moved there. I knew this bar was there, and I
5 can deal with that. But you're not there yet. And having
6 dualing bands in the middle of the night is not my idea of
7 what's, you know, in the character of that island.

8 MR. HUTCHERSON: Well, I think you'll find we
9 have a limitation, whereas they don't have a limitation
10 ordinance, and so there's no restriction or statute of
11 limitation for them to adhere to as we have been asked to.

12 MR. POWELL: And when those limitations are
13 exceeded as I'm sure -- is it your testimony that North
14 Captiva bar does not have any limitations?

15 MR. HUTCHERSON: Not to my knowledge. I looked
16 for hearing numbers on it, couldn't find anything.

17 MR. POWELL: But you don't know for a fact
18 that --

19 MR. HUTCHERSON: It's my understanding, yes, sir.

20 HEARING EXAMINER: You're talking about
21 limitations of outdoor music, not the time of operation?

22 MR. POWELL: Right. So they can -- but as far as
23 the hours of operation, there's no limitations on that?

24 MR. HUTCHERSON: I'm not aware of any.

25 MR. POWELL: Okay. And you're proposing hours of

1 operation?

2 MR. HUTCHERSON: Yes, it's in our Staff Report.

3 MR. POWELL: And when those hours of operation
4 extend themselves beyond whatever is approved and --
5 potentially approved in this application, who is going to
6 enforce that? Who do I call?

7 MR. HUTCHERSON: Well, code enforcement is the
8 obvious answer. Like I said, we expect Mr. Scott to
9 adhere to the restrictions. He's got a reputation on the
10 island as operating a business there before. He has
11 children, and we would expect him to operate within the
12 law.

13 MR. POWELL: I don't know Mr. Scott, I'm sure
14 he's a fine man. But, you know, I don't need to begin
15 trying to figure out who I speed dial at 11 or 12 o'clock
16 at night because the music is still blaring. I would
17 prefer to call somebody who has the enforcement power to
18 do that sort of thing instead of having to be relegated to
19 the owner of the property who may or may not be there at
20 that particular time.

21 MR. HUTCHERSON: And I understand that. It's my
22 understanding there was a sheriff's deputy on the island
23 for a period of time, about a year or so, who was since
24 taken off the island for lack of activity.

25 MR. POWELL: So I have serious objection to any

1 music that's being piped to the outside. I think you can
2 keep that inside. If this was approved, and I go on the
3 record saying I'm against this, but if there is any
4 approval, I think that that kind of thing should be
5 confined to the indoors. You have a 3,000 square foot
6 lodge that's proposed there. I think you have an awful
7 lot of room in that place, and if you want to play some
8 music, close the doors and go inside.

9 MR. UHLI: I've tried to be really patient about
10 this, but it would work a lot better if you would just do
11 this as a Q and A because if he makes statements, those
12 are things that I can't cross-examine and that's a
13 problem, so --

14 HEARING EXAMINER: If you can -- I'll give you a
15 chance to make your statement. If you can stick to
16 questions, because you're kind of mixing the two and they
17 are kind of hard to separate.

18 MR. UHLI: We have different procedures in
19 different places.

20 HEARING EXAMINER: That's all right. That's
21 fine.

22 MR. POWELL: I appreciate your giving me guidance
23 any time I'm off the line, okay?

24 HEARING EXAMINER: That's fine.

25 MR. POWELL: Actually, I have a lot of other

1 questions, but I'm going to save those for the next
2 meeting, so I'm done.

3 HEARING EXAMINER: Okay. If you'd like to make a
4 statement, you certainly may do that as well.

5 MR. POWELL: Well, I think that I could save that
6 for the next meeting, but, you know, I can tell you
7 something that I would like to put on the record.

8 HEARING EXAMINER: It helps also, because if
9 they're going to be coming back with conditions, they may
10 want to hear what you have to say.

11 MR. POWELL: Okay. I think there was discussion
12 about beach access; is that correct?

13 MR. HUTCHERSON: Yes.

14 MR. POWELL: And how the guests on the proposed
15 property could access the beach. I think it was also
16 suggested maybe they won't use the beach, is that right,
17 because they are -- the fishing lodge?

18 MR. HUTCHERSON: Well, that's one possibility.
19 There are easier beaches to get to in southwest Florida,
20 you know.

21 MR. POWELL: Well, people who come to the island
22 are on the island now.

23 MR. HUTCHERSON: Right.

24 MR. POWELL: In order to get around the island,
25 in your estimation, do you need a golf cart?

1 MR. HUTCHERSON: It makes it easier. I have done
2 both. I have walked and used the golf cart, my own
3 personal experience.

4 MR. POWELL: People coming to the island for the
5 first time, what do you think, in your opinion, are they
6 going to need golf carts?

7 MR. HUTCHERSON: They're going to want a golf
8 cart.

9 MR. POWELL: And those people who come to the
10 island to look around the island, see the island, maybe
11 even go to the beach, you know, where are they going to
12 have access to that beach?

13 MR. HUTCHERSON: Down in the southwest corner, I
14 understand that's where the parking lot is for the state
15 preserve area, the beach area.

16 MR. POWELL: Do you know how many parking spaces
17 are in that lot right now?

18 MR. HUTCHERSON: Golf cart parking spaces?

19 MR. POWELL: Yes.

20 MR. HUTCHERSON: Judging by the area on the
21 aerial photograph, and I didn't measure it, I don't know,
22 ten maybe.

23 MR. POWELL: Eight.

24 MR. HUTCHERSON: Eight.

25 MR. POWELL: And do you know the other access to

1 the beach?

2 MR. HUTCHERSON: No, sir.

3 MR. POWELL: It's to the north side of the
4 airfield right down at the end of the airfield on the
5 western strip, that is correct. Do you know how many
6 parking spaces are there for access to the beach?

7 MR. HUTCHERSON: I'm not aware that there's any
8 spaces there because it's the dead end of a road, I
9 believe.

10 MR. POWELL: You're correct. Actually, there's
11 two spaces there that don't cross over private property
12 and don't inhibit the driveways to the dwellings there.
13 So we have two plus eight, that's ten, and we have 300
14 homes on the island right now, residence, and if anyone
15 from your facility goes to the beach, where do you think
16 they're going to park, in those parking spaces?

17 MR. HUTCHERSON: I can't tell you that they're
18 going to do something illegal. You know, we provide them
19 with literature showing them where the beach accesses are,
20 the two legal ones or the one illegal one as you've
21 alluded to.

22 MR. POWELL: Well, as far as I know, it's not
23 illegal for them to go park and, you know, residents have
24 a tough time finding parking right now. And my point is
25 that you'll be adding, what, 30, 35 people additional to

1 the island, all -- at least half of whom don't have golf
2 cars and some of whom may go to the beach?

3 MR. HUTCHERSON: I don't know so much that
4 they'll be added, it would just be an alternative for
5 another place to stay. I mean, you've got visitors coming
6 to the island on a daily, weekly basis now, this just
7 gives them another place to stay. I mean, while it does
8 increase the capacity on the island, it just gives them
9 another opportunity, another choice.

10 MR. POWELL: Another choice to stay for --

11 MR. HUTCHERSON: Some other house.

12 MR. POWELL: So that they'll be coming to the
13 island to look around, stay and enjoy themselves; is that
14 right? And in doing so, they would be taking a golf cart
15 and driving around to take a look first or second or third
16 time they may be on the island. But, obviously, planning
17 to have a golf cart, you go to the other restaurant or to
18 Barnacle Bill's, and places like that, you would want to
19 have transportation, you're not going to walk there all
20 the time. So, therefore, they'll be driving these golf
21 carts; is that right?

22 MR. HUTCHERSON: Yes, sir, some of them will
23 probably.

24 MR. POWELL: And this impact on -- the additional
25 guests, in your opinion, will not impact the roads?

1 MR. HUTCHERSON: No more than the normal
2 construction activity, you know. The golf carts aren't so
3 much. In my opinion, what does it, you've got front end
4 loaders, you've got construction traffic building the
5 homes on the island, running around, they're much, much
6 heavier.

7 MR. POWELL: I'm glad you said that because this
8 project is a very big project for a little island like
9 this. Who is going to maintain roads since we, the
10 residents, maintain those roads right now?

11 MR. HUTCHERSON: Well, Mr. Grady, being a
12 property owner would.

13 MR. POWELL: In what degree, his 15 units?

14 MR. HUTCHERSON: I haven't seen the documents to
15 tell. I don't know how you all share to be honest.

16 MR. POWELL: It's voluntary.

17 MR. HUTCHERSON: Well, then, you would need to --
18 Mr. Grady would be approached to -- I mean, the voluntary
19 people are the ones on the island who choose to
20 participate?

21 MR. POWELL: Yes, it's voluntary. So does the
22 applicant have any plan for his particular portion of the
23 upkeep for the roads?

24 MR. HUTCHERSON: He's not been approached by
25 anybody on the island. He has no plans, but it obviously

1 behooves him to make sure that the road is actually
2 passable at his location if that is what you're saying.

3 MR. POWELL: The original application called for
4 an incinerator?

5 MR. HUTCHERSON: No, sir.

6 MR. POWELL: The original application that was
7 presented called for an incinerator?

8 MR. HUTCHERSON: No, sir.

9 MR. POWELL: Okay. The incinerator was in some
10 language in the Staff Report?

11 MR. HUTCHERSON: We revised the application on
12 the third submittal to include an incinerator after staff
13 indicated to us that it wasn't a problem on the island
14 anymore. We subsequently removed it after we found out it
15 would be a problem. The fire department spoke to us so we
16 took it off.

17 MR. POWELL: You have to forgive me, because, you
18 know, when I said the original application --

19 MR. HUTCHERSON: I understand.

20 MR. POWELL: -- we were not notified of this
21 particular situation, this application or proposal, until
22 about six days ago. And, I mean, I'm typically in other
23 places and while I like it here, it's beautiful, it was a
24 push to get down here and understand what was going on and
25 see all of the different plans as I tried to do. So I may

1 not be as finite as I'd like to be in this particular
2 situation, but I appreciate you letting me know it's the
3 third submittal.

4 MR. HUTCHERSON: It was in January we added it.
5 I'm not sure. Either December or January it was on our
6 second or third submittal. We had been on site with
7 staff.

8 MR. POWELL: That was withdrawn?

9 MR. HUTCHERSON: The fire department first
10 objected saying they would have a problem with an
11 incinerator on the island, they tried to make it known to
12 the county. We said they didn't make it known to us, so
13 we'll be happy to take it off.

14 MR. POWELL: But it was included in the third
15 submittal for the disposal of trash?

16 Are you aware of the situation on the island with
17 regard to trash?

18 MR. HUTCHERSON: Well, I'm aware that it's barged
19 off.

20 MR. POWELL: You're aware that the pickup times
21 for trash have been extended twofold. We use to get two
22 pickups a week, and now we're down to one?

23 MR. HUTCHERSON: I'm not aware of the specifics,
24 no, sir.

25 MR. POWELL: Okay. Are you aware that each

1 individual homeowner now has to have -- they don't have
2 to, but I think it would be a good idea to have a couple
3 of bins because one gets filled up pretty quick and now
4 we've had to add another one because of the holding of
5 trash. Are you aware of that?

6 MR. HUTCHERSON: No, I have no personal knowledge
7 of that.

8 MR. POWELL: I think given the fact that the
9 incinerator was requested, was that knowledge of the
10 problem that we're having on the island with regard to
11 removing the trash?

12 MR. HUTCHERSON: Well, it was a reduction in the
13 waste stream. We simply thought to remove the ashes, they
14 would be ashes at that point.

15 MR. POWELL: And dispense of the ashes versus the
16 solid garbage is what?

17 MR. HUTCHERSON: It's the volume.

18 MR. POWELL: Exactly. The question is, was the
19 incinerator included in the third submittal because the
20 applicant is aware of the garbage situation with regard to
21 disposal and the problems of disposing of the garbage on
22 the island?

23 MR. HUTCHERSON: I can't say that for sure
24 without speaking for Mr. Scott. But, I mean, I'm aware
25 that garbage gets barged off the island if that's what

1 you're saying. I'm aware Safety harbor has an incinerator
2 and there are some problems with it. I wasn't made aware
3 of that until just recently.

4 MR. POWELL: Okay. Are you aware that the Pine
5 Island Association and Pine Island is now discussing the
6 issues about us dumping, meaning Upper Captiva dumping
7 garbage on Pine Island?

8 MR. HUTCHERSON: No, sir.

9 MR. POWELL: You're not aware of that?

10 MR. HUTCHERSON: No, sir.

11 MR. POWELL: I'll leave that for another time.

12 Just one other thing. What's the depth of the
13 well?

14 MR. HUTCHERSON: It's the existing permitted
15 well, and I didn't check it, but it's been tested, in
16 fact, cleared every six months according to the program.
17 I can have that information the next time.

18 MR. POWELL: This may not be this particular
19 meeting, I don't know if you can tell me if it is or
20 isn't, but I heard testimony that that particular piece of
21 property that the well is on is owned jointly by Mr. Bill
22 Hart and Mr. Graydon Scott.

23 MR. HUTCHERSON: The property is. I guess the
24 well would be, too. To be honest, I'm not privy to
25 whatever deals they made amongst themselves as to who

1 retains ownership of the well. I know how the property is
2 titled on the property appraiser's website.

3 MR. POWELL: Is there an agreement between Mr.
4 Bill Hart and Mr. Scott regarding the use of that well for
5 this particular project?

6 MR. HUTCHERSON: Not that I'm aware of.

7 MR. POWELL: You don't know; is that correct?

8 MR. HUTCHERSON: That's correct.

9 MR. POWELL: Okay. I think at this time I really
10 don't have -- I have some other questions, but I think I'm
11 going to save these other questions for the next meeting,
12 and I appreciate your guidance on this.

13 HEARING EXAMINER: You're welcome.

14 MR. POWELL: Thank you very much, Mr. Hutcherson.

15 HEARING EXAMINER: Anyone else like to say -- do
16 you want to ask a question? Wait. Come to the microphone
17 so I can get your name.

18 MR. SCOTT: Graydon Scott, the applicant.

19 Mr. Powell, this weekend I was out on the island
20 and your house is occupied. Do you know how many people
21 were in your home this weekend?

22 HEARING EXAMINER: We don't want to get into this
23 kind of conversation. No, we're not going to get into a
24 he said, she said. He's testified. You're the applicant.
25 Let him make his testimony, and then I'll give you your

1 turn, a chance to ask those questions later on if they're
2 relevant. But I don't want to get into these kind of
3 personal discussions. They get too personal. Okay.

4 Thank you, Mr. Powell.

5 Yes, sir, please come up. You can go to the
6 microphone or sit here, wherever you feel comfortable.
7 Thereupon,

8 TED SCHAVE,
9 called as a witness, having been first duly sworn, was
10 examined and testified as follows:

11 HEARING EXAMINER: Please give your name for the
12 record.

13 MR. SCHAVE: Ted Schave. We own property
14 directly west across from Rum Road on Longboat Circle. A
15 bunch of homes aren't shown on those aerials, but we are
16 aware, all of us have homes there.

17 I find that kind of interesting that all in all
18 the idea of the project is quite good. I might even --
19 I'd like to even speak in favor of it. However, knowing
20 what we know, if I would have to come down on one side or
21 the other right now, I would be against the project.

22 The density questions are of interest. Everybody
23 wants less people wherever they are. It is interesting
24 the discussion about workers that was kind of passed
25 over. They either come or go from the island on a daily

1 basis or some of them not too far removed probably within
2 a hundred feet of the property, a bunch of them pool
3 together and get some number of people living per house.
4 So there's the density, the workers increase the density
5 of the island, the population.

6 I suppose as an adjacent land owner, a big
7 concern is the height potential because view amenities are
8 a big deal on the island.

9 My last point then may be tied into the view and
10 everything. The reason I would be against -- I would want
11 to vote against anything today if I was asked to vote is
12 that the design is undefined. I think the intent is
13 probably very good and with a little more definition of
14 the design, possibly it would be a very nice project for
15 the island. Density thing is always how do you face that.

16 So with that, I'd like to be available next time
17 if I can make it.

18 HEARING EXAMINER: Thank you, sir.

19 MR. UHLI: May I ask him one question?

20 HEARING EXAMINER: Certainly.

21 MR. UHLI: Sir, I'm just interested in what you
22 mean by the design is undefined. Are you talking about
23 the design of the buildings themselves or what do you mean
24 by that?

25 MR. SCHAVE: I think -- I'm a builder myself, and

1 I believe that design in people's mind is defined quite
2 well, but it would be interesting to have the site
3 defined, a little more definition on the site and even the
4 lodges. I think you might be willing to live with a less
5 height restriction, and, like you say, 20 feet above
6 grade, you can probably even live with that and come up
7 with what I perceive as your intent.

8 But I understand the people saying that lodge
9 sitting 35 feet up with a roof line 35 feet in the air
10 would look squirrely to begin with and why would you do
11 it, but yet there's no restriction so it could happen.
12 There's always some jerk that does something, you know,
13 that you -- afterwards you say, why on earth would he do
14 that.

15 MR. HUTCHERSON: Robert Hutcherson. You just
16 said upgrade, you meant finish.

17 MR. SCHAVE: No. Well, but you're talking -- as
18 I understood it, if you've got on the high side or you're
19 going to add 20 feet, probably no more than 20 feet with
20 those structures above the flood plane or whatever that --

21 MR. HUTCHERSON: Right. One corner that might be
22 appropriate. I'm not sure about the other corner.

23 MR. SCHAVE: You're not thinking of going up 35
24 feet for a variety of reasons, and maybe if people -- look
25 at me giving advice here --

1 MR. SCHAVE: Off the record. In a commercial
2 project you don't want to --

3 HEARING EXAMINER: Actually, there's nothing off
4 the record here. Whatever you say is on the record. If
5 you want to go off the record, wait until we finish the
6 hearing.

7 MR. SCHAVE: I need some guidance. Those --

8 HEARING EXAMINER: I'll tell you what. Let me
9 give you a chance later when we're all finished, then you
10 can get a chance to go through the entire process.

11 MR. SCHAVE: We have a lot of things --

12 HEARING EXAMINER: I understand. That's the way
13 the process works.

14 MR. UHLI: You've indicated that height is part
15 of this. Is there any other part of this that you think
16 is not adequately defined?

17 MR. SCHAVE: You know, well, the landscaping, the
18 layout, you know, the total design for the site, the
19 building, you know, people were chipping at how much of
20 the 3,000 or the 4,400 square feet was going to be used
21 this way and that way. Why not define it and, you know,
22 you got a gut feel, you're not going to waste money.
23 Maybe when people saw it, they'd say, hey, you know, this
24 is as close as we can get other than the density thing. I
25 mean, that's always going to bite everybody.

1 MR. UHLI: You'd like to see more definition of
2 the square footage within the lodge building and what it's
3 going to go for?

4 MR. SCHAVE: That. And then maybe just
5 statements on the structures themselves. And I understand
6 where you're headed, which is probably a good deal. I
7 don't know how you guys beat the density thing. If I was
8 you, I'd want -- myself, I want two.

9 Thank you.

10 HEARING EXAMINER: Thank you.

11 Anyone else like to speak?

12 Yes. Sure, come on up.

13 Thereupon,

14 HENRY PAUL,
15 called as a witness, having been first duly sworn, was
16 examined and testified as follows:

17 HEARING EXAMINER: Please give your name and
18 address for the record.

19 MR. PAUL: My name is Henry Paul. I live at 3823
20 Corona Street in Tampa, and I own a house, along with my
21 wife, and three lots on North Captiva. The house I own is
22 on 540 Longboat Circle, which I'll point out here. It's
23 the third house right there. And the lots I own are on
24 Cutlass.

25 I am opposed to the development, but I would like

1 to point out some specific concerns that I have not heard
2 mentioned here. I was on the island in September, and
3 there had been a tremendous amount of rain and that whole
4 area, that road there, was under water. I mean, it was --
5 a golf cart was basically almost flooded out. It would go
6 over the floorboards, and it stayed that way for quite
7 sometime. And I'll point out the area where the flooding,
8 I recall the flooding being. This whole area here
9 (indicating) and around the corner and up -- it went up
10 Longboat Circle to some extent. It did not get to the
11 property. At that time I had not bought the property yet,
12 but I am very concerned how -- the impact that this is
13 going to have on that area because when the rains come,
14 it's obviously very difficult to get around and I haven't
15 heard anything addressed to that issue. So that is one
16 particular issue that I am very concerned about and have
17 not heard anybody address that.

18 Also, just, you know, the other concerns, the
19 density and the height, and beach access is something that
20 is also a concern. That is a problem on the island. And,
21 you know, that's something that needs to be worked on in
22 general, but that is definitely a problem that I'm
23 concerned about.

24 That's all I have to say. I would like to call
25 my lawyer up to ask some additional questions.

1 I'd like to talk to you right now as far as --

2 HEARING EXAMINER: Wait. Let him finish and then
3 I'll give you a chance to come up. No, wait. I'm going
4 to have to swear you in. I have to go through the entire
5 process. I can't have you talking off the record. And
6 before you do that, do you have any questions?

7 MR. UHLI: No.

8 HEARING EXAMINER: Mr. Brookes.

9 MR. BROOKES: On behalf of Mr. Paul and Mr. Rapp,
10 Mrs. Paul, Mrs. Rapp, we have a number of conditions we'd
11 like to propose today that they can take back and think
12 about or come back with next week that may address some of
13 the issues.

14 HEARING EXAMINER: Do you have them written out
15 or are you going to read them? Just give them to me.

16 MR. BROOKES: I have them kind of written out,
17 but it's better if I just read them quickly.

18 HEARING EXAMINER: Fine.

19 MR. BROOKES: One is a preliminary storm water
20 plan showing locations of any retention areas. We don't
21 know whether this project at 1.59 acres is exempt or not
22 from water management district review and permitting. If
23 it is, it falls -- the burden will fall on Lee County to
24 make sure that that is adequate.

25 We'd like to see some height limitation. It's

1 been discussed today how to handle that, but something one
2 story above the base flood elevation with a roof pitch
3 that's not excessive, and I don't know the exact number of
4 what that would be but that's something to think about and
5 come back with a condition.

6 No outdoor music. If we are building these homes
7 on stilts to preserve all hammock, seagrapes, and native
8 vegetation except for the footprints of the pilings that
9 need to be constructed and the sidewalks. So trying to
10 preserve more of the native vegetation as part of the
11 buffering and screening and actual what's on the property
12 remain, just build the buildings and leave all the
13 vegetation around it.

14 Land Development Code parking requirements
15 modified for golf carts as opposed to cars. If the
16 restaurant of so many seats requires parking for "X"
17 number of cars, you would say we want parking for "X"
18 number of golf carts. Golf carts that are servicing each
19 of the cottages, we'll have golf carts coming from the
20 people on the island using them to get around to go to
21 restaurants, go to the pool and the pool bar. And what
22 happens is the golf carts stack up in the road and begin
23 to take over the private road, and that blocks access to
24 fire trucks. Other golf carts may become stacked up,
25 there's just nowhere to put them.

1 No septic tank. If there is a package plant, it
2 could be a shared use agreement with the adjoining
3 marinas, some of the adjoining commercial uses. We have
4 put so many septic tanks in this small area now, we're now
5 exceeding the capacity of the sandy soil to absorb all the
6 bacteria that's going in there.

7 We'd like to see some water quality monitoring in
8 that canal if using the canal in the marina. There are
9 biological indicators that the septic tanks may not be
10 working in the area.

11 A well agreement, a shared use agreement for that
12 well that's binding with the other property owner, whoever
13 it may be, Mr. Bill Hart and the applicant here, but an
14 agreement, a shared use by the agreement between the two
15 properties and any other users that are on that well.

16 The access for this property to come from the
17 corner on the northeastern access, not to have access
18 points all the way around the other side of the property.
19 Also on the western edge between the real estate office
20 and the proposed property, there's supposed to be an
21 access in there. But just limit it to one access point
22 like it shows on the map. Instead of having access both
23 this way and then all the way around this way, just cut
24 all the access in this way. That would reduce all the
25 traffic coming down this very extremely narrow Rum Road

1 that's in bad shape and has flooding and has electrical
2 wires and telephone wires leading through it and it's
3 difficult to navigate and already has a lot of traffic.

4 Density, either five units for the 1.59 acre site
5 which would bring it into compliance with the three units
6 per acre for Captiva and without a caretaker unit or if
7 there is going to be a caretaker or as it's termed on the
8 application an owner unit, which we think the owners will
9 actually share this unit, then two cottages, an owner unit
10 and two cottages. That would again bring it into the
11 density of one dwelling unit per acre for that one owner
12 unit and then .59 acres would allow them to have two
13 cottages. So either five units total or one owner unit
14 and two cottages.

15 No time shares. Perhaps a restrictive covenant
16 on condos could be amended to include no time share
17 units. And those be restrictive covenants going with the
18 land.

19 Increased visual buffering. Knowing that these
20 homes are going high, perhaps some visual buffering where
21 instead of -- I think the original plan is 36 inch high
22 hedges, not so much the initial planning, but allowing
23 those hedges to grow and not trim them down so that they
24 do provide additional screening.

25 No liquor services on the property because of the

1 location so close to residences and no restaurant. We
2 feel there's two to three restaurants already on the
3 island, that this restaurant will probably be leased to
4 someone to operate, and won't be actually a part of the
5 fishing lodge owners, it will be leased out. There's a
6 restaurant very close, right next door to it, and the
7 combining odors and cooking and noise of the two
8 restaurants together would be excessive.

9 Road services agreement. Agreement to provide
10 some road services to pay a fair share. Right now the
11 share is voluntary, but I believe it's \$200 per unit. But
12 some agreement to pay long term road services and maintain
13 the entrance to the facility.

14 A garbage service agreement.

15 HEARING EXAMINER: On the agreement, with whom
16 would the agreement be made?

17 MR. BROOKES: I believe it's called the Upper
18 Captiva Road Commission, and it's a private commission
19 that's established that maintains these roads. These
20 aren't county maintained roads, they're maintained by the
21 property owners. There's some evidence that these private
22 roads will be maintained by this applicant for their fair
23 share.

24 Along with the application, a garbage services
25 agreement, a binding agreement that the garbage generated

1 by this facility will go somewhere. Someone to pick it up
2 and someplace for it to go.

3 A docking services agreement that people that are
4 coming to this island will have a place to dock or unload
5 or more for ferries and have a binding agreement as to how
6 people will get there and how they will leave. And that
7 those agreements will also be working in the event of a
8 hurricane situation.

9 If evacuation order is ordered, that there is
10 some ferry that is willing to come out here and evacuate
11 people from the island because right now there is no
12 agreement by any private ferry service to take these
13 people off the island and they could very well become
14 stranded there if the event -- hurricane event happened
15 and there was an evacuation order and there's no agreement
16 that someone is going to provide the evacuation services
17 at that time. They may be taking their boats somewhere
18 else. These people will be left and stranded out there
19 along with many other islanders.

20 Thank you.

21 HEARING EXAMINER: Okay. Thank you.

22 Anyone else like to speak?

23 Okay. I know you have to leave for a few
24 minutes, Mr. Kelner. What we'll do then, we'll be in
25 recess until May the 14th at ten o'clock in this room.

1 Thank you.

2 We're in recess.

3 (The hearing was adjourned until May 14, 2004, at

4 10 a.m.)

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1 STATE OF FLORIDA)

2 COUNTY OF LEE)

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5 I, Roberta June Bishop, RPR, Contract Court
6 Reporter for the Twentieth Judicial Circuit of Florida, do
7 hereby certify that I was authorized to and did
8 stenographically report the foregoing proceedings and that
9 the typewritten transcript, consisting of pages numbered 1
10 through 132, inclusive, is a true record.

11 Dated this 12 day of May, 2004

12

13

14



Roberta June Bishop, RPR,

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Contract Court Reporter,

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Twentieth Judicial Circuit,

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State of Florida

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Applicant: Graydon W. Scott
Re: Grady's Lodge

APPEARANCES:

MICHAEL CICCARONE, Attorney at Law,
representing Bernard S. Frey.

JOAN C. HENRY, Assistant County Attorney

BRYAN KELNER, Lee County Dept. of Community Development

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1 MORNING SESSION

2 July 14, 2004

3 9:02 A.M.

4

5 THE HEARING EXAMINER: All right, let's get started.

6 Good morning. I'm Salvatore Territo, Lee County
7 Hearing Examiner.8 We're hearing for the continuation of
9 case DCI2003-00080. Graydon W. Scott, and it -- it looks
10 like "recognition" of -- in respect with --11 Oh, I'll get it out eventually. In reg -- Geeze.
12 Related to Grady's Lodge.

13 (Laughter)

14 THE HEARING EXAMINER: Thank you.

15 The "R.E.G." just threw me off completely and I was
16 getting all my words mixed up. Sorry.

17 Okay.

18 I don't know if there's anyone here who had not
19 been here before, but the routine is that the applicants have
20 finished their case. I think, had you gone already, Bryan?

21 MR. KELNER: Yes.

22 THE HEARING EXAMINER: Okay. And we're now into
23 the public participation portion. And we have attorneys that
24 are asking questions.

25 And anyone in the audience who either has spoken or

1 would like to speak again, you're certainly welcome to speak
2 again today. But if you can, confine yourself to what goes
3 on today rather than repeating what we had last time.

4 I do have a few new exhibits than we had last
5 time. I think I had a petition that was sent in. And I have
6 your letter as well. So I think we're okay on that.

7 Did I miss any --

8 MR. UHLE: Had Mike finished his cross-examination
9 examination of Bryan?

10 MR. BROOKES: Not.

11 THE HEARING EXAMINER: You have not?

12 Okay, are you going to start?

13 Okay, Mr. Ciccarone, are you going to start?

14 MR. CICCARONE: Well, yeah.

15 Mr. Hearing Examiner:

16 Once again, Michael Ciccarone, representing Bernard
17 Frey.

18 I was going to tell you that with respect to how
19 you're scheduling things today, I learned from Mr. Depew
20 yesterday that he's got what I think is about a two-hour
21 direct presentation. And it may make sense to let him do
22 that so Mr. Kelner can respond to it. Because, otherwise, I
23 think we'll be calling Mr. Kelner back to respond to Mr.
24 Depew. I don't really care, except that I didn't realize it
25 would be that long.

1 THE HEARING EXAMINER: I think it's the reason we
2 continued it. I think you indicated last time it would be
3 that long, so it made no sense to continue the case, or to
4 continue having the case at that time.

5 MR. CICCARONE: Right. Yeah, what I'm trying to do
6 is to avoid repeat -- bringing people back and forth. But
7 I'll defer to you. I just found this out yesterday. It may
8 make sense to do it. I don't have any objection if you want
9 to --

10 THE HEARING EXAMINER: How long is your
11 cross-examination going to take? Do you know? I know,
12 obviously, that it depends on the answers but --

13 MR. CICCARONE: I don't think more than a half an
14 hour.

15 THE HEARING EXAMINER: All right, why don't we do
16 that then.

17 MR. CICCARONE: Okay.

18 THE HEARING EXAMINER: And we'll have Mr. Depew
19 come up, if he's the next one that gets up.

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Bryan Kelner Cross (by Ciccarone)

1 Thereupon,

2 BRYAN KELNER,

3 having previously been sworn, was examined and

4 testified further as follows:

5

6 CROSS-EXAMINATION

7 BY MR. CICCARONE:

8 Q Mr. Kelner, have you had a chance to review your

9 testimony from the last hearing?

10 A Uh, no, I didn't.

11 Q All right. Well, there were a couple of unresolved

12 questions that I want to run by you again to see if maybe

13 you're able to answer them today.

14 And the first one was a question asked by the

15 Hearing Examiner, on page 158 of the transcript. And

16 basically the issue is limiting the number of seats. And he

17 asked the following question:

18 "Q Will the development order limit the number of

19 seats they can have if it's not contained in a condition

20 here? In other words, if we don't have something in the

21 zoning resolution when the applicant goes to get a

22 development order, will the Development Review Staff be

23 able to or even know to limit the number of seats unless

24 there's a condition here?"

25 And your response was you weren't sure, you wanted

Bryan Kelner Cross (by Ciccarone)

1 to check on it.

2 So now that you've had time - and hopefully you
3 remembered to check on it - can you enlighten us?

4 A Well, yes. With regard to that, of course, that if
5 it's not mentioned in the development order, no. It could be
6 approved for the restaurant without the number of seats
7 because there is no number specified in the zoning resolution.

8 Q So if the Hearing Examiner deems it essential then
9 that the number of seats be limited, then I think what you're
10 saying is we need to put a condition in here limiting it?

11 A That's correct.

12 Q Otherwise the Development Review Staff won't know
13 to do that?

14 A That's correct.

15 Q Okay, I appreciate that.

16 Now, you may recall, at the end of the last
17 hearing, that I asked you --

18 And I'm going to try to find the exact language
19 here. Let me lay the foundation.

20 We were discussing when you apply certain
21 restrictive sections to all commercial rezonings, regardless
22 of whether they're planned developments or conventional
23 rezonings and --

24 Here we are. Here's my question to you:

25 "If you could point to me anywhere in the Land

Bryan Kelner Cross (by Ciccarone)

1 Development Code where it says that the concept of accessory
2 use is different for planned development as opposed to a
3 conventional rezoning, and whether Section 34-3021 of the
4 Land Development Code does or does not apply to both types of
5 rezoning."

6 And your answer at the time was you couldn't point
7 to anything in the Code. And I invited you, between then and
8 today, to see if you could find such a provision.

9 And so now that you've had the time to do that, let
10 me ask you if you have found it? Or whether your answer
11 stands that basically it's not there.

12 A Uh, if you look at it from the standpoint of the
13 specific wording, then I wasn't able to find it in the
14 regulations. But, if you look under subordinate uses,
15 34-3021, and the purpose and intent, it talks about, "The
16 purpose of this section is to provide for certain commercial
17 uses provided such uses are clearly subordinate to a
18 permitted principal use and are in compliance with the
19 regulations as set forth in this section."

20 The intent of this section, when we're looking at
21 it, is primarily to deal with conventional rezonings.
22 Examples are if you were to have a RM-2 rezoning, where you
23 have a hotel/motel is permitted. Then, of course, you have
24 to have some regulations to limit this. So, in other words,
25 this would apply to that.

Bryan Kelner Cross (by Ciccarone)

1 But through a planned development rezoning process,
2 of course, you can set those parameters. And, in this
3 particular case, the parameters were set for the
4 hotel/motel. The -- we look at it as far as the number of
5 units. We talked about the lobby and administrative office,
6 the size of it. We talked about the porch, the outdoor
7 seating area, one half of that was for the units.

8 So if look at all of these, they add up to roughly
9 about a little over 7,300 square feet. The building total
10 area is approximately 11,000 square feet.

11 So, from that standpoint, the -- this section
12 really is not intended for planned developments.

13 Q All right. Now, I understand that's how you are
14 applying it. My question is, can you point to me the
15 language you're relying upon, the language adopted by the
16 County Commission that supports that interpretation as you
17 understand it?

18 A The -- the only -- the other section I think that
19 you would look at, is when you have a planned development
20 zoning, is Section 34-378 affects the planned development
21 rezonings. And under (a) it says "complies with applicable
22 regulations." Basically, after the adoption of the Master
23 Concept Plan, the conditions and auxiliary documentation --

24 THE COURT REPORTER: Slower, please.

25 THE HEARING EXAMINER: You have to slow down. Slow

Bryan Kelner Cross (by Ciccarone)

1 down a bit, yeah.

2 A Okay.

3 And any and all development of subsequent use of
4 land, water and structures within the planned development
5 must be in compliance with the following order of
6 precedence.

7 We talked about the Lee Plan, Divisions 1, 2, 3 of
8 this article, which refers to the application itself and
9 general provisions.

10 The Master Concept Plan and the attendant
11 conditions and auxiliary documentation. Of course, this
12 is referring to the documentation that would support it and
13 the conditions of the rule.

14 And then it goes down to the applicable county
15 development regulations in force at the time, and general
16 provisions of the Chapter.

17 Q Okay. That's your answer and we'll -- we'll let
18 you stick with that.

19 Do you recall my questioning you about whether
20 restaurant Group III, as opposed to restaurant Group II, is
21 consistent with the Comprehensive Plan at this location?

22 A Yes.

23 Q Do you remember that?

24 A Yes.

25 Q And I think we agreed, did we not, that II clearly

Bryan Kelner Cross (by Ciccarone)

1 is?

2 A Yes.

3 Q The question is whether III is?

4 A Yes, it is.

5 Q All right. Is it your testimony that Group III
6 restaurant is consistent with the Comprehensive Plan --

7 A Yes.

8 Q -- at this location?

9 And is that because this is a planned development
10 as opposed to a conventional rezoning?

11 A Well, it is a planned development and also the --
12 it would meet the site location standards, too.

13 Q All right. And if you would, would you tell me how
14 you would apply the site location standards to that question.

15 A Well, in fact, for the -- in the Staff Report, on
16 page 10 of 12, Policy 6.1.2 requires all commercial
17 development be consistent with the site location standards.
18 However, Policy 6.1.2.2.c. Neighborhood Commercial, states,
19 on Lee County's islands where there are no intersector or
20 collector arterials, neighborhood commercial centers may be
21 located using standards for minor commercial centers.

22 So, in essence, the site location standards would
23 not apply to the islands.

24 Q All right.

25 A So the use would be permitted.

Bryan Kelner Cross (by Ciccarone)

1 Q Well, I'm not sure I appreciate the linkage. In
2 other words, how do we go from that statement specifically to
3 the restaurant Group III use? How are you making that
4 connection?

5 A Well, the site location standards, of course, since
6 there is no roads on the island, the provision of the Comp
7 Plan states that you don't have to meet the site location
8 standards. So, in other words, you could use -- the
9 restaurant use itself could be permitted.

10 So I could put restaurant Group IV?

11 A Yes.

12 THE HEARING EXAMINER: Bryan, why don't you pull
13 that microphone a little closer to you.

14 THE WITNESS: Pardon?

15 THE HEARING EXAMINER: Pull the microphone a little
16 bit closer.

17 THE WITNESS: Oh, I'm sorry.

18 THE HEARING EXAMINER: I know we're having a little
19 problem hearing in the back. And the front.

20 Q (By Mr. Ciccarone) Is a restaurant Group III more
21 intensive than a restaurant Group II?

22 A Yes.

23 Q And a restaurant Group IV, I presume, is more
24 intensive than a restaurant Group III?

25 A Uh, by definition it's slightly different in the --

Bryan Kelner Cross (by Ciccarone)

1 in the Chapter 34 Land Development Code.

2 Q It's of similar intensity but a slightly different
3 nature?

4 A Yes.

5 Q Is that a correct way to look at it?

6 A Yeah, I can get the exact language for you in just
7 a second.

8 Restaurant Group IV refers really to dinner
9 theaters. So, in other words, there is going to be
10 entertainment along with that. Establishment would provide
11 paid entertainers, such as singers, dancers, comedians,
12 theater players, along with food services.

13 THE HEARING EXAMINER: You have so speak a little
14 bit more distinctly. We're having a hard time --

15 THE WITNESS: Oh.

16 THE HEARING EXAMINER: -- understanding you.

17 THE WITNESS: I'm sorry.

18 Dinner theaters. Establishments would provide paid
19 entertainment, such as singers, dancers, comedians, theater
20 players, along with food service.

21 Q (By Mr. Ciccarone) Now, if we had paved roads on
22 Captiva, if I'm following your reasoning correctly, we
23 wouldn't be allowed these more intensive restaurant uses.
24 But because site location standards don't apply to this
25 barrier island, with dirt roads only, we can have these more

Bryan Kelner Cross (by Ciccarone)

1 intense uses. Am I misunderstanding you?

2 A That's correct. You can have the more intensive
3 uses.

4 Q Can you point the Hearing Examiner to any other
5 case where the staff has applied that interpretation?

6 A No. Not offhand, no.

7 Q Okay. Switching gears --

8 (Mr. Ciccarone whispering to the witness)

9 Q Jumping over now to the consumption on premises
10 issue.

11 A Yes.

12 Q Just so we understand it. In this particular
13 application is the applicant requesting consumption on
14 premises use?

15 A Yes.

16 Q All right. Now, if you would turn to Section
17 34.1264 of the Land Development Code. I would like to ask
18 you about that.

19 A Okay.

20 Q If I'm reading this correctly, it provides for
21 consumption on premises approval via several different
22 methods: The first being administrative approval; is that
23 correct?

24 A That's correct.

25 Q All right. And then the second one would be by

Bryan Kelner Cross (by Ciccarone)

1 special exception?

2 A That's correct.

3 Q And then the third one would be by planned
4 developments and planned unit developments?

5 A That's correct.

6 Q Now, right below the reference to planned
7 development and planned unit developments, there is a
8 subsection called (b), Location; parking. Do you see that?

9 A Yes.

10 Q All right. Now, if I'm reading this correctly,
11 (b) is not a subset of any of those three previous types of
12 approval. It's actually the beginning of a new --

13 A That's correct.

14 Q -- master section, if you will.

15 All right. And (b) -- (b)(1) one refers to
16 prohibited locations; is that correct?

17 A That's correct.

18 Q All right. Now, if I'm reading subsection (a), it
19 says, "Except as may be exempted pursuant to other
20 provisions, no establishment for the sale or service of
21 alcoholic beverages may be located within 500 feet of:

22 "A dwelling unit under separate ownership, except
23 when approved as part of a planned development."

24 Did I read that correctly?

25 A That's correct.

Bryan Kelner Cross (by Ciccarone)

1 Q Now, if this weren't a planned development, and we
2 had a dwelling unit under separate ownership within 500 feet,
3 we -- would we be allowed a COP? Or would it be prohibited?

4 A You'd have to come in for a special exception
5 approval. Because under -- if you look under 34-1264(a)(2),
6 Special Exception, a special exception for consumption is
7 required for any establishment not covered by (a)(1), of
8 course; and any establishment that provides outdoor seating
9 areas for patrons consuming alcoholic beverages; except a
10 Group II or III restaurant may have outdoor seating
11 approved administratively provided the outdoor seating is not
12 within 500 feet of religious facility, school, daycare
13 center, park or dwelling unit.

14 So, in other words, if this was just a conventional
15 rezoning, and it had a restaurant there, for the outdoor
16 seating they would have to come in for a special exception
17 approval.

18 Q All right.

19 Now, if you'll go back to (b), and then look at
20 (b)(2), it talks about exceptions to locational standards.
21 Do you see that?

22 A Under (b)(2)?

23 Q Yes.

24 When it refers to the location standards to which
25 exceptions might be taken, what is your understanding of

Bryan Kelner Cross (by Ciccarone)

1 where those location standards are to be found here?

2 A Uh, could you repeat your question?

3 Q Yes. If I'm trying to apply (b)(2), in other
4 words, exceptions to location standards, what are the
5 location standards that I'm looking at that I'm going to try
6 to take exception from?

7 A Well, you would be looking under, of course, (b)(2)
8 would be restaurants Groups II, III and IV.

9 Q Well, again, I don't mean to be argumentative --

10 A Yeah.

11 Q -- but as I'm reading subsection (2) it lists
12 exceptions, and one of them is the one you just described.

13 A Yes.

14 Q But it's talking about exceptions to location
15 standards. I'm trying to understand what the location
16 standards are that we need to take exception from. Where do
17 I find that in here?

18 THE HEARING EXAMINER: If I've understood his
19 testimony so far, he's saying locational standards do not
20 apply.

21 MR. CICCARONE: And that may be --

22 THE WITNESS: That's right.

23 MR. CICCARONE: -- his answer to his question. But
24 I need him to confirm that.

25 THE HEARING EXAMINER: Okay.

Bryan Kelner Cross (by Ciccarone)

1 THE COURT REPORTER: May I have a second to set up
2 a listening device?

3 THE HEARING EXAMINER: Yes. I can stop it one
4 second.

5 We'll go off the record for a second.

6 (Whereupon, off the record for a brief time)

7 THE HEARING EXAMINER: We're back on the record.

8 Q (By Mr. Ciccarone) Do you remember the question?

9 A Yes. The - with regard to, of course, the planned
10 development, they do not apply. But if you're going through
11 as a special exception, there's - under Section 34-203,
12 section (e) special exception, then there is a section that
13 addresses consumption of alcoholic beverages. And it speaks
14 to people within 500 feet of the subject property. But as a
15 planned development it wouldn't apply.

16 Q Help me out just a second here. If --

17 Let's assume it's not a planned development just
18 for the moment. I'm trying to figure out what -- where do I
19 go in the regulations --

20 THE HEARING EXAMINER: Let me ask a question. Why
21 are we going some place that it is not? Why do we care if
22 it's not a planned development since this is a planned
23 development?

24 MR. CICCARONE: Well, because I think it is key to
25 the staff's position as to whether location standards do or

Bryan Kelner Cross (by Ciccarone)

1 don't apply and what the standards are. I'm trying to
2 determine, in the staff analysis, if the recommendation to
3 approve the COP is based on the same rationale that there are
4 no site location standards that apply, period, in this case.

5 And I'm not arguing with the staff. I'm just
6 trying to understand where the staff is coming from.

7 THE HEARING EXAMINER: Mr. Brookes?

8 MR. BROOKES: Your Honor, nowhere in this alcoholic
9 beverage section is there any exemption for PD's, this 500
10 feet from a house.

11 THE HEARING EXAMINER: I understand that. But he's
12 -- he's testified that he thinks there is a exception. When
13 you get a chance to cross-examine him, you certainly may ask
14 that question.

15 MR. CICCARONE: Yes. And I --

16 Thank you, Mr. Brookes.

17 Q (By Mr. Ciccarone) I mean, I'm not arguing with
18 your interpretation. I'm simply trying to understand, as you
19 went through your staff analysis, and you confronted the
20 language about location standards, you conclude -- and I
21 gather that it didn't matter because this doesn't apply in
22 the case of planned developments?

23 A That's correct.

24 Q Period?

25 A That's correct.

Bryan Kelner Cross (by Ciccarone)

1 Q And if I understood your earlier testimony, when we
2 talk about location standards in general, we're talking about
3 the site location standards in the Comprehensive Plan? Is
4 that what we're talking about?

5 A Well, not -- Okay, we're talking about site
6 location standards really with regard to the restaurants
7 themselves, the use itself. Once established, of course, that
8 on the islands, of course, the restaurant doesn't have to
9 meet the site location standards, then the outdoor seating
10 -- the seating limits is, you know, it's a moot point with
11 regard to it. In other words, what we're saying is that it's
12 approved.

13 And then we can look at as far as the separation
14 standards for residents, we look at it from compatibility
15 issues.

16 Q Okay.

17 A And that's why we have the conditions that are put
18 in there.

19 Q All right. Now, just to wrap up, do you recall at
20 the last hearing we went down the list of proposed uses and
21 we put them either in principal use or ancillary use
22 categories?

23 A Yes.

24 Q Do you recall doing that?

25 A Yes.

Bryan Kelner Cross (by Ciccarone)

1 Q And I think, somewhat to my surprise, and maybe
2 even the Hearing Examiner's, you listed some things as
3 ancillary. Is your testimony the same today as it was a few
4 months ago?

5 A Well, I guess -- I think you're referring to the
6 uses that are auxiliary to the hotel/motel?

7 Q Yes. Right.

8 A What we're looking at here, as far as they're still
9 part of the hotel/motel use, administrative offices, the --
10 and the restaurant. There's also the mention about it being
11 open to the public. But, as he said, part of it would be for
12 the residents and guests of it.

13 What we tried to do here was -- in the staff
14 report, was to show that the hotel/motel, we had these uses.
15 And maybe the language we put in there as "auxiliary" could
16 have been better written. But the intent was we didn't want
17 to see any free-standing restaurants. In other words, so
18 that this could come back later, if we just had the use as a
19 restaurant there, and they could build a restaurant on the
20 site. So this is the reason we had the uses in there. We
21 have the -- like I say, the administrative office is in
22 there, we have the real estate offices. Which, under those
23 things, we put them there purposely so we wouldn't have these
24 things free-standing. In other words, so you could create
25 another -- if the hotel/motel didn't proceed, then they could

Bryan Kelner Cross (by Ciccarone)

1 put these other uses on the property.

2 THE HEARING EXAMINER: So -- Let me -- if I
3 understand you're saying that "ancillary", in this particular
4 case, means associated with the same structure; not
5 necessarily ancillary as we've been using uses in other cases?

6 THE WITNESS: That's correct, yes. I think we
7 probably could have crafted the language better in that. But
8 our concern -- of course, staff's concern with that is we
9 didn't want to see restaurant use as a permissible use in
10 there, if something failed with regard to the hotel these
11 other uses come back. The way it's phrased now, for them to
12 proceed with a free-standing restaurant that's not associated
13 with that, they would have to come in and amend the -- the
14 zoning resolution itself.

15 THE HEARING EXAMINER: Okay. Thank you.

16 Q (By Mr. Ciccarone) That actually is a good segue
17 to what I want to conclude with.

18 I think you may recall, from the last hearing, that
19 the primary point of disagreement between you and the
20 opponents to this may very well turn on the question of what
21 is the principal use and what is the subordinate use; and
22 whether the subordinate use in fact is so unrestricted and
23 great that in effect it has become the principal use - the
24 hotel being the -- now becoming the subordinate use. Do you
25 recall that line of testimony?

Bryan Kelner Cross (by Ciccarone)

1 A Yes.

2 Q All right, now the reason I lead you up to that is,
3 if I understood your last answer to the Hearing Examiner,
4 you're saying that the staff has a concern that the
5 subordinate uses don't become free-standing principal uses?

6 A Yes.

7 Q All right. Now, if I'm reading this application
8 correctly, and I were to phase this project so that the
9 lodgings were Phase 2; and I built everything else as
10 Phase 1, and for some reason or other I never got around to
11 Phase 2, then I would in fact have a free-standing
12 restaurant/cocktail lounge/bar, et cetera. I mean, is that
13 not a logical conclusion?

14 A No, I think you would then not be in compliance
15 with the zoning resolution. In other words, if the zoning
16 resolution is approved, I don't think you would be in
17 compliance with the resolution itself. Because really the
18 principal use of it is the hotel/motel.

19 Q Well --

20 A And I guess, furthermore, there is no phasing of
21 the project either.

22 Q Well, let's cut to the chase. Without a staff
23 condition requiring that the hotel/motel use be built at
24 least contemporaneously with the other uses, if not first, as
25 a practical matter how do we prevent this from becoming a

Bryan Kelner Cross (by Ciccarone)

1 free-standing bar and restaurant?

2 A I think if the Hearing Examiner tells us that there
3 should be a condition to that effect, then the staff wouldn't
4 object to that.

5 Q Well, does the staff have any objection to adding a
6 condition that would require that the lodgings be built
7 either before or at the same time as the other structures so
8 that in fact, if your interpretation is correct and these are
9 truly ancillary, that we have them all there functioning as
10 one cohesive planned development. Do you have any objection
11 to that?

12 A No objections, no.

13 Q Could I take your testimony as being a
14 recommendation that such a condition be added to an approval?

15 A Yes.

16 Q All right.

17 MR. CICCARONE: Now, I have no further questions.
18 I don't really know if anything will come up that would
19 require redirect. I'll really try to avoid that.

20 Thank you for being so patient.

21 Bryan, thank you.

22 THE HEARING EXAMINER: You're welcome.

23 Did anyone else want to cross-examine Mr. Kelner?

24 MR. BROOKES: I do.

25 THE HEARING EXAMINER: Mr. Brookes? Yes, please.

24 Q And where, in the conditions and the planning
25 review that you've done, have you required boating access in

Bryan Kelner Cross (by Brookes)

1 terms of any slips or dockage space for this fishing lodge?

2 A No, there is no condition at all with regard to
3 that. Of course, as -- already water taxis are coming to the
4 island now. And I'm assuming that they'll use either that,
5 or the lodge itself will have their own water taxi to bring
6 people back and forth.

7 Q And if the lodge itself has its own water taxi,
8 where will that water taxi dock?

9 A You'd have to ask the applicant that.

10 Q Okay, but you never asked the applicant?

11 A No, we didn't get into that. No, other than --

12 Q So you haven't required any boat slips or dock
13 spaces that would be similar to a parking space for a
14 mainland hotel?

15 A No.

16 Q Okay.

17 Under the C-1 zoning they would be allowed five
18 hotel units?

19 A Uh, I believe that's it, yes. Yes.

20 Q Okay.

21 A I think in the staff report it mentioned
22 approximately five units.

23 Q Okay. And in other circumstances, a hotel versus a
24 dwelling unit, they'd be given an equivalency of three. So
25 if you had one dwelling unit times three, you'd get three

Bryan Kelner Cross (by Brookes)

1 hotel units; correct?

2 A Yes.

3 Q Okay. And this property has 1.59 acres?

4 A That's correct.

5 Q Okay.

6 Were the hurricane evacuation impacts on Pine
7 Island evaluated for this project?

8 A No.

9 Q Did you evaluate the impacts on the Matlacha
10 Bridge, the current constraint from the Pine Island?

11 A No.

12 Q And in a hurricane evacuation, would people from
13 this fishing lodge evacuate through Pine Island?

14 A Uh, their -- the applicant had provided
15 correspondence. I believe it's in the staff report.

16 Yes, there is an Attachment G of the staff report
17 where the applicant had talked about protection of life and
18 property in coastal high-hazard areas.

19 Q Does it specify where they will evacuate through?

20 A No, they haven't.

21 Q Okay. When you said that there was a ferry already
22 servicing the island, do you know where the ferry docks at on
23 the mainland side?

24 A The water taxi?

25 Q Yes.

Bryan Kelner Cross (by Brookes)

1 A Uh, I believe you can get access through Pineland
2 Marina, I believe, is one location. Now, there could be
3 other locations, too.

4 Q Bokeelia, which is also on Pine Island; correct?

5 A It's possible, but I can't say for certain on that.

6 Q Okay. So as a planner you haven't looked into that
7 and you haven't reviewed the hurricane evacuation route that
8 this resort would provide for its guests?

9 A No.

10 Q And its employees; correct?

11 A That's correct.

12 Q You haven't required any condition requiring an
13 evacuation boat or an evacuation boat agreement to --

14 A No, we haven't.

15 Q Okay. And will this add to the special needs
16 population of the island of Upper Captiva or North Captiva in
17 the event of a hurricane evacuation?

18 A How do you mean special needs?

19 Q Are there more people and houses out there than
20 there are boats?

21 A I couldn't answer that question.

22 Q Okay, if you look at the aerial that's shown --

23 A Yes.

24 Q -- on the board there, and you can see a number of
25 homes that are all interior on the island?

Bryan Kelner Cross (by Brookes)

1 A Yes.

2 Q Correct?

3 A That's correct.

4 Q And there is a number of subdivisions with platted
5 lots?

6 A That's correct.

7 Q And approximately 600 platted lots out there;
8 correct?

9 A I think that would be a rough estimate of that.

10 Q Okay, and many of them are interior?

11 A That's correct.

12 Q Okay, and if a hurricane were to hit, these people
13 would have to leave the island by boat; correct?

14 A That's correct.

15 Q And not all of the homes and units have boat docks
16 and boat slips; correct?

17 A That's correct.

18 Q So some of those people will either have to share a
19 boat with a neighbor or they'll have to get a public water
20 taxi; correct?

21 A That's correct.

22 Or other means of access off the island.

23 Q Okay. And if the water taxis aren't running, the
24 sheriffs or other public services would have to remove these
25 people from the island in an evacuation situation because

Bryan Kelner Cross (by Brookes)

1 they can't drive their car, and if they don't have a boat
2 they'd be stuck out there; correct?

3 A That's correct.

4 Q So you'd be adding to those special needs
5 populations?

6 A That's correct.

7 THE HEARING EXAMINER: How are you defining
8 "special needs"? Special needs in the sense of needing
9 evacuation? Special needs in the sense of handicapped? How
10 are you using the term?

11 Q (By Mr. Brookes) Mr. Kelner, with regard to the
12 special needs for hurricane population, that is addressed in
13 the Comprehensive Plan in terms of -- they call it special
14 needs for hurricane evacuation; correct?

15 A Yeah, these are, I believe, too, is referring to
16 residential population. You must remember this is a
17 commercial operation here, too. And I believe in -- the
18 applicant, in their analysis in there, talked about 24 hours
19 they will have the -- the guests of their lodge evacuated
20 from the island.

21 Q Okay.

22 A So they could answer that themselves. And I'm
23 assuming that they would have a method of getting these
24 people off that are staying at their lodge.

25 Q Okay. And you haven't seen that yet, though, in

Bryan Kelner Cross (by Brookes)

1 the application; correct?

2 A Uh, well, they have that -- that's mentioned in
3 their -- I can just read a part of this to you.

4 Q Exhibit G again; correct?

5 A That's correct. Yes.

6 Mr. Kelly, of Emergency Management, advised that
7 because there is no vehicular access to the island, because
8 of anticipated type of typical guest, there will be no effect
9 on hurricane evacuation.

10 He further stated Emergency Management would be
11 assessing a shelter mitigation fee, approximately \$710, at
12 the time of development order building permit.

13 From a practical standpoint, the lodge will be
14 closed and all guests ordered to leave at the point when
15 landfall is predicted within 24 hours.

16 The lodge will develop a plan of action for
17 securing the property and informing incoming guests with
18 hurricane information in the event of a storm.

19 Q Okay, but you haven't actually analyzed the actual
20 route? What boat they would take?

21 A No.

22 Q Where that boat would land? And if that boat
23 would have any impacts on the Pine Island mitigation
24 evacuation?

25 A No. No.

Bryan Kelner Cross (by Brookes)

1 Q Okay. Where, in the alcoholic beverage section,
2 Division 5 of the Land Development Code, that talks about
3 prohibitions on alcoholic off premises in 34-1263; and in
4 on-premises, in 1264, does it say that if you're a planned
5 development you're exempt from the 500 feet prohibition?
6 Being that you can't have alcoholic beverage service, either
7 off-premises or on-premises, within 500 feet of a dwelling
8 unit? An existing dwelling unit. It doesn't actually say
9 that; does it?

10 A No, it doesn't. But with regard to the section, it
11 does mention within planned developments.

12 Q Okay, where is that? And let's go to that really
13 quickly.

14 A Okay.

15 Q You're on 34-1264(a)(3), correct? Planned
16 developments and planned unit developments?

17 A Yes, that's correct.

18 Q And it says that no administrative approval is
19 necessary where an individual establishment or other facility
20 proposing consumption on premises is explicitly designated on
21 the Master Concept Plan is included in the scheduled of uses;
22 correct?

23 A That's correct.

24 Q But it doesn't say they're exempt from the 500-foot
25 prohibition; does it?

Bryan Kelner Cross (by Brookes)

1 A No, it doesn't. No.

2 Q Okay. And then also says consumption on premises
3 for other uses within planned developments and planned unit
4 developments require administrative approval or special
5 exception; correct?

6 A That's correct.

7 Q Okay. And the prohibited location, under the
8 section, is 500 feet of a dwelling unit unless you meet one
9 of these other criteria; correct?

10 A Except when approved as part of a planned
11 development.

12 Q And where are you reading that?

13 A That's under the location -- prohibited locations
14 under (b)(1)a.2., dwelling unit under separate ownership,
15 except when approved as part of a planned development.

16 Q Okay. But if we're talking about a dwelling unit
17 that someone else owns, that's a residential unit that's not
18 part of this planned development, and this consumption on
19 premises, this bar, is located within 500 feet of that
20 pre-existing neighbor, that doesn't qualify for this section;
21 does it?

22 A Well, this really -- what it means is that if
23 -- this section here with regard to the dwelling unit, in
24 other words, surrounding the property, when you have the
25 public hearing, and you're having a consumption on premises,

Bryan Kelner Cross (by Brookes)

1 and you have a planned development, people are notified of
2 it. And, of course, they're aware that you're going to have
3 a consumption on premises, and that's what the public hearing
4 is for so people will be able to come out and voice their
5 objection or approval or put conditions on the consumption on
6 premises.

7 Q Okay. And if this 500 feet location prohibition
8 applied --

9 THE HEARING EXAMINER: Now, you keep saying
10 prohibition. Are you saying it's outright prohibited? Or
11 are you saying it's prohibited unless you take further
12 steps?

13 Q (By Mr. Brookes) That's what I was just going to
14 get to.

15 THE HEARING EXAMINER: Okay, that's fine.

16 Q (By Mr. Brookes) The only exception that I see
17 here is for restaurants Group II, III and IV is b.3., which
18 would allow a service bar, in the sale or service of
19 alcoholic beverages only to patrons ordering meals. If the
20 restaurant contains a cocktail lounge for patrons waiting to
21 be seated at dining tables, the lounge must be located so
22 there is no indication from the outside of the structure that
23 the cocktail lounge is located within the building.

24 So you haven't required that as a condition of this
25 approval; have you?

Bryan Kelner Cross (by Brookes)

1 A No.

2 Q Okay.

3 MR. BROOKES: No further questions.

4 THE HEARING EXAMINER: Thank you.

5 Does anyone else want to cross-examine?

6 MR. UHLE: Yes.

7 THE HEARING EXAMINER: No, before you get back,
8 anyone else want to cross-examine Mr. Kelner?

9 Okay, Mr. Uhle?

10 MR. UHLE: You want me to do it from here or --

11 THE HEARING EXAMINER: If you pull the microphone
12 closer to yourself.

13 Or you can go up there, if you prefer.

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Bryan Kelner Redirect (by Uhle)

1 REDIRECT-EXAMINATION

2 BY MR. UHLE:

3 Q Matt Uhle, for the record.

4 Bryan, I have to start by, unfortunately, dragging
5 you through the mud at the distinction between subordinate,
6 accessory and ancillary uses.

7 First of all, would you agree that those sound like
8 they're synonymous terms on the face of it?

9 A Yes.

10 Q But would you also agree that, as applied to the
11 Lee Plan and the Land Development Code, they may actually
12 have a slightly different meaning?

13 A Yes.

14 Q Okay. Let's start with accessory use. Can you
15 please look at Section 34-2 of the Land Development Code and
16 see if there is a definition for "Use, accessory."

17 A Yes, there is.

18 Q Could you please read that.

19 A "Use --"

20 THE HEARING EXAMINER: Read it slowly, please.

21 A Sure.

22 "Use, accessory" means the use of a structure or
23 premises which is customarily incidental and subordinate to
24 the principal use of the structure or premises.

25 Q (By Mr. Uhle) Is it fair to rephrase that by

Bryan Kelner Redirect (by Uhle)

1 saying that it's a use that customarily wouldn't be put on a
2 piece of property but for the existence of some other use
3 that's the principal use on the property?

4 A That's correct.

5 Q Okay. Bryan, with regard to this particular
6 planned development proposal, is the pool an accessory use?

7 A That's correct.

8 Q And to which use on the parcel would the pool be
9 accessory? Would it be the hotel? The restaurant? The
10 caretaker's residence? What?

11 A It would be to the hotel.

12 Q Okay, thank you.

13 Can you now look at the Land Development Code and
14 see if there is any definition of either "ancillary" or
15 "use, ancillary" in 34-2?

16 A No.

17 Q Are you familiar with any other definition of
18 ancillary, ancillary use in Chapter 34?

19 A No. Not offhand, no.

20 Q Let me propose one to you and see if you think this
21 would be an accurate description of an ancillary use.

22 An ancillary use would be a principal use that
23 would be included in a mixed use development, but that would
24 be smaller than at least one other principal use on the
25 site. Would you say that's a fair definition?

Bryan Kelner Redirect (by Uhle)

1 A I would think that would be a fair definition.

2 Q And that that particular definition is
3 distinguished from an accessory use in that the use could be
4 a principal use that customarily could be completely separate
5 from the other use in general practice?

6 A Yes.

7 Q Okay. I will get back to this in a few minutes,
8 because we have to go back over this square footage issue.
9 But --

10 MR. CICCARONE: Mr. Hearings Examiner --

11 THE HEARING EXAMINER: Yes.

12 MR. CICCARONE: Could I ask the court reporter to
13 mark this section so we can find it later when we come
14 back --

15 THE COURT REPORTER: Yes.

16 MR. CICCARONE: -- to get the precise language that
17 was just used?

18 Thank you.

19 THE HEARING EXAMINER: Also for anybody's benefit,
20 to whom I'm going to send a copy of the transcript, we put it
21 in a PDF format that is searchable. Which that might help
22 you as well. It makes it a lot easier to find these kind of
23 things. I'm not saying this gentlemen shouldn't mark that
24 for you. But in a searchable format, those kind of things
25 are sometimes easier to find.

Bryan Kelner Redirect (by Uhle)

1 MR. CICCARONE: Well, I mean, literally for today,
2 I think I might have some --

3 THE HEARING EXAMINER: Oh, for today.

4 MR. CICCARONE: -- questions about it. Right. I
5 didn't want to have to have him spend ten minutes looking for
6 that.

7 THE HEARING EXAMINER: Thank you.

8 Q (By Mr. Uhle) With regard to subordinate uses, is
9 that a term that's defined in Section 34-2 of the Land
10 Development Code?

11 A No, it's not defined.

12 Q But subordinate uses are discussed and regulated in
13 Section 34-3021; are they not?

14 A Yes.

15 Q Okay, could you please turn to that.

16 MR. CICCARONE: What was that section that we're
17 dealing with?

18 THE HEARING EXAMINER: 34-3021.

19 Q (By Mr. Uhle) Can you please read the purpose
20 section under 34-3021?

21 A Subordinate use. Purpose: The purpose of this
22 section is to provide for certain commercial uses provided
23 such uses are clearly subordinate to a permitted principal
24 use and are in compliance with the regulations set forth in
25 the section.

Bryan Kelner Redirect (by Uhle)

1 Q Now, when you read that, does it appear that it
2 puts additional limits on commercial uses? Or that it's
3 actually a device that provides additional rights for
4 landowners above and beyond what's in the rest of the Land
5 Development Code?

6 A Could you repeat that, please?

7 Q When it talks about providing for something --

8 A Um-hmm.

9 Q -- does that suggest to you that this section is
10 intended to limit the right of landowners above and beyond
11 what's in the rest of the Land Development Code? Or that it
12 provides additional rights to landowners above and beyond
13 what's in the rest of the Land Development Code?

14 A I think it -- it limits the rights --

15 Q Let me rephrase the question.

16 A Yes.

17 Q Is it your opinion that Section 34-3021 applies to
18 this particular case?

19 A No.

20 Q In your opinion, would Section 34-3021 apply to any
21 circumstance in which the use matrix or the planned
22 development resolution approval showed both of the uses or
23 all of the uses that were being discussed as being permitted
24 by right?

25 A Yes. In other words, if it's -- Well, if it's

Bryan Kelner Redirect (by Uhle)

1 permitted -- the use is permitted by right and there is no
2 restriction, it wouldn't apply in a planned development.
3 This wouldn't apply.

4 Q So is it -- I mean, would it make sense to read
5 Section 34-3021 to say that, notwithstanding the fact that,
6 let's say, in a particular zoning district that a hotel and a
7 restaurant are permitted by right, that there are limits on
8 the size of the hotel or on the size of the restaurant that
9 you can put in a hotel?

10 A No.

11 Q That would not make any sense?

12 A No.

13 Q So, in that sense, is it not fair to say that this
14 particular section is designed to provide -- for it to make
15 sense, in connection with the rest of the Land Development
16 Code, it's intended to provide additional rights to
17 landowners; not to limit their rights that are otherwise
18 created in Land Development Code?

19 A That's correct.

20 Q And are there not, in fact, conventional zoning
21 districts that permit, for example, hotels by right but do
22 not permit some of the "subordinate uses" by right, so that
23 that section gives somebody the right to use those
24 subordinate uses notwithstanding the use matrix?

25 A That's correct.

Bryan Kelner Redirect (by Uhle)

1 Q Let's look now at the square footages and the
2 scheduled uses.

3 You recall that Mr. Ciccarone asked you some
4 questions last time about the square footages and to what
5 uses they should be applied?

6 A Yes.

7 Q Do you recall that there was an effort to multiply
8 all of the square footages of the actual units together and
9 come up with a figure? And I think that figure was something
10 like 5,740 square feet?

11 A Yes, I think that would be approximately what it is.

12 Q Okay. Now, with regard to the other uses on this
13 property, the lobby and administrative office is a thousand
14 square feet. Is that a use that you would attribute the
15 square footage to the hotel or some other use?

16 A To the hotel.

17 Q What about the area shown as the covered porch,
18 that is shown as the entrance and reception area, would you
19 describe that as part of the hotel? Or part of one of the
20 other uses on the site?

21 A I think it would be part of the hotel.

22 Q Okay.

23 A Yes.

24 Q And does not the plan indicate that that is half of
25 the 1120 square foot area?

Bryan Kelner Redirect (by Uhle)

1 A Yes, I believe it's designated on the plan.

2 Yes, it would be -- because the -- it's 1120 square
3 feet, and the seating for the outdoor is 560. So it would be
4 half.

5 Q Now, with regard to the pool, how would you treat
6 the pool? Would that be counted as square footage in this
7 calculation? And, if so, to what would it be attached?

8 A I don't think you would count it as square footage
9 to it, by I think it would attach to -- to the hotel.

10 Q Thank you.

11 So is it fair to say that the only other uses on
12 this property are the restaurant and the real estate
13 office/store and the caretaker's unit?

14 A That's correct.

15 Q Okay. I'll stop asking questions on that.

16 With regard to the boat slips. Bryan, can you look
17 at the Master Concept Plan and tell me if there is a parcel
18 that's shown on this plan that is not actually included
19 within the boundaries of the planned development?

20 A Yes, there is. There is -- it's this parcel right
21 in this location here (indicating)?

22 Q And does that plan not show that there are docks
23 protruding from that particular parcel?

24 A That's correct. They're along the side here,
25 finger docks.

Bryan Kelner Redirect (by Uhle)

1 Q And do you recall --

2 MR. CICCARONE: Excuse me --

3 Q -- the testimony that Mr. Scott owns an undivided
4 fractional two-thirds interest in that property?

5 A That's correct.

6 Q So would it not be reasonable to assume that Mr.
7 Scott has a right to use some or all of those docks?

8 A I think it would be a reasonable assumption.

9 MR. BROOKES: Objection, Your Honor. This is
10 assumptions. This is a planning thing, we either have to
11 have it in the application or a condition, you can't just
12 have assumptions.

13 THE HEARING EXAMINER: I understand. I'll take
14 your comments and I'll accept it as hearsay rather than
15 direct testimony.

16 MR. CICCARONE: Well, in the same vein, to the
17 extent that he's being asked to state legal conclusions, we
18 obviously would object on the grounds that it's inappropriate
19 and not his expertise.

20 THE HEARING EXAMINER: Okay, to the extent that
21 they're legal, I'll disregard those as well.

22 Thank you.

23 Q (By Mr. ^{Uhle}~~Brookes~~) Now, Bryan, there are a number of
24 ways to get to this island; are there not?

25 A Yes.

7/14

Bryan Kelner Redirect (by Uhle)

1 Q You can get there by plane; can't you?

2 A Yes.

3 Q You can get there by water taxi?

4 A Yes.

5 Q And you can get there by your own private boat, if
6 you have one --

7 A That's correct.

8 Q -- and if you have a dock.

9 With regard to hurricane evacuation, let's assume
10 for purposes of argument that you have a private boat and you
11 have it docked at a dock at this location. Are there any
12 constraints on where you can go to evacuate with your boat?

13 A No.

14 Q So you don't have to go back to the Pineland
15 Marina? You can go wherever you want?

16 A That's correct.

17 Q With regard to air transportation, if you had a
18 private plane, or access to a private plane, where would you
19 probably fly back to?

20 A You know, I would fly out of the way of the
21 hurricane. That's what I would do. You don't have to fly to
22 Pine Island, that's for sure.

23 Q Is the condition that you proposed with regard to
24 hurricane evacuation unusual in relation to other hotels that
25 have been approved in Lee County in the coastal high-hazard

Bryan Kelner Redirect (by Uhle)

1 area?

2 A Yes. I don't think they have that condition. I
3 can't be certain for other cases. It's not unusual.

4 Q You can sit down, please.

5 I need to ask you just a couple questions about the
6 consumption on premises.

7 Bryan, is it fair to say, first of all, that there
8 is a general rule that you can't get an administrative
9 approval for a COP with outdoor seating unless -- if you're
10 within 500 feet of a single-family residence?

11 A That's correct.

12 Q Is it fair to say the regulations then go on to say
13 that the 500-foot limit doesn't even apply if you're talking
14 about a planned development?

15 A That's correct.

16 Q Even assuming, for purposes of argument, that the
17 500-foot limit did apply in this case, does not the
18 regulations also create an exception to the 500-foot rule for
19 certain Class II and III restaurants?

20 A Uh, I'm not sure how you mean the Class II or III
21 restaurants. Perhaps if you can --

22 Q You can look at the appropriate section here.

23 A 1264.

24 Q If you can -- I think it's --

25 First of all, under (b)(1), that's the section that

Bryan Kelner Redirect (by Uhle)

1 creates the 500-foot general rule; is that not the case?

2 A Yes.

3 Q And then under (b)(1)a.2. that's the part that says
4 that if you have a planned development, the 500-foot rule
5 doesn't even apply?

6 A That's correct.

7 Q Ignoring that for the moment, and assuming that the
8 500-foot limit does apply, does not the subsequent section -
9 that's (2) - create exceptions from the 500-foot standard?

10 A Yes.

11 Q And is there not an exception for certain Class III
12 restaurants, among others?

13 A Yes.

14 Q And the restaurant that's being requested here is a
15 Class III restaurant?

16 A That's correct.

17 MR. UHLE: No further questions.

18 THE HEARING EXAMINER: Any other -- any further
19 cross? Recross?

20 MS. CICCARONE: I need just a little bit, Your
21 Honor.

22 THE HEARING EXAMINER: Okay, thank you.

23 What we'll do is, after this round is finished,
24 we'll take a short break.

25 Put your name on the record one more time, please.



25

testimony today with Mr. Uhle --

A No.

By the way, did you have a chance to discuss your

wording.

Q Well, that's what I was going to ask you, because

A It makes it difficult, of course, without seeing

distinguishment? Based upon that distinction, applying them

words, or by reference to the Land Development Code, or

A Um-hmm.

You recall the testimony you just provided in that

23 By the way, did you have a chance to discuss your
24 testimony today with Mr. Uhle --

Bryan Kelner Recross (by Ciccarone)

1 Q -- prior to today's hearing?

2 A No.

3 Q All right. So let's just stick with your
4 understanding of what the words mean.

5 "Accessory uses" we know is defined in the LDC.

6 A Yes.

7 Q So we don't need to have you revisit that.

8 But maybe you could tell me how the other two,
9 ancillary and subordinate, are to be distinguished from
10 accessory.

11 A Well, I had looked up these words also to get an
12 indication of how would you use subordinate. And
13 "subordinate", of course, means is subservient to it or lower
14 class of a ranking.

15 And "incidental" is something of the minor --
16 pardon me, minor consequence. So it's not a major item.

17 Q And are you -- you're looking at some paperwork.
18 Is that a dictionary or what?

19 A Yes. Yes.

20 Q All right. And that was for subordinate?

21 A That's correct.

22 And for incidental.

23 Q And for incidental.

24 And how about ancillary?

25 A I didn't -- I didn't look up ancillary because I

Bryan Kelner Recross (by Ciccarone)

1 believe they refer to incidental in there. In 3021.

2 Q Well --

3 A Yes. I just looked up the subordinate
4 and incidental because we talked about the accessory use and
5 the customary incidental to it, and so that's the reason.

6 Q All right. Would you go to 34-3021.

7 A Yes, I have it here.

8 Q All right. Now, I thought Mr. Uhle did an
9 excellent, ingenious job of walking you through this, but I'm
10 not sure I understood it. So help me out here.

11 The -- I see the word "subordinate" used in the
12 very first sentence; and then later on it refers to other
13 subordinate uses. And then below that, this section applies
14 to subordinate commercial uses. And then later on the uses
15 listed in Section (c)(2) will be permitted when clearly
16 subordinate to the principal use.

17 So you would agree with me that this section --

18 Well, it's even entitled "Subordinate Uses". That
19 is what we're talking about; correct? The subordinate use?

20 A That's correct. In this section.

21 Q All right, now again, I understand we have a
22 different opinion as to whether this section applies at all.
23 But the question is, is it your testimony that if it does
24 apply, there is a distinction to be made as to whether we
25 would call the use a subordinate use versus an ancillary

1 use?

2 A I think you could make that distinction, yes.

3 Q All right. Now, having said that, make the
4 distinction for me. How do I know when something is
5 subordinate versus when it's ancillary?

6 A Well, we look at this section here, and we look at
7 a hotel/motel. What they mentioned here, of course, there
8 are certain uses that they allow, such as retail uses;
9 restaurants subordinate to the hotel itself.

10 I think if you looked at an auxiliary use, you
11 would look at something like the swimming pool.

12 And this section here, of course, is designed in
13 the sense for your, um, for uses such as -- um, that are not
14 planned developments. And that's why they use the term
15 auxiliary.

16 Q Okay. Well, now, again, we're not going to argue
17 the point whether it does or doesn't apply to planned
18 developments.

19 What I'm looking for is the staff's working
20 definition of subordinate uses versus ancillary use. Because
21 it's quite important to the case, as I'm sure you
22 appreciate. And the Hearing Examiner needs to know how you
23 are using these words.

24 So let's start. We know what an accessory use is
25 because it's defined for us.

Bryan Kelner Recross (by Ciccarone)

1 A Um-hmm.

2 Q All right?

3 So now, in your own words, a subordinate use means
4 what?

5 A These uses here, that are under this section, that
6 are permitted subordinate to the hotel. In other words, that
7 you can have these particular uses within a hotel or motel
8 use. In other words, they're allowing that use.

9 Q Irrespective --

10 A It's not -- it's not the principal use of it.

11 Q It's not the principal use.

12 All right, so it's -- it's a lesser use, but
13 related to the principal use? Is that what you're saying?

14 A Well, it's a lesser use. And, in this particular
15 instance, of course, with regard -- they're allowing those
16 type of uses in a hotel/motel. In other words, under the
17 strict definition of this section. So they're allowing some
18 additional rights here.

19 Q All right. What's your definition then of an
20 ancillary use?

21 A Well, as I say, if you look at the ancillary use to
22 it, you would look at, in this particular case here, we'd be
23 having our swimming pool. I think you could also say that
24 your caretaker's residence, I think, would be an ancillary.
25 It is in support of that hotel/motel. In other words,

Bryan Kelner Recross (by Ciccarone)

1 somebody has to be there to manage it after the particular
2 operation.

3 THE HEARING EXAMINER: Let me ask you a question,
4 if I may. Because we keep using ancillary, because that's
5 the word you used in the schedule of uses.

6 THE WITNESS: Yes.

7 THE HEARING EXAMINER: Did you intend to use that
8 word to mean the same as accessory? Or were you intending
9 something different than that?

10 THE WITNESS: I think -- I think it was -- I guess
11 we could have used a better term in there with regard to that
12 -- that language in there. As I stated earlier, the intent
13 was more or less these were grouped under there so that we
14 would not have other uses such as the restaurant being
15 allowed as a principal use.

16 THE HEARING EXAMINER: Could you have said --

17 THE WITNESS: So we lumped them together.

18 THE HEARING EXAMINER: I'm sorry.

19 Could you have said accessory uses, but it has to
20 be in the same structure? And would that have given you the
21 same intent?

22 THE WITNESS: I would say so, yes.

23 THE HEARING EXAMINER: I'm not trying to change
24 your wording. I'm trying to --

25 THE WITNESS: Yes.

Bryan Kelner Recross (by Ciccarone)

1 THE HEARING EXAMINER: -- because we're getting
2 wrapped around this word "ancillary".

3 THE WITNESS: Yes.

4 THE HEARING EXAMINER: -- and it's not defined
5 anywhere.

6 If you meant accessory with restrictions, that may
7 clarify the question. That may not satisfy everyone here.
8 But they're going to be allowed to have those uses.

9 THE WITNESS: But that's really the intent of that,
10 that's correct. So that, in this particular situation here,
11 these would be ancillary to that hotel. In other words --

12 THE HEARING EXAMINER: They're accessory uses that
13 have to be in the same structure as the hotel?

14 THE WITNESS: That's right. They cannot be
15 free-standing. That's correct.

16 THE HEARING EXAMINER: That's what you intended to
17 say when you used the word ancillary?

18 THE WITNESS: Yes.

19 THE HEARING EXAMINER: Okay.

20 When you're talking about the subordinate uses, are
21 those uses that would have to -- that the applicant would
22 have to ask for? Or are they automatically allowed unless
23 you restrict them?

24 THE WITNESS: You'd have to ask for those uses.

25 THE HEARING EXAMINER: Okay, so the subordinate use

Bryan Kelner

Recross (by Ciccarone)

1 is not automatic by that 34-³⁰²¹~~0321~~?

2 THE WITNESS: No.

3 THE HEARING EXAMINER: Okay, that helps me. I'm
4 not sure if it's going where you're going. But I'm trying to
5 get clear in my mind where we're going.

6 MR. CICCARONE: Well, these are ultimately legal
7 questions that may have to be resolved somewhere else, we
8 don't know. But I think anyone having to answer those legal
9 questions undoubtedly would like to know how the staff is
10 interpreting these words and applying them.

11 And I very much appreciate you're efforts in that
12 regard.

13 Q (By Mr. Ciccarone) So let me close by asking
14 this:

15 I think Mr. Uhle asked you whether 34-3021
16 restricts rights or, if you will, expands upon rights found
17 elsewhere. And at one point you answered it one way, and
18 later you answered it the other. And I'm not sure I know
19 what your answer is.

20 A Well, I think what it really does, it expands upon
21 the rights for that individual who has a hotel/motel in a
22 district where such things as a restaurant would not be
23 permitted. So, in other words, it allows them the use in
24 those specific instances.

25 Q All right. Okay, that --

7/14

Bryan Kelner Recross (by Brookes)

1 I just needed to clarify. I'm not arguing with
2 you.

3 MR. CICCARONE: Thank you, very much.

4 I don't know if anybody else has anything.

5 THE HEARING EXAMINER: Mr. Brookes, any other
6 questions?

7

8 RECROSS-EXAMINATION

9 BY MR. BROOKES:

10 Q Mr. Kelner, Mr. Uhle pointed at the site plan to
11 these docks up here.

12 A Yes.

13 Q Um, do you know if they're -- are those docks
14 privately owned?

15 A Uh --

16 THE HEARING EXAMINER: I thought you objected to
17 that question. I knew you objected to him answering that
18 question. Now you're asking it. You can ask it if you want
19 to. But you objected to the fact that he was giving an
20 opinion about what the use of those docks is and who can use
21 them.

22 If you want to ask the question, you certainly may.

23 MR. BROOKES: I'll open the door back up again.

24 THE COURT: Okay.

25 Q (By Mr. Brookes) If you have land --

Bryan Kelner Recross (by Brookes)

1 I just needed to clarify. I'm not arguing with
2 you.

3 MR. CICCARONE: Thank you, very much.

4 I don't know if anybody else has anything.

5 THE HEARING EXAMINER: Mr. Brookes, any other
6 questions?

7

8 RECROSS-EXAMINATION

9 BY MR. BROOKES:

10 Q Mr. Kilner, Mr. Uhle pointed at the site plan to
11 these docks up here.

12 A Yes.

13 Q Um, do you know if they're -- are those docks
14 privately owned?

15 A Uh --

16 THE HEARING EXAMINER: I thought you objected to
17 that question. I knew you objected to him answering that
18 question. Now you're asking it. You can ask it if you want
19 to. But you objected to the fact that he was giving an
20 opinion about what the use of those docks is and who can use
21 them.

22 If you want to ask the question, you certainly may.

23 MR. BROOKES: I'll open the door back up again.

24 THE COURT: Okay.

25 Q (By Mr. Brookes) If you have land --

Bryan Kelner Recross (by Brookes)

1 MR. CICCARONE: I'm going to object.

2 (Laughter)

3 Q (By Mr. Brookes) If you have a land use on the
4 mainland, and you have two uses, and they're using the same
5 parking lot, do you typically require a shared parking
6 agreement?

7 A If you have two uses on one site, you mean?

8 Q Say you -- say we were in Lee County, mainland Lee
9 County, and you had two separate owners, and they had two
10 separate uses and they wanted to share a parking lot and use
11 that parking lot. For planning and zoning purposes, would
12 you require a shared parking agreement or some other
13 commitment in writing?

14 A Yes. In fact, you'd have to. If -- you would have
15 to have that. You would have to have a special exception if
16 you're going to have shared parking on two different
17 properties.

18 Q Okay.

19 A In other words, you have two different properties,
20 and the person only has one use, and he's trying to make the
21 additional parking on another site, you would have to come in
22 for a special exception.

23 Q And you haven't required any special exception or
24 shared parking agreement on those docks for the boat slips?

25 A Not at all. No, that's not part of the subject

Bryan Kelner Recross (by Brookes)

1 property to be rezoned.

2 Q Okay. But they're going to be using that for
3 parking their boats; correct?

4 A Uh, you'd have to ask the applicant with regard to
5 that.

6 Q And the Planning Department hasn't asked the
7 applicant, and that hasn't been made part of the review?

8 A I believe -- Now, I would have to go through the
9 files with regard to that, but I think in there that there is
10 some mention of accessing the property.

11 THE HEARING EXAMINER: Does the staff treat boat
12 parking the same way it treats vehicular parking on the
13 mainland?

14 THE WITNESS: No. No.

15 THE HEARING EXAMINER: Okay.

16 Q (By Mr. Brookes) Do you know whether the applicant
17 had permission to put each of those docks on that site plan?

18 A I believe they're --

19 On this site plan here (indicating)?

20 Q Yes. When they show that these docks are here --

21 A Yes.

22 Q -- and part of this site plan, did they have
23 permission to put these finger docks as part of the site plan
24 from the private landowners that own those docks?

25 A No. Because that's -- it's shown on there, but

Bryan Kelner Recross (by Brookes)

1 it's not part of the legal description. And I think -- I
2 guess maybe the reason for showing part of that is that the
3 applicant is part owner of that property, too.

4 Q Part of part of that property, perhaps, but not all
5 the property; correct?

6 A That's right.

7 Q And there are some landowners that object to their
8 docks being used and their docks are still shown up there in
9 the site plan as access points for boating for this project;
10 correct?

11 A Yes.

12 Q With regard to the hurricane evacuation question
13 and the water taxi, do you know how many seats are available
14 in the water taxi?

15 A No.

16 Q You never asked that?

17 A No.

18 Q Do residents also use the same water taxi?

19 A Uh, that -- I'm not sure whether the applicant --
20 you'd have to ask the applicant whether --

21 Q So you never asked that either?

22 A -- they're going to use their own water taxi or
23 they're going to use an existing water taxis.

24 Q There is nothing in here that is a condition that
25 requires them to have their own ferry or water taxi; correct?

Bryan Kelner Recross (by Brookes)

1 A No.

2 Q If they were to use the taxi or water ferry that's
3 already in existence, residents also use that; correct?

4 A That's correct.

5 Q Um, you don't know how many seats are available
6 on it?

7 A No.

8 Q Do you know how long it takes for a round trip from
9 Upper Captiva to Pine Island? A round trip in a hurricane
10 evacuation, how long would it take for each boat trip?

11 A No, I don't.

12 Q So you don't know how many people could be
13 evacuated in that 24-hour evacuation period, by taking the
14 number of seats on the taxi and then the length of the trip
15 and calculating out how many people could realistically be
16 evacuated on that taxi; do you?

17 A No.

18 Q And neither Lee County nor the applicant has asked
19 for -- the water taxi for a commitment to operate during the
20 24-hour hurricane evacuation orders; have you?

21 A No.

22 Q Okay. And once the hotel guests get to Pine Island
23 to the marinas, how will they get off Pine Island?

24 A Uh, that I don't know. I would assume that their
25 guests would arrive either by their own vehicles or some

Bryan Kelner Redirect (by Uhle)

1 other means to the location where the -- on Pine Island where
2 they go to the -- to the Upper Captiva.

3 Q So if they were flying in, they would come by taxi
4 or rental car?

5 A It's possible. I don't know.

6 Q Okay. And that hasn't been explored in the
7 application or your review?

8 A No.

9 MR. BROOKES: Okay, no further questions.

10 THE HEARING EXAMINER: Thank you.

11 Anything else from anyone?

12 MR. UHLE: Yeah, just a couple quick questions now.

13

14 REDIRECT-EXAMINATION

15 BY MR. UHLE:

16 Q Bryan, do you recall Mr. Hutcherson's testimony, at
17 a previous hearing, in which he stated that ancillary
18 commercial uses are not subject to the commercial site
19 location standards?

20 A Uh, I'd have to check. But, you know, I can't
21 recall that.

22 Q Let me ask you this: Would you -- assuming that
23 that was his testimony, would you agree with that statement?

24 A Yes.

25 MR. UHLE: Um, no further questions.

Dave Depew's Presentation

1 THE HEARING EXAMINER: Unless you have other
2 questions, we'll take a short ten-minute break.

3 Thank you.

4 We're off the record.

5

6 (Thereupon, a recess was taken from 10:21 to 10:32 a.m.)

7

8 THE HEARING EXAMINER: Everyone ready to get
9 started?

10 Okay, we're back on the record.

11 Mr. Depew?

12

13

14 DAVE DEPEW'S PRESENTATION

15

16 MR. DEPEW: Mr. Hearing Examiner, I raised my hand
17 and got sworn in the last -- the first time, or whenever it
18 was.

19 THE HEARING EXAMINER: Consider yourself sworn.

20 MR. DEPEW: So I'm considering myself still under
21 oath.

22 THE HEARING EXAMINER: Serial sworn.

23 MR. DEPEW: For the record my name is --

24 Sworn at.

25 For the record, my name is David Depew, and I'm

Dave Depew's Presentation

1 representing, as I indicated before, Kathrynne Powell.

2 I'm about to undertake a PowerPoint presentation to
3 you, which I have put on this CD.

4 Also on this CD are a couple of aerial photographs
5 and some other things which I'll get to as part of the
6 exhibit.

7 But I'm gonna' pass out these as the -- as one of
8 my exhibits.

9 THE HEARING EXAMINER: All right. And I'm not sure
10 if I have any from you. But if I don't, this will be Depew
11 Exhibit No. 1.

12 Thank you.

13 MR. CICCARONE: Thanks, I guess, Dave.

14 MR. DEPEW: I know this is, as they say, "Must see
15 TV"

16 I'm here, and I actually pared this down from what
17 Mr. Ciccarone and Mr. Brookes and I discussed yesterday. So
18 I hope it's not going to be a full two hours.

19 But, for the record, I am representing Kathrynne
20 Powell, who is one of the adjoining property owners directly
21 to the south of the subject property.

22 I'm going to have a -- also as one of my exhibits,
23 I have a printout version of this particular PowerPoint
24 presentation, which I will hand you all as well.

25 THE HEARING EXAMINER: All right, I'll mark this as

Dave Depew's Presentation

1 Depew Exhibit No. 2.

2 Thank you.

3 MR. DEPEW: Anyone else that would like one, I'll
4 just set them here on the corner.

5 Actually I better keep one, just because I don't
6 trust technology.

7 I'm going to have a few other exhibits as well, but
8 I'll hit them as I go through the presentation.

9 I'm going to skip through some of this stuff fairly
10 quickly, simply because there's no reason to hit this over
11 and over again.

12 It's a ten hotel/motel units and a number of uses
13 that are associated with the request. The staff has included
14 these in their staff report, and there's no reason for me to
15 hit that any more detailed than what I have already.

16 It is located on Upper Captiva. I would simply
17 remind everyone - we've been over it time and time during the
18 three days of this hearing - it is a barrier island with no
19 vehicular access. It has limited infrastructure. And it is
20 in the Outer Islands Future Land Use Map Designation.

21 The Objective 1.4 of the Lee Plan talks about
22 non-urban areas. The Outer Island Designation is a non-urban
23 area. And it is a designation on the Future Land Use map for
24 categories of areas that are not anticipated for urban
25 development at this time. That's important...it's not

Dave Depew's Presentation

1 anticipated for urban-style development at this time.

2 This is the subject property. It is on Upper
3 Captiva. You have a picture on the bulletin board there
4 provided by staff. But, um --

5 Well, it's brighter on the computer screen than it
6 is there.

7 At any rate, you can see the character of the
8 site. It's heavily vegetated at this point. It's just south
9 of the Island Club.

10 You can get an idea of the pictures of the boats
11 that are docked at the dock slips that are along this canal
12 area that then proceeds out to Pine Island Sound.

13 If you have not been out there, the channel runs
14 out the canal. It runs down along the front of this
15 undeveloped property to the southeast of the mouth of the
16 canal. It then cuts back over across the bay area, or the
17 inlet area here, and then goes to the southeast around the
18 tip. There is a house out here, and just off this picture,
19 which you can see on the staff picture, there is a little
20 house on the tip of that. And just off the tip is a fish
21 shack.

22 The channel then goes off to the north. And there
23 is another channel, which I don't advise unless you know the
24 waters very well, that goes off to the south, southeast of
25 the property.

Dave Depew's Presentation

1 This is an interesting photograph, as is the one
2 that the staff shows. Although you don't see it as clearly
3 on the one that the staff is showing you.

4 In that you can see the docks that we've been
5 discussing off and on here all along this canal area. And I
6 would point out to you that in this particular picture you
7 can see that the docks have boats attached to those docks,
8 docked at those docks at this point. And I would submit to
9 you that this property is not developed at this point, and
10 yet those docks are fully utilized.

11 It's part of the Captiva Planning Community. Upper
12 Captiva Island has been included as that particular area in
13 the Lee Plan. And it states very clearly that the area will
14 look much as it does today, in the absence of a major
15 hurricane or other natural disaster. That's the last
16 sentence of the description of the Captiva Planning
17 Community. So the anticipation is that there's not going to
18 be a great deal of growth. It's outside of the future urban
19 area and, as indicated, the staff and the planning
20 considerations for the Captiva Planning Community are that
21 there won't be radical changes. There are not going to be
22 huge growth pressures and potential for expanded development
23 in this area.

24 The Lee Plan Policy 1.4.2 talks about outer
25 islands. I would direct your attention to the highlighted

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1 section, in which it says, "The continuation of the outer
2 islands essentially in their present character is intended to
3 provide for a rural character and lifestyle, conserving open
4 space and natural upland resources."

5 That is the overall intent of this land use
6 category. And I think it's important when the Hearing
7 Examiner looks at this request to consider what sort of
8 activity is going to be taking place out here.

9 What you have now is an aerial photograph with the
10 zoning superimposed upon it. My apologies, in the written
11 handout you can't really tell very well what some of these
12 aerial photographs show. But on the overall picture here --

13 Is it possible to maybe eliminate this? This might
14 brighten up a little bit if -- Is it this one?

15 THE HEARING EXAMINER: There is another one over
16 there. That one stays on.

17 MR. DEPEW: This one stays on no matter what?

18 THE HEARING EXAMINER: You can turn it off. It's
19 the emergency backup. If you want to turn it off, it's the
20 one right there. You just have to remember to put it back
21 on. We're not supposed to turn that one off.

22 MR. DEPEW: There we go.

23 MS. CICCARONE: That's much better.

24 MR. DEPEW: Yeah, it's just a lot easier to see
25 it. It's such a glare on the screen.

Dave Depew's Presentation

1 This one's important because what I've done on this
2 one is show you where the subject property is. That's this
3 kind of big yellow outline down here. And it's labeled with
4 the C-1 zoning that it possesses. And just to the north you
5 see the Island Club as well.

6 But, more importantly, you can see -- and I'm not
7 sure how well it's showing up on that one -- but I will tell
8 you that the zoning all up in this area of the island is also
9 C-1. And let me -- because I was afraid I was going to get
10 into a situation where that didn't show up very well, let me
11 also put up another exhibit that gives you a better idea of
12 what --

13 I'll just put up here for a minute. We'll probably
14 take it down later.

15 This exhibit has got the zoning on it.

16 MR. CICCARONE: One second.

17 Mr. Hearing Examiner, for the sake of the record,
18 perhaps if Mr. Depew can explain in better narrative terms
19 where this is, it would help us later on to understand what
20 he's talking about. I know where it is, but anybody looking
21 at the record won't know.

22 MR. BROOKES: Also, we could mark that as an
23 exhibit number so we can keep track of some of these exhibits.

24 THE HEARING EXAMINER: You intend to give this to
25 me, I assume?

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1 MR. DEPEW: I do. And I'm even going to give you a
2 11 by 17 version of it, if you don't particularly want to
3 unfold the big one. But I'm going to give you the big one as
4 well.

5 THE HEARING EXAMINER: What I'll do is mark the
6 large one as Depew Exhibit No. 3 and the small one as 3-A.

7 MR. DEPEW: And I'm sorry it's curled, but curled
8 it is.

9 You'll notice on either the paper exhibit or the
10 electronic exhibit -- and my apologies, the electronic one
11 simply wouldn't take all of this and still make it legible,
12 so I blew up a section which is basically from the airstrip
13 to a portion south of the property.

14 But I'll speak from the paper one just
15 momentarily. You'll see that the area north of the inlet
16 here -- and this little point here is the -- is Barnacle
17 Phil's Restaurant. So when you go out there, there is
18 dockage in there for the patrons of the restaurant.

19 But you'll see that this whole area to the north of
20 the restaurant and south of the airstrip is zoned C-1. It's
21 got commercial zoning on it. And you'll also see that the
22 development in that area is fairly sparse. If you take a
23 good look at the photograph that you've got before you, you
24 will also see that there are a number of canals that go up
25 here and front along these properties, which I'm running the

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1 pointer along here now. These canals come in from this
2 channel and ultimately go on, and these C-1 properties front
3 that canal.

4 This is important because we also note that the
5 airstrip is just to the north of here. There's plenty of
6 land on Upper Captiva that's already zoned commercial, if
7 someone wants to come along and place a fishing lodge, that
8 has better access than this one.

9 THE HEARING EXAMINER: I'm not sure what's doing
10 that. Sorry.

11 MR. DEPEW: We had testimony from one of Phil
12 Kinzie's daughters, and I don't remember her maiden -- her
13 married name. But the former Miss Kinzie talked about the
14 property that she owns to the north of Barnacle Phil's.
15 Well, the property that's owned up there is already being
16 used for various commercial and light industrial type uses.
17 If you go out there you'll see that there are all kinds of
18 activities taking place up there that are much more suited to
19 the kinds of uses that are being requested by this particular
20 applicant.

21 The extension of these resort-style uses down into
22 this predominantly residential neighborhood from the Island
23 Club is simply inappropriate. And I would submit to you that
24 the lack of adequate access, the dockage along this area here
25 that is supposed to be used for this facility, is simply not

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1 the kind of dockage that you need to support the kind of
2 facility we're talking about. And that it would be much more
3 appropriate, and there exists property on Upper Captiva that
4 is more appropriately situated.

5 I would also submit to you that if this particular
6 piece of property gets zoned for a resort, these are sure to
7 follow as resorts. And that, I believe, is certainly
8 contrary to the activity that is anticipated by the Lee Plan
9 for this particular piece of property. And when I say this
10 piece of property, I mean in large, the island of Upper
11 Captiva.

12 Lee Plan Policy 4.1.1 requires development designs
13 to be well integrated and properly oriented to the property
14 upon which it is placed.

15 Before I get to that, I do want to just make a
16 couple of points from the site plan.

17 If I can just move this one over for a moment.

18 If you take a look at the site plan, and you take a
19 look at the aerial photographs showing where the Island Club
20 is, If you go out and visit the site as you, I know, are
21 intending to do, you will see that the activities on the
22 Island Club are oriented towards the marina. If you will,
23 the dockage space that is here on this canal. They all are
24 interior to that site.

25 What happens on this particular property is that

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1 the activity is oriented out of the site. It is oriented
2 down to the south and to the southwest towards the existing
3 single-family residential uses that are out here.

4 And the activity that is going to take place is
5 going to take off the rather heavily-vegetated area that's on
6 the property and replace it with this, these units. A total
7 of 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 -- 10 cottages; and an 11th
8 building; and a pool bar; and a pool; and a pool deck. And
9 instead of orienting this back up and away from these
10 residences, the orientation is to spread out this use to the
11 residences to the south and to the southwest with the access
12 being, in essence, to the back side of the property. If this
13 is indeed going to be utilized for access, the access isn't
14 to the front of the property, the access is off here to the
15 side.

16 So, I would tell you that it -- it's my belief that
17 it is not well-integrated or properly oriented consistent
18 with Lee Plan Policy 4.1.1, simply because instead of trying
19 to separate the uses, they have spread those uses out. I'll
20 come back to that in a little bit in another fashion.

21 Policy 5.1.5 is the compatibility policy in the
22 plan. It is a requirement that the character and integrity
23 of the residential environment be protected. I would tell
24 you that this is not going to protect the residential
25 activities that exist to the south and to the west. And the

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1 evidence of that is that the adjoining property owners have
2 objected and have shown up over the course of these hearings
3 to tell you that they don't -- they don't think this is the
4 right kind of activity to intrude into their neighborhood.

5 If you take a look, again, at the potential for the
6 uses up around the Barnacle Phil's Restaurant, and the
7 surrounding activities with an airstrip to the north and the
8 commercial and light industrial uses up the canal, it makes a
9 lot more sense that that's an area that would lend itself to
10 these kinds of uses. But as you go south and west of the
11 Island Club, you find that these kinds of uses out here are
12 residential uses.

13 There was a lot of discussion about the kinds of
14 residential uses and the fact that some of these homes are
15 rentals on an infrequent basis. That's a little different
16 renting out homes from time to time and having them available
17 for rent than you're going to find in a hotel/motel
18 operation. It's a different kind of use, and I believe that
19 it is a kind of use that is consistent more with the
20 low-intensity development that you're finding to the south
21 and west. What we're talking about here, with 10 hotel/motel
22 units and a restaurant of this size and magnitude, is one
23 that is significantly different in the size and, to a point,
24 that is a difference in kind.

25 To that end, again, looking at this particular

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1 property, you will see - and it doesn't show up as well as I
2 would have liked to - but I've noted residences around the
3 subject property. This photograph is a 2002 photograph, even
4 though it's a copyright 2004, so some of the properties that
5 are under construction are not shown. When you go out there
6 you will see the new construction, and you will see that
7 there are residences in very close proximity around the
8 subject property to the south and to the west of the site.

9 So that's something that your site visit is going
10 to give to you. And it's something, as I said, that is
11 important in terms of understanding what's happening. The
12 use of the Island Club is now being extended to the south and
13 to the west into an area that heretofore had not had these
14 kinds of impacts associated with it.

15 The orientation of the site plan places sound
16 generators facing residential uses to the south. If you look
17 at the pool bar and the outside seating for the restaurant
18 and the pool itself, those are going to be major sound
19 generators. That's where your primary activities are going
20 to be taking place. That is going to -- in these pathways
21 through these cottages -- going to have a clear shot to the
22 south and to the west for the adjoining residential
23 development.

24 It directs recreational activities to the area that
25 is open to the south in between the various units. It does

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1 not provide any sort of sound barrier or light barrier or
2 activity barrier for the adjoining properties and the
3 adjoining residential uses.

4 This is a view from the property directly to the
5 south looking to the, it would be to the north/northwest, off
6 of the second floor balcony to the subject property. There
7 are, as you can see, some significant vegetation associated
8 with the property. Again, you're going to have a visit out
9 there, and you will see exactly what's going on. The Master
10 Concept Plan removes virtually all of the vegetation from the
11 site.

12 The proposed Master Concept Plan installs a
13 D buffer along the east, south and west easement boundary for
14 the road. D buffer consists of five trees per 100 feet.
15 There will be a total estimated 27 trees, not counting any
16 credits that the applicant may get for existing trees. And a
17 36-inch hedge. A three-foot-tall hedge, that is what is
18 replacing this (indicating).

19 The adjoining properties are not going to receive
20 any sort of benefit from the proposed buffers. The site plan
21 is going to allow light and sound to pass over and through
22 the proposed cottages. And the activities are going to be
23 oriented to provide a maximum nuisance to the adjoining
24 subject properties. The view and the sound corridors will
25 have direct impact on the surrounding properties.

Dave Depew's Presentation

1 If you take a look at the Island Club, you will see
2 that the Island Club has tennis courts in the back...is what
3 these guys are here (indicating). And it's got some parking
4 of golf carts back here. But the restaurant is oriented
5 towards the area where the boats are parked.

6 They have a pool area back here, it's separated by
7 a fence. They have another pool area over here. But most of
8 their activities are taking place surrounding the docking
9 area. The subject property is doing something quite
10 different.

11 The Club activity is directed inward towards the
12 other elements in the development. Has direct access to the
13 water. Includes marina activities with boat dockage as part
14 of their project. They work within the existing zoning
15 category. They have set the buildings away from the
16 perimeter.

17 In this particular instance we have somewhere
18 between 10 rooms and one -- one room for a caretaker, but the
19 room sizes haven't decreased. We've decreased the number of
20 rooms from the original request, but the room sizes haven't
21 decreased. But let's say, for the sake of discussion, we've
22 got somewhere between 20 and 40 guests on average when the
23 facility is filled up; a caretaker's residence of one to two
24 people; a restaurant serving somewhere between four employees
25 for the various guests; administration with one employee;

Dave Depew's Presentation

1 maintenance; two employees for cleaning; a total of somewhere
2 between 28 to 49 guests and employees on the site.

3 All of that activity is going to take place in this
4 kind of a situation. This is a cross-section based on the
5 site plan.

6 And I'm going to give you, as well, a paper copy of
7 this one.

8 MS. CICCARONE: Is this a separate exhibit?

9 MR. DEPEW: It is a separate exhibit in the sense
10 that it's a copy of what we're looking at on the --

11 THE HEARING EXAMINER: I'll mark this as Depew
12 Exhibit No. 4.

13 MR. DEPEW: And there is some extra copies of this
14 up here.

15 What we've done is, in the most recent set of
16 amendments for this request, they've reduced the size of the
17 cottages. What we've done is taken the house, that is the
18 Powell's house just to the south, and shown you a
19 cross-section across the property. As I indicated before,
20 and you've seen the pictures before of what actually exists
21 out there, this is what's going to take place. We're going
22 to have a lodge facility that is limited to the maximum
23 height out there. We've got a series of cottages that have
24 been reduced in height, which you would think, "Oh, well that
25 may help." But it really doesn't because the second story,

Dave Depew's Presentation

1 up here, of the Powell's house is now directly looking across
2 the road into the hotel.

3 This is the change that we're talking about out
4 there. We're having this kind of activity on the subject
5 property, and we're having this kind of activity on the
6 residences that are directly across the street to the south
7 and to the west of this particular request.

8 And when I say "street", I use that term
9 guardedly. You'll see that, as you go out there, it is a
10 dirt path that has mostly golf cart traffic with the
11 occasional pickup truck.

12 That's what we're talking about here. Make no
13 mistake, we are looking at some significant development on
14 this site. A development that is going to intrude into the
15 adjoining residential activities and is going to insure that
16 those folks do not have quiet enjoyment of their property.

17 There are no conditions, so far, in the staff
18 report that require construction of a hotel/motel units as
19 Phase 1. We've talked about that here this morning. I agree
20 with Mr. Kelner's position that should be done, and I would
21 hope that the Hearing Examiner would adopt that.

22 Alternatively, as Mr. Ciccarone, I believe
23 outlined, there is certainly the opportunity for someone to
24 phase the hotel/motel units as Phase 2, and Phase 2 never
25 gets constructed; we have an ongoing restaurant and bar

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1 activity out there with no hotel units whatsoever.

2 There is no condition to limit the maximum number
3 of seats in the bar or the restaurant. I asked that as part
4 of my cross-examination - I hate to use that term - as part
5 of my questions, shall we say, of Mr. Hutcherson on the first
6 day of the hearing. And there was no indication that there
7 was a maximum number, and there was no inclination to provide
8 any kind of condition that would set a maximum number.

9 The -- this is really quite impossible because I
10 believe that you can have -- uh, you literally could have
11 hundreds of seats out there. You could easily establish a
12 250-seat restaurant facility if you start seating people
13 around the pool. And notwithstanding Mr. Uhle's and Mr.
14 Kelner's discussions about square footages and everything
15 associated with this particular property, if you put a pool
16 bar out by the pool, you're serving people at the pool.
17 That's what a pool bar means. So the idea that this is part
18 of the hotel and not part of the restaurant service is
19 absurd. It's part of what the -- the pool bar is not serving
20 stuff that's made in the hotel, they're serving stuff that's
21 made in the restaurant. So the pool might be part of the
22 hotel, but if the decking is going to be serviced by the pool
23 bar, as is clearly shown, the pool deck is not part of the
24 hotel. The pool deck then becomes part of the restaurant.
25 And if it's the contention of the applicant that

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1 they will not be serving drinks, they will not put tables out
2 there, they will not put any sort of drink service out at the
3 pool, they need to state that and that needs to be a
4 condition in all this. Because that's part of the problem,
5 the activity that's going to take place when a bunch of folks
6 come back from fishing all day, when they've been out
7 slugging down Budweisers, and then they continue to slug down
8 Budweisers out by the pool until 10, 12:00 at night, is the
9 problem that we're facing here. It's not a situation where
10 they just don't like changes out on their island. They're
11 trying to exclude people. Their problem is that when they've
12 got kids, and when they're visiting themselves, and maybe
13 their grandkids are visiting, that they've got a bunch of
14 drunks out at the pool hootin' and hollerin' until 11:00,
15 12:00, 1:00 in the morning. And that's not what the island
16 is about and that's not what was intended. And that's what
17 the fear is. That's what the problem is.

18 And staff has already said that they can have
19 outdoor music. The condition is that it won't interfere with
20 other surrounding properties. Now, how that one is going to
21 be enforced, I don't know. By the time the code enforcement
22 guy is going to get out there, the music is not even on any
23 more. And how many times has the code enforcement guy been
24 out there at 1 a.m. when somebody is having a party out by
25 the pool bar? At any rate, that's the serious problem that's

Dave Depew's Presentation

1 associated with this request.

2 The outdoor seating around the pool could
3 potentially add an additional 100 seats to the activity that
4 we're talking about.

5 The noise-related conditions, as I indicated are
6 unenforceable.

7 And the lack of assigned dock slips will surely
8 create disputes from folks who come in, as I said, after
9 slugging down Buds all day out there on the water, and
10 arguing about whose going to put whose boats where. This is
11 not the kind of activity you want inside a residential area.

12 The Land Development Code talks about
13 compatibility. It has a definition. It talks about wherein
14 a positive relationship based on fit, similarity or
15 reciprocity of characteristics or a neutral, at least a
16 neutral relationship, based on a relative lack of conflict,
17 actual or potential. I can tell you this has clearly got the
18 potential for some very serious incompatibility.

19 It goes back to the question of the design which
20 orients the site to broadcast the nuisance to the adjoining
21 residential uses instead of sending it back up towards the
22 Island Club.

23 The buffers, as I have indicated to you, are
24 inadequate. Five trees -- 27 trees over the entire boundary
25 are simply not going to do it; and a 36-inch hedge, it's not

Dave Depew's Presentation

1 going to do it. That's not going to provide an adequate
2 sound screen or a visual screen. It simply will not be
3 sufficient.

4 There will not be any sort of compatibility.

5 They're going to be ongoing conflicts between the
6 neighbors and this.

7 It injects a new level of intensity into a
8 residential neighborhood. And it would not provide any sort
9 of transition from the Island Club. The idea, as Mr.
10 Hutcherson attempted to provide to you, is to provide some
11 sort of transitional use. All it does is take the Island
12 Club and extend it down into the residential area to the
13 south. A transitional use is one that's less intense. This
14 is the same use. It's got -- it's got all the same
15 activities that are going to take place at the Island Club.

16 Subject property is on a barrier island unconnected
17 by roads to the mainland. And, in fact, the roads out there
18 are dirt trails, predominantly driven by golf carts.

19 There is going to be an increased demand on the
20 mainland for marina parking. Mr. Brookes got into that on
21 his cross-examination a moment ago. There has simply been no
22 analysis done on that at all. There is no analysis of
23 traffic impacts on the mainland. There are no analysis of
24 emergency impacts on the mainland.

25 The facilities analysis itself for the subject

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1 property is simply inadequate.

2 Waste water generation. We have -- if you start
3 counting this up, they could potentially throw 350 restaurant
4 seats out there. For this analysis, what I did was I took a
5 hundred restaurant seats. That's not an unreasonable area
6 that -- in terms of using the decking and the area inside the
7 building, and whatever other area they're going to be serving
8 food in.

9 I threw in 25 pool bar seats, tables around the
10 pool, where they're going to be throwing drinks to the
11 folks.

12 Ten hotel/motel units and one caretaker's
13 residence.

14 I took a look at 64(e)-6.008 of the Florida
15 Administrative Code.

16 Mr. Hearing Examiner, I'm going to give you a copy
17 of that as part of my exhibits. And I will apologize, I only
18 have three of them, so we may need to make some additional
19 copies.

20 MS. CICCARONE: I don't need one.

21 THE HEARING EXAMINER: This will be Depew Exhibit
22 No. 5.

23 MR. DEPEW: I'm not really going to refer to that,
24 but I would like you to have it just in case you want to take
25 a look at it yourself and make sure that you understand where

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1 the numbers are coming from. Because that's where I got all
2 this stuff from is directly from that Administrative Code.

3 A hundred seats in the restaurant times 40 gallons
4 per day will give you 4,000 gallons per day of waste water
5 generation.

6 Twenty gallons per day per seat, for the 25 pool
7 bar seats, will give you 500 gallons per day.

8 Ten rooms at 100 gallons per day -- I think that's
9 a low figure because we're talking about hotel rooms that
10 conceivably are three- and four-person rooms. Maybe more.
11 But at least that. But let's just say we're looking at a
12 standard hotel room at 10 gallons per day. That's a thousand
13 gallons.

14 Caretaker's residence will generate, according to
15 that Florida Administrative Code, 100 gallons per day.

16 You got 5600 gallons per day. This is not an
17 unreasonable development scenario for this site. I didn't
18 try and go out on a limb. I didn't try and provide you one
19 that showed 350 restaurant seats. I showed you one that is a
20 realistic development scenario based on that site plan. And
21 they're already over the 5,000 gallons per day.

22 Lee Plan standard 11.2 talks about any new single
23 commercial or industrial development that generates more than
24 5,000 gallons of sewage per day must connect to a sanitary
25 sewer system.

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1 Now, they can come in and do a presentation that
2 says they're going to have 15 seats in their restaurant.
3 That's not reasonable. That's not -- that's not going to be
4 happening. They're opening a restaurant and bar out there
5 that's got some rooms attached to it and they're going to be
6 just like Barnacle Phil's. They're going to be hauling
7 people in there and getting them seated and feeding them and
8 giving them beers, and whatever else they're going to give
9 them. And then they're going to send them off. And they're
10 going to have a few folks who are going to be staying at
11 their hotel. They're going to generate that. They're not
12 going to have 15 seats or 30 seats, or whatever it is that
13 was suggested before, because that's not even going to cover
14 the folks that are staying at their lodge. They're going to
15 need something on the order of 100 seats. And they're going
16 to generate more than 5,000 gallons of waste water. The
17 applicants' estimate of less than 5,000 just presumes really
18 a low, and unbelievably low, number of seats in both the
19 restaurant and the bar.

20 It doesn't add in the office and retail uses
21 whatsoever, which you're just going to add more waste water
22 estimates in there.

23 And the staff has not included any kind of
24 condition to assure that the applicants' assumptions are
25 going to be met. Okay, maybe they're going to have a 30-seat

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1 restaurant? Let's put a condition in there that says 30-seat
2 restaurant. The applicant was unwilling to do that when I
3 asked about it on the first day of the hearing. But if it's
4 truly something that is ancillary to the hotel, let's make it
5 of a size that's ancillary to the hotel. If there is only 10
6 units, and our waste water generation is based on two persons
7 per unit, a 20-seat restaurant ought to do it. And if the
8 applicant wants to condition the request to a 20-seat
9 restaurant, then maybe we can argue about whether or not it's
10 compatible or not.

11 But we're certainly not going to argue about
12 whether it's ancillary, because a 20-seat restaurant is
13 intended to service the folks at the hotel/motel operation
14 they're talking about. More than that, it's not. More than
15 that, it's serving the general public. And the testimony
16 that was already that they're planning to serve the general
17 public. Mr. Hutcherson said that on the beginning day of the
18 hearings, that they were going to have folks come in from the
19 public. If that's the case, how can this be an ancillary
20 restaurant to the hotel? It's not. It doesn't meet any of
21 those kinds of definitions.

22 I'll come back to that point in a minute as well.

23 I was shocked this morning to understand that Lee
24 Plan Policy 6.1.2 does not apply to undeveloped barrier
25 islands. And the testimony, as the Hearing Examiner may

Dave Depew's Presentation

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24 Plan Policy 6.1.2 does not apply to undeveloped barrier
25 islands. And the testimony, as the Hearing Examiner may

Dave Depew's Presentation

1 recall, was based on the staff report on page 10 of 12, in
2 which it was stated, "However, Policy 6.1.2.2.c.,
3 Neighborhood Commercial, states, 'On Lee County's islands
4 where there is no intersecting network of collectors and
5 arterials, neighborhood commercial centers may be located
6 using standards for minor commercial centers.'"

7 You know, I didn't read that the same way that the
8 testimony said this morning. I read that as you could do a
9 neighborhood center using a standard for a minor commercial
10 center. There are still standards for minor commercial
11 centers. 6.1.2 has standards for minor commercial centers.

12 The testimony this morning, though, was that this
13 doesn't apply at all. I don't get that from that statement.
14 So I didn't want to get up and ask questions about it, but I
15 don't think that's what that means. I'm going to leave that
16 up to the Hearing Examiner to interpret that. But I -- if
17 that is true, I could put a K-Mart out here because we've
18 only got dirt roads. That surely cannot be what the staff is
19 intending to propose to you. So that's got to be something
20 -- there is something more there. And I know that, as I
21 said, I didn't get up and ask questions about this, but this
22 simply cannot be.

23 And I can tell you that that's not what the Lee
24 Plan states. The Lee Plan says that all commercial
25 development must be consistent with the location criteria in

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1 this policy. Part of the location criteria says you don't
2 have to locate it with regard to a neighborhood commercial
3 center, but you have to locate it with regard to a minor
4 commercial center.

5 If you do go down to Note 7 -- 6.1.2.7, or whatever
6 the number actually becomes, but Note 7 in 6.1.2, it says
7 that subsections 1 through 4 will apply to the following
8 commercial developments: Free-standing retail or services
9 establishments, restaurants. They will not apply to hotels
10 or motels, marinas.

11 I mean, here the issue is drawn. I'm not going to
12 beat this one to death either. Is this the tail wagging the
13 dog? Or is this the dog wagging the tail? Is this actually
14 a hotel/motel with an ancillary restaurant? And ancillary
15 retail? And ancillary vehicle rental? And ancillary
16 administrative offices? And what are some of the other
17 ancillary things we've got? Um, ancillary food stores? I
18 mean, that's what we've got here. We've got a hotel/motel
19 that has all these other uses.

20 Or is this a restaurant and bar that wants to sell
21 t-shirts, and has got a few rooms out there that they're
22 going to rent for fishing tournaments from time to time? But
23 the restaurant and bar is going to be in operation all the
24 time; and the rooms will be taken up from time to time.
25 Again, is it the dog wagging the tail? Or is it the tail

Dave Depew's Presentation

1 wagging the dog?

2 So the question is, is the project subject to Lee
3 Plan site location standards? My experience has been that
4 all development is subject to Lee Plan standards. Site
5 location and other standards. No matter what permit is
6 issued, it's subject to the Lee Plan. And I believe it's
7 subject to the entirety of the Lee Plan. That has been my
8 experience with permitting and development and design in Lee
9 County. And you have to look at the entirety of the plan,
10 not just one sentence of the plan. That's what I've always
11 had to do here, and that's been the background that has then
12 presented itself to me.

13 Is it because -- is it exempt because hotels and
14 motels are not subject to subsections 1 through 4? I would
15 say no. It has to be a hotel with ancillary uses, not a
16 restaurant with an ancillary hotel. The restaurant and
17 lounge use has far exceeded the use of the hotel/motel. So
18 you have to look at what it's doing, what is the most
19 activity that's taking place on the site? Again, that's been
20 my experience with permitting in Lee County, and that's been
21 what the staff has told me on other cases.

22 What standards exist to determine when a
23 development is a restaurant with motel rooms versus a hotel
24 with an ancillary restaurant? Well, you don't have any
25 definitions of accessory use in the plan or ancillary use or

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1 subordinate use. You have a definition of accessory use in
2 the Land Development Code. But if you don't have it in the
3 plan, and you don't have all these things defined in the
4 Code, what do you do?

5 Well, I went to the planning literature and I
6 looked at the Land Development Code, and I looked at all the
7 provisions that I could find in there. 34-3021 talks about
8 providing certain commercial uses that are clearly
9 subordinate to a permitted principal use. The request
10 defines the restaurant, the food store, rental and leasing
11 establishments and specialty retail as ancillary uses. But,
12 there has been no provision to limit those ancillary uses to
13 a size against which some objective standard has been
14 established.

15 34-3021 suggests 10 percent as a measure of
16 ancillary status. And regardless of whether it applies to
17 planned districts or doesn't apply to planned districts,
18 that's the only one I could find that talked about something
19 that's subordinate or ancillary to a permitted use. So,
20 that's the only thing in there. If it doesn't apply, it
21 doesn't apply. But that's the one that the Code has so far.

22 It also defines accessory use as something that is
23 incidental and subordinate to the principal use. Well, I
24 went to a series of planning works often cited by the staff,
25 as well, in these sorts of things. The first one being

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1 Moskowitz and Lindbloom.

2 THE HEARING EXAMINER: This will be Depew Exhibit
3 No. 6, I think. If I got my numbers wrong, I'll straighten
4 them out when I go back and do it.

5 MR. DEPEW: On this one, it talks about accessory
6 uses, and that's really the only thing they had in there
7 defined, they didn't have really ancillary defined and
8 subordinate, too. But it did talk about --

9 And you've got the full quote in there. It did
10 talk about a series of activities with regard to accessory
11 uses. And it noted a problem that appears to have started
12 occurring between one of the earlier versions of this
13 particular planning work and the current version, which has a
14 red cover. And it's called the new latest or the latest new
15 definitions. And if -- you've got the cover page there.

16 And what it says is that it may be advisable to
17 physically limit the accessory use to prevent it from
18 becoming the principal use. The planning literature has
19 recognized that accessory uses have a tendency, in some
20 situations, to expand and to take over the principal use on
21 the subject property. And I will tell you that you have
22 absolutely got this situation here. This is a situation that
23 is tailor-made for that particular concern. Because there is
24 a very good chance that you're going to have these sorts of
25 things expand in exactly that fashion.

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1 Michael Meshenberg is another planner that talks
2 about these sorts of things.

3 THE HEARING EXAMINER: I'll mark this as Depew
4 Exhibit No. 7.

5 Thank you.

6 MR. DEPEW: And Meshenberg talks about the fact
7 that it -- if it really is something that's a secondary use,
8 it has to be subordinate to the principal use. And, again,
9 he says that the regulatory experience has led to spelling
10 out in more detail the types of accessory uses permitted in
11 individual districts and development standards. Because,
12 again, the tendency is that the accessory uses can expand to
13 overwhelm the principal use.

14 And, finally, I give you Tracy Burrows, APA,
15 PAS publication with regard to the same subject.

16 THE HEARING EXAMINER: Thank you. I'll mark this
17 as Depew Exhibit No. 8.

18 MR. DEPEW: I did this primarily because I wanted
19 to make sure you had every possible definitional work that
20 I've been able to come across from a planning standpoint.
21 And it -- she also talks in there about it being subordinate
22 to and serving a principal building or use.

23 Now what does all this ultimately mean? This is a
24 generally-accepted professional standard that's found in the
25 planning literature. Accessory use is what you've got

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1 defined. There are no generally-accepted definitions that I
2 was able to discover of subordinate use or ancillary use.
3 But accessory use gives us at least a window on the kinds of
4 problems that have been associated with these adjunct uses,
5 if you will. Uses that are associated with the principal
6 use, and are somehow controlled by the principal use.

7 It is reflected, to some extent, in the LDC. We
8 have discovered in Lee County, it appears, just through the
9 reading of Section 34-3021, that there needs to be some kind
10 of standard with regard to what kind of subordinate uses
11 or associated uses or adjunct uses might be necessary to
12 look at.

13 Whether or not it applies to a planned district or
14 not, I'm not going to sit here and argue. I will tell you
15 that there have been instances when the staff has attempted
16 to apply these kinds of standards to projects that I have
17 been involved in. I can also tell you that, from the
18 standpoint of having to go get special exceptions on top of
19 planned developments, is also something the staff has been
20 attempting to apply very recently, and yet did not seem to
21 occur in this particular case. Although it occurred in one
22 that we had last week in this very forum, with some of these
23 very same people, in which the staff said we need to impose
24 an additional special exception on top of the planned
25 district that we're already asking for. And yet, for some

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1 reason in this particular case, that standard was not
2 followed by the staff. So, I don't understand exactly what
3 the logic to that particular aspect is either.

4 I can tell you that any sort of adjunct or
5 accessory type use must be subordinate and incidental to the
6 principal use. In other words, the principal use, the dog
7 has to wag the tail. The tail cannot wag the dog.

8 The literature suggests that limitations to assure
9 that doesn't overwhelm the principal use are appropriate and
10 often necessary. And yet, the staff fails to provide any
11 sort of objective conditions that would limit these
12 commercial uses. All they've said was -- and this morning
13 the testimony was at least illuminating, to some extent, that
14 we recognize it has to be ancillary to it. It has to be a
15 part and parcel of it. But there is still no question of how
16 we're going to divide this up. Is it going to be 20 percent
17 restaurant to 80 percent hotel room? Is it going to be 20
18 percent hotel room to 80 percent restaurant? We have been
19 provided with no objective standards.

20 And we've indicated basically here that it's going
21 to be handled on an ad hoc or case-by-case basis.

22 There are no conditions for subsequent permitting
23 to allow any of the other folks that are going to be looking
24 at permits to determine whether it's got this kind of status.

25 If you take a look at the lodge building, the

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1 porch, the pool bar and the pool deck area, 7,059 square
2 feet. The hotel rooms are only 5742 square feet. Now, you
3 can take off a thousand square feet of that 7,059 square feet
4 and say that's going to be the -- the area that the, uh,
5 office is going to be and all the other stuff. But the hotel
6 rooms are still going to be too big. This is the tail
7 wagging the dog, it's not the dog wagging the tail.

8 The subordinate use has significant potential to
9 overwhelm the principal use on this. And since there is no
10 objective to determine this ancillary use, other than those
11 found in 34-3021, I would submit that the proper way to
12 handle this, and the way it's been handled in the past, is to
13 have conditions on the zoning:

14 Limit the food and beverage service activities to
15 the hotel/motel patrons is one possibility.

16 Limiting the size of the restaurant to 10 percent,
17 plus or minus 600 square feet, including the porch and the
18 pool bar. That makes it of a size that will service the
19 hotel and motel patrons. That makes it ancillary. That
20 makes it subordinate to.

21 You could prohibit food and beverage service on the
22 pool deck. That's another way that can help squeeze the
23 restaurant use down to the point where it's not overwhelming
24 the hotel/motel use.

25 You can limit the other commercial activities in

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1 the hotel/motel area. Five percent, for example, is
2 approximately 250 square feet.

3 So there are ways and conditions to do that, but
4 they need to be considered. They need to be objective
5 conditions that make sure that, again, the dog is wagging the
6 tail.

7 In terms of commercial site location standards, the
8 question is whether this development serves rural residents?
9 No. It's intended to serve visitors to the island. There is
10 nobody -- there is no one here that's told you that this is
11 intended to service, somehow, the portion of the island with
12 its hotel/motel operation. With the restaurant, that's
13 probably true. But remember, it's not a restaurant. It's a
14 hotel/motel.

15 Does it serve marine traffic? Well, you're going
16 to get there by boat, but it doesn't have any frontage on any
17 of the canals. And as I indicated, we've got lots of
18 property up here that's got canal frontage that we could
19 locate some sort of commercial activity on. And you're not
20 going to have the residents that you have down here to the
21 south and west. But this property -- and it's not part of
22 the request, so I'm not even considering this up here
23 (indicating). That's irrelevant as far as I'm concerned.
24 This is -- this is a piece of property that's totally
25 land-locked, and it's going to be a fishing lodge.

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1 It's not a marina.

2 Does it allow -- does 6.1(a) allow some kind of
3 waiver? No.

4 The application itself is deficient. We talked
5 about that a little bit over the last couple of hearings.
6 The requirement is a boundary survey which shows existing
7 conditions to full survey accuracy. The survey that was
8 shown to the Hearing Examiner, and was provided as part of
9 the application, we have already had testimony that said it
10 did not include all of the existing conditions.

11 I will also tell you that 34-202(b) requires that
12 you include a copy of the deed restrictions. You've already
13 had testimony with regard to the deed restrictions. Those
14 deed restrictions were not provided to the applicant. That's
15 a picture of the existing conditions on the subject
16 property. That's the shed, or whatever, that exists there
17 that was not shown on the survey.

18 That's the deed restriction. That property was
19 purchased in full knowledge that it was to be used in
20 accordance with the C-1 zoning classification of the Lee
21 County zoning ordinance.

22 34-411(c) talks about the tract or parcel of
23 development has to adequately accommodate the proposed
24 structures and all on-site utilities. As I indicated to you,
25 even a reasonable development scenario, under the site plan

Dave Depew's Presentation

1 that's being proposed, is going to require some sort of waste
2 water treatment facility. There is no waste water treatment
3 facility on this property. All of the waste water is
4 intended, according to the testimony, to be developed and
5 utilized of septic tanks. So right off this is, I believe,
6 in violation of the design criteria you found in the Land
7 Development Code.

8 But the other question is whether or not the site
9 can adequately accommodate the proposed structures. In going
10 back to that cross-section I showed you, and taking a look at
11 that in relation to the site plan you've got there, I believe
12 that the answer to that is no, it is not going to adequately
13 accommodate the uses that are going to be placed on the
14 property and those structures.

15 There are no detention areas shown on there. And I
16 heard the testimony that says the detention areas are going
17 to wind in around all of the units. That's going to be an
18 interesting exercise for the engineer who is going to be
19 doing the drainage on that thing because that's also going to
20 cause, I suspect during rainstorms, some pretty wet feet of
21 people coming back and forth to their units and the -- and
22 the lodge. But, in any event, it's not shown on there. And
23 it doesn't look like you've got a whole lot of room to have
24 both the human activities and the storm water management
25 activities on the site.

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1 You've got golf carts that are going to -- no
2 question there is going to be some activities going over here
3 to the beach. The subject property is located on the east
4 side, predominantly, of the island. And to get over to the
5 beach, you have to come either to the south, and then go over
6 on one of the roads; or come up to the north and go over to
7 the west on one of the roads. Now, there aren't any parking
8 areas along here. They're just going to be taking their golf
9 carts and parking them along the side of the roads.

10 Now, I grant you that the roads are cart paths, and
11 there is not a lot of traffic on there, but if an emergency
12 vehicle needs to get past there and it's jammed up with golf
13 carts on the beach it's going to be a problem.

14 In any event, I would go back to the Lee Plan
15 vision of this island. The Lee Plan vision is not that we're
16 going to have 5:00 rush hour in downtown Fort Myers with golf
17 carts all along the beaches over here. There are no
18 provisions for that. And what this does is it sticks a
19 series of golf carts and makes them available to move over to
20 the beaches for the residents at the hotel.

21 Now you can say, "Well, the residents are going to
22 be fisherman. They're not going to go to the beach." They
23 don't have any dockage. This is a land-locked parcel. So
24 the folks are going to go somewhere. Does that mean they're
25 all going to stick around the pool and drink and party?

Dave Depew's Presentation

1 Well, again, there's the problem.

2 There is no guaranteed access to the marina
3 facilities that anyone has been able to propose. There is no
4 guaranteed dockage for a proposed fishing lodge.

5 34-411(f) talks about development and the
6 subsequent use of the planned development. The actual
7 activity to which the planned development is going to be put
8 shall not create or increase hazards to persons or property.
9 And it shall not impose a nuisance on surrounding land uses
10 or the public's interest generally through the emissions of
11 noise, glare, dust, odor or water pollutants. We've talked
12 about waste water generation, we've talked about sound and
13 light pollution coming from the activities. Simply not
14 adequately addressed by the site design.

15 34-411(i) says that site planning and design shall
16 minimize any negative impacts of the planned development on
17 surrounding land and land uses. Instead of providing the
18 transitional use, as I indicated before, it provides an
19 intrusion into the single-family uses that exist to the
20 south, east -- yeah, the southeast, the south, southwest,
21 west and northwest of the subject property.

22 34-411(k) as to where the planned development is
23 surrounded by existing development. That was the slide that
24 I showed a little bit earlier that showed residential uses on
25 three sides of this development. Which is not compatible or

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1 which is a significant higher or lower intensity, the design
2 emphasis will be to separate and mutually protect the planned
3 development and its environs. I've beaten that one up. I'm
4 not going to continue on, by simply saying this doesn't do
5 that.

6 Inadequate buffers and the lack of approval
7 conditions will mean continuing conflicts.

8 The rezoning criteria asks whether there is an
9 error or ambiguity that has to be corrected? There was never
10 an error that has been alleged or existing on this particular
11 site. There is no ambiguity in the regulations, as applied
12 to the current zoning on the subject property. There may be
13 an ambiguity in the regulations if you apply the new zoning
14 standards to the subject property, depending on how you
15 interpret all of the discussion we've had this morning about
16 ancillary and subordinate. But with regard to the existing
17 zoning, there is nothing there. There is no ambiguity. I
18 mean, nobody has even said there is an ambiguity on the
19 existing zoning.

20 The parcel has permissible uses. Those are uses --
21 those are not all the C-1 uses. But those are uses that are
22 consistent with the Lee Plan in terms of what could be placed
23 on this particular piece of property that are available to
24 the subject property today. Nobody's alleged that there are
25 uses that somehow make the subject property impossible to

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1 develop. They can put a five-room hotel/motel on the
2 property, with the units less than 425 square feet. They can
3 add a subordinate restaurant and support facilities without
4 rezoning. They've got provisions in the Lee Land Development
5 Code to do that.

6 The next rezoning criteria is whether proposed
7 change is intended to rectify errors on the official zoning
8 map. Well, there are no errors alleged. There is none that
9 exist at this point that we're aware of.

10 Whether or not the level of access flow is
11 sufficient to support the proposed development intensity.
12 Well, they don't have an access to a marina, so their --
13 their level of access and traffic flow has to only be looked
14 at vis-a-vis the dirt roads that are around it. They have no
15 guaranteed access whatsoever to the proposed development
16 because there is no guarantee that they're going to be able
17 to get the guests onto the island at any of the existing
18 docking facilities. Nobody showed us any easements or
19 anything else that says they're going to get the folks out
20 there.

21 The question is: Has the applicant proved any sort
22 of entitlement by demonstrating compliance with the Lee
23 Plan? I would submit to you my experience in getting permits
24 done is that this has got a whole lot of stuff that doesn't
25 comply with the Lee Plan and the Land Development Code,

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1 notwithstanding staff's presentation here this morning that
2 said that the commercial site location standards don't apply
3 on undeveloped barrier islands with dirt roads. I have never
4 seen that policy applied in that fashion in the 20, almost 25
5 years that I've been working in Lee County. And in the
6 decade or so that those particular policies have been in
7 place, I've never seen the staff apply something like that
8 and come up with that sort of interpretation.

9 And, in fact, the applicant has a reasonable use on
10 the subject property and has not demonstrated any sort of
11 right to uses that are going to so surely negatively affect
12 the adjoining and the proximate property owners.

13 The question is: Will the request meet or exceed
14 all the performance standards? It doesn't meet them.
15 They're going to absolutely be a nuisance. That's what's
16 going to happen out there. There are going to be parties,
17 there are going to be continuing code enforcement
18 complaints. This is going to be nothing but a problem.
19 There is no reason to buy into a problem on something like
20 this when the parcel has uses permitted on it now.

21 34-145(d)(3)d. says that the request must be
22 compatible with existing or planned uses in the surrounding
23 area. With the current conditions, the inadequate buffers,
24 the, you know, inappropriate lack of objective standards to
25 limit the development, it simply will not control the

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1 potential incompatibilities.

2 Going onto number (e), under that same code
3 section, the question is whether the approval or request will
4 not place an undue burden on the existing transportation or
5 planned infrastructure facilities, and will be served by
6 streets with a capacity to carry traffic generated by the
7 development. Well, I already talked a little bit about going
8 out to the beach with the golf carts. You've got service
9 traffic. There's going to have to be some significant
10 service traffic for this. You've got supplies to be
11 delivered to the restaurant and bar. You've got the pool
12 maintenance materials. You've got materials to maintain the
13 golf carts. You've got the laundry, and employees, and all
14 the rest of the infrastructure that's going to be required to
15 maintain the hotel/motel operation.

16 And you've got -- you've still got this really
17 unaddressed question about waste water treatment.

18 It's simply going to place a significant burden.
19 And the reason is that what we're being proposed here is a
20 kind of urban-style development. It -- it's a low-level
21 urban-style development, but it's still an urban-style
22 development that you're placing on a barrier island that was
23 anticipated not to have that kind of development.

24 Going on to f., it states, where applicable, the
25 request will not adversely affect environmentally critical

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1 areas of natural resources. But it's going to be located on
2 a barrier island, it's going to generate noise, light and
3 significant waste water.

4 The question is whether or not, for rezoning
5 criteria, again, the proposed use or mix of uses is
6 appropriate at the subject location. But it's not. It
7 represents an intrusion into the single-family uses, with
8 incompatible uses, inadequate buffering and setbacks. And
9 the proposed development allows these commercial uses to be
10 located in a fashion inconsistent with the Lee Plan.

11 We are not talking about residences that came to
12 this site. If that had been there for 20 years, and the
13 Powells and some of the other folks had come in and said to
14 you, "Gosh, we just can't take this any more. You've got to
15 shut them down." That would be a different story entirely.
16 Those residences are there. We're being asked to change the
17 zoning to bring the Island Club style of activities further
18 to the south and to the west. So, this is not a situation
19 where we've got an existing development that has been there
20 for decades and is part of the island community. What we're
21 asking for is a brand new activity that is not heretofore
22 permitted in this area.

23 The conditions must provide sufficient safeguards
24 for the public interest:

25 They don't limit the extent and timing of ancillary

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1 commercial uses.

2 They don't establish adequate buffers and setbacks
3 for the adjoining property owners to the southeast, south,
4 southwest, west and northwest.

5 They are not enforceable and cannot be administered
6 by the county at this remote location. You are going to find
7 that this is going to be a terrible situation for the
8 neighbors. They are going to be at each other's throats. I
9 can predict it sure as we're standing here and having this
10 hearing today.

11 They are not -- the conditions that are proposed
12 are not based upon the objective standards articulated by the
13 Planned Development Code or the Lee Plan or any of the
14 planning -- the generally-accepted planning works that I was
15 able to research for this hearing.

16 The recommended conditions must be reasonably
17 related to the impacts on the public interest created or
18 expected from the proposed development. But the conditions,
19 as I indicated, are not adequate to assure that conflict will
20 not occur on a continuing basis. They will not be adequate
21 to assure that the public interest, as articulated by the Lee
22 Plan, will be implemented. And they are not adequate to
23 allow administration and enforcement.

24 Is there no reasonable use to which the subject
25 property can be put? There are a number of reasonable uses.

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1 You can put five hotel units out there. You can put a couple
2 of residential units out there. You can put an ancillary
3 restaurant and service facility out there. It's not a
4 problem. There's no reason to rezone this.

5 Does the request comply with the procedural
6 requirements as established by the applicable plans, codes
7 and ordinances? No. It's deficient. The survey, the deed
8 restrictions, the site design. We can go on and on.
9 I've gone on and on. It doesn't conform to any of these
10 elements of either the Land Development Code or the Lee Plan.

11 Is the use sought consistent with the Comprehensive
12 Plan? No. It's not. It inserts an intensive resort-
13 commercial use into a single-family neighborhood. It does
14 not provide a transition from the Island Club. It just
15 extends it.

16 The proposed plan doesn't comply with the Lee Plan
17 criteria or the generally-accepted planning principles
18 related to these kinds of uses. You will find, in very short
19 order, that the tail will start wagging the dog.

20 It doesn't comply with the applicable site location
21 criteria and it doesn't meet the waste water treatment
22 standards.

23 It's inconsistent with the protection of the Outer
24 Island Land Use designation.

25 They have not demonstrated entitlement to the

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1 proposed rezoning. It's simply deficient when you compare it
2 to other rezoning requests that the Hearing Examiner,
3 himself, has heard on time after time after time.

4 The proposed request lacks Lee Plan consistency
5 that's normally required by these other requests. It has a
6 set of uses deemed reasonable by similarly-situated
7 properties already in existence. And there has been no data
8 presented that would justify any sort of special treatment
9 for this property.

10 It's not in conformance with the Lee Plan and the
11 LDC with regard to these various criteria.

12 The existing uses are sufficient. There is no
13 demonstration that the existing uses have violated the Lee
14 Plan in any way, shape or form. And, in fact, I believe, if
15 my recollection is correct, we have testimony from the
16 applicant that what was going on out there was consistent
17 with the Lee Plan.

18 And even though the staff and I are probably not in
19 agreement, at least with what I heard this morning in regards
20 to the question of whether or not the commercial site
21 location standards comply or not, if the staff position is
22 correct, then they certainly have a whole series of
23 additional uses that they could undertake under the C-1
24 designation.

25 And there has been no testimony to suggest that

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1 the existing zoning is somehow economically nonviable. The
2 existing zoning is perfectly viable, as witnessed by the
3 activities that are out there right now on that island.

4 It's not in keeping with the neighborhood and it
5 will create significant incompatibilities. It's an intrusion
6 of these uses into a residential neighborhood. And there is
7 no guaranteed access of any sort to the site.

8 The standards that are used to determine whether
9 ancillary uses are subordinate are simply inadequate. They
10 are not supported either by the regulations or by the
11 professionally-accepted standards of the planning
12 profession.

13 And that is it.

14 I'll be happy to just look over this a minute and
15 see if there is anything else that I wanted to cover.

16 THE HEARING EXAMINER: Rather than going into a
17 long discussion and questions, we'll take our lunch break
18 now. And I'm sure you'll be back for cross-examination after
19 lunch?

20 MR. DEPEW: I will indeed be.

21 MR. CICCARONE: What time?

22 THE HEARING EXAMINER: We'll come back at 1:15. Is
23 that enough time for everyone? Hour and a half?

24 MR. CICCARONE: Can we leave our things here?

25 THE HEARING EXAMINER: Yes.

Dave Depew's Presentation

1 Excuse me.

2 I'll lock the room up, so you may leave anything
3 that you like.

4 MR. CICCARONE: Thank you, very much.

5

6 (Thereupon, the luncheon recess was taken at 11:43 a.m.)

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20 BY MR. UHLE:

23 But, before I do that, I have a resolution and
24 Hearing Examiner opinion that I would like to present to you
25 to see if you're familiar with these?

Dave Depew Cross (by Uhle)

1 A Yes, sir. This first one is Tarpon Lodge. And
2 this is a resolution of the Board of County Commissioners.

3 Tarpon Lodge, as the Hearing Examiner may know, is
4 located at Pineland.

5 The next thing that you've got here is the -- it
6 appears the Hearing Examiner recommendation on the same case.

7 Q Yes.

8 A For the record, that is case DCI 2000-00007. And
9 the hearing dates were May 10 and May 12 of the year 2000,
10 for the Hearing Examiner; and for the County Commission it
11 was July 17th of 2000.

12 Q Now, what I'm going to do is, when I hit the
13 appropriate places in today's testimony, I'm going to wind up
14 asking you questions about that particular case.

15 But just to set up the facts in that case, you
16 were --

17 THE HEARING EXAMINER: Let me give it a number.
18 It'll be Applicant's -- excuse me -- Applicant's Exhibit No.
19 14.

20 Q (By Mr. Uhle) You were one of the agents in that
21 case; were you not?

22 A Yes, sir, I was.

23 Q Mr. Hutcherson was actually listed as a co-agent?

24 A Yes, sir. Mr. Hutcherson worked for Morris Depew
25 Associates at the time.

Dave Depew Cross (by Uhle)

1 Q And that particular case was found consistent with
2 the Comprehensive Plan and approved by the Board of County
3 Commissioners; was it not?

4 A Yes, sir, it was.

5 Q And that property is located in the Pineland area;
6 is it not?

7 A That is correct.

8 Q And that's on Pine Island?

9 A Yes, sir.

10 Q It's not located at any major intersection of
11 arterials or collectors; is that not the case?

12 A That's correct. It is not located at any major
13 intersection or arterials and collectors.

14 Q And did it not have a residential use abutting it
15 and single-family residential across the street?

16 A It did. Yes, sir.

17 Q And it's probably within a few hundred feet of the
18 Pineland Marina; is that correct?

19 A Yes, sir, it is.

20 Q The Pineland Marina is the place that's been
21 identified as the location where the water taxi goes to North
22 Captiva?

23 A I believe that's one of the locations. And yes
24 sir, I believe that was the testimony.

25 Q And the approval in that case was for a 50-unit

Dave Depew Cross (by Uhle)

1 hotel to be constructed in phases, as well as a restaurant of
2 approximately 2700 square feet; was it not?

3 A Yes, sir, I believe that -- that is. I'm going to
4 accept those numbers because I know that they were something
5 like that.

6 Q You can verify that.

7 A But I don't recall the numbers right off the top of
8 my head. But rather than take all this time up for me to,
9 you know, rummage through this, I will say roughly --

10 Q Okay.

11 A -- that that looks like that's what it was.

12 Q And that was on a parcel slightly less than three
13 acres; was it not?

14 A Yes, sir, that's my recollection. It was somewhere
15 around a three-acre site.

16 Q We'll come back to that later.

17 Looking at your testimony here, with regard to the
18 first page, there is a reference to Objective 1.4. You see
19 that?

20 A Yes, sir.

21 Q Okay. Would you agree that -- with the previous
22 testimony in this hearing, that the average lot size in this
23 particular area probably runs around a quarter of an acre?

24 A I haven't done that research, so I couldn't tell
25 you for sure what the average lot size was.

Dave Depew Cross (by Uhle)

1 THE HEARING EXAMINER: Would you check the
2 microphone, I don't think it's recording. It's recording, I
3 don't think it's amplifying.

4 MR. DEPEW: How about now?

5 THE HEARING EXAMINER: Yes. Thank you.

6 Q (By Mr. Uhle) Would you disagree with the
7 testimony that was given previously --

8 A I haven't done that analysis, so I don't know.

9 Q Assuming, for purposes of argument, that the lots
10 are in fact roughly a quarter of an acre, would you describe
11 that kind of density as being rural or urban in nature?

12 A I don't think the density per se is going to reach
13 that definition, if you're trying to get to the definition of
14 it because there are other factors that define what is rural
15 and what is urban.

16 Q Just from a --

17 Well, let's put it this way: The Lee Plan has
18 categories that have densities of four units an acre that are
19 permitted; does it not?

20 A Yes, sir, it does.

21 Q And are those identified as future urban areas on
22 the land use map?

23 A Yes, sir, they are.

24 Q Okay. And the North Captiva Island Club, would you
25 characterize the development on that parcel as being more

Dave Depew

Cross (by Uhle)

1 urban or rural in nature?

2 A Again, I'm not sure I'd make that distinction.
3 It's a resort-type of facility, and it's similar to urban
4 uses in that it is a fairly intensive use. And it's similar
5 to certain kinds of rural uses in that it's located in a
6 rural -- generally rural setting in terms of the undeveloped
7 barrier island and the limitations that the future land use
8 map places upon development out on undeveloped or partially-
9 developed, if you will, barrier islands.

10 Q Okay. Moving on to page 2, when you were
11 referencing the aerial that's at the top left of page 2.

12 A Yes, sir.

13 Q My recollection is that you made a statement with
14 regard to the parcels immediately south of the airstrip --
15 undeveloped parcels. That you believed that if this project
16 were approved that that property certainly would be developed
17 as a resort. Do you recall saying that?

18 A Um, I don't think I expressed it in quite that
19 fashion. What I was trying to indicate is that the
20 properties here that I'm noting on this other exhibit -- and
21 I don't recall the number of that exhibit. Was it 2?

22 THE HEARING EXAMINER: I think it was No. 3.

23 A No. 3. These properties just to the south, on the
24 easterly end of the airstrip, are part of a C-1 block of
25 properties. And CPD is that little yellow thing in there.

Dave Depew Cross (by Uhle)

1 But that's a commercial area just south of the airstrip. And
2 I thought if there was going to be resort development, among
3 other things, on the island; that it was certainly more
4 appropriate in that area than to extend the Island Club down
5 into this residential area south of the Island Club.

6 Q When you review zoning requests, do you typically
7 do so based on the availability of other better-located
8 property for that particular use?

9 A The answer to that is, it depends. Um, it depends
10 on how the Comprehensive Plan treats the properties in
11 question here.

12 In the case of the outer islands designation, the
13 Comprehensive Plan and all of the previous policy statements
14 that I'm aware of by the various commissions we've had over
15 the years, have indicated that, in general, they are not
16 encouraging more intensive development on the islands. So
17 from that standpoint, I think you can look at where is a more
18 appropriate location for something like that. And so, in
19 this particular instance, I'd say the answer is that yes, you
20 could indeed look at that. In other instances, I would say
21 no, that's generally not a consideration because we're in a
22 very different set of circumstances.

23 Q Did you review the potential impacts of a
24 hypothetical resort at this location on the single-family to
25 the southeast?

Dave Depew

Cross (by Uhle)

1 A I'm sorry, which location are we talking about at
2 this point?

3 Q The C-1 property that you identified.

4 A South of the airport?

5 Q Yes.

6 A No, sir. I did not do any sort of fullscale
7 analysis on that particular piece of property. I do know
8 that there are other commercial uses, however, in that area,
9 including some uses that actually approach light industrial.

10 Q You don't have any inside information about what
11 the owner's actual plans are for that property; do you?

12 A I do not.

13 Q With regard to the next aerial, that's the one in
14 the middle, right?

15 A Yes, sir. The ones that have the residential units
16 noted on them, although you can't see it very well on this
17 small piece.

18 Q Wouldn't you agree that that aerial indicates that
19 most of those parcels are vacant?

20 A The aerial does, which is why I mentioned that when
21 the Hearing Examiner goes out there, he'll see that there has
22 been some construction in the area, that is fairly recent, of
23 new houses that are being put on some of those parcels.

24 Q Even if you included the houses that are under
25 construction or have recently been construction, wouldn't it

Dave Depew

Cross (by Uhle)

1 still be true that more than 50 percent of those lots would
2 be undeveloped?

3 A I don't know. I didn't do that kind of calculation.

4 Q Moving on to your next slide on compatibility.

5 If you could go over to the Master Concept Plan,
6 please.

7 THE HEARING EXAMINER: Why don't you take the
8 microphone with you.

9 Q (By Mr. Uhle) First of all, let me just ask you
10 this: What would you say on that plan are the uses that are
11 going to generate the most impacts on the neighborhood?

12 A Well, the pool and restaurant area are certainly
13 going to be one of the areas that start generating impacts on
14 the neighbors. The way the building is oriented and the way
15 the pool and the pool bar is oriented, the impacts are
16 certainly going to be going to the southeast, the south and
17 the southwest.

18 You've also got golf cart parking on the west side,
19 so there is going to be some impact with the increased
20 traffic to the site.

21 You then have the residential units around the
22 outside. I want to say the outside -- I mean the westerly
23 boundary, the southerly boundary and easterly boundary. So
24 there is going to be traffic between those and the main
25 lodge.

Dave Depew Cross (by Uhle)

1 The entry of the lodge appears to be on the east
2 side of the lodge, so that's going to be accessing -- It's
3 unclear to me how the guests are going to be getting into the
4 site completely at this point. But let's just say for the
5 sake of discussion, they're going to come off of this area
6 over here to the northeast. So there is going to be an
7 impact of guests, supplies and other equipment coming in
8 here.

9 It's also not clear how the construction is going
10 to be taking place on this. And we know for a fact that much
11 of vegetation is going to be removed from the site because
12 that's how you're going to fit all of the dwellings in here,
13 the other facilities that are going to associate with this.
14 So I would say that in terms of the orientation of the site,
15 that's probably what you're looking at.

16 It's not clear where the trash is going to be kept.
17 I'm assuming that that would be kept along the north side so
18 that, you know, activities and service of the restaurant and
19 the commercial facilities in the lodge, the main lodge
20 building, will probably be along the north side, which is
21 adjacent to the Island Club. But we're still going to have
22 traffic over on this east side; you're going to have traffic
23 on the west side; and then you're going to have whatever
24 outdoor activities around the pool, the music and bar
25 service, et cetera, on that south side.

Dave Depew

Cross (by Uhle)

1 Q Your answer went well beyond the scope of my
2 question, so I'll ask you the question again.

3 A I'm sorry, I thought that's what you were asking me.

4 Q Would it be fair to say that the uses on that
5 parcel that would have the most impacts to the neighbors
6 would be whatever goes on in the lodge and whatever goes on
7 around the pool?

8 A Well --

9 Q As opposed to the residential hotel units which --

10 A With the caveat that we're going to increase golf
11 cart traffic as a result of this, and construction traffic
12 and service traffic to and from the lodge, I'd say yes.

13 Q Okay. Can you go over to the Master Concept Plan
14 and tell us what the distance is between the north property
15 line and the lodge?

16 A 20 feet.

17 Q Is that a fairly standard setback in Lee County?

18 A Um, I need more detail on the question. Fairly
19 standard for what?

20 Q I'll withdraw the question.

21 And you would agree that the pool is located
22 immediately adjacent to the lodge, to the south of the lodge;
23 would you not?

24 A Right there. Yes, sir.

25 Q And your clients are separated from the lodge and

Dave Depew Cross (by Uhle)

1 from the pool by open space and by a series of hotel
2 buildings; is that not correct?

3 A Yes, sir.

4 Q Would you imagine that the orientation of the hotel
5 buildings would be toward the pool and the lodge, or away
6 from it?

7 A I would assume that they are going to be oriented
8 -- the front door, shall we say, the access to the units are
9 going to be oriented towards the lodge and the pool.

10 Q So, from your client's perspective, what they're
11 going to be seeing is open space and the backs of the hotel
12 buildings; is that not correct?

13 A And the pool. Those buildings are not joined
14 together. There is view corridors to the pool. And if you
15 will look on my cross-section, the upper balcony should be
16 able to look over those and into the lodge area itself.

17 Q But the immediate uses, immediate to their
18 property, are open space, a buffer and the hotel backs?

19 A Yes, sir.

20 Q What is the open space that's been indicated as a
21 minimum on this parcel on the Master Concept Plan?

22 A 50 percent.

23 Q Is that more or less than the standard requirement
24 in the Land Development Code for a CPD?

25 A It's more.

Dave Depew Cross (by Uhle)

1 Q And is there not a condition that's been both put
2 on the Master Concept Plan and proposed by the applicant that
3 involves the preservation of native vegetation on the site?

4 A Yes, sir, I believe there is.

5 Q Moving on to the next page, the aerial, that's
6 underneath the Island Club versus subject.

7 A Yes, sir.

8 Q Can you please tell us what the use is on the
9 Island Club immediately abutting the subject property?

10 A In order to orient us, we have the Island Club just
11 north of the subject site on this particular aerial
12 photograph. You've got Mango's Restaurant; you've got a
13 pool; you've got tennis courts; and there is some golf cart
14 access all along the northerly boundary.

15 Q So, basically, is it fair to say that you've got
16 golf cart storage between -- is the abutting use next to the
17 subject property?

18 A For a portion of the boundary, yes, sir.

19 Q And what's the use for the remainder of the
20 boundary?

21 A You've got the restaurant that's out there as a
22 portion of the boundary. The back side of the restaurant.

23 Q And are there any significant buffers between those
24 particular uses and the subject property?

25 A There is a wooden fence in some state of disrepair.

Dave Depew Cross (by Uhle)

1 Q In the last frame here, under "Compatibility",
2 where you estimate there are 28 to 49 guests/employees on
3 site; is that assuming full occupancy of the hotel?

4 A Yes, sir, it is.

5 Q Would you expect that this hotel would be fully
6 occupied at all times?

7 A No, sir, I would not.

8 Q On page 4, under the first box called
9 "Compatibility", you have an item that says, "Lack of
10 assigned dock slips will create disputes."

11 A Yes, sir.

12 Q Is it your understanding that there is no agreement
13 allocating the slips between the owners?

14 A I have no idea. No evidence has been presented, so
15 I'm not aware of any.

16 Q So you're just assuming that that's the case in
17 this analysis.

18 A I know how -- I know how boaters get after they've
19 had a long day out fishing, and they're trying to get back in
20 and clean their catch and clean themselves.

21 Q But, I mean, the truth of the matter is you don't
22 know at this point if there's any kind of agreement
23 allocating boat slips?

24 A I do not.

25 Q On the same page where you talk about commercial

Dave Depew Cross (by Uhle)

1 analysis, there is a reference to --

2 Well, we'll skip that.

3 Let's go on to waste water generation. Let me
4 start by asking, you're not an expert in the permitting of
5 septic tanks; is that a fair statement?

6 A That's a fair statement.

7 Q Have you ever run a restaurant?

8 A I've worked in them, I haven't run them.

9 Q You worked as a waiter or a --

10 A Bartender and cook, yes.

11 Q For the purpose of this particular analysis, you've
12 assumed a hundred restaurant seats. Was there any testimony
13 that the applicant put on that indicated that there would be
14 a hundred restaurant seats?

15 A No, sir. The testimony I recall was that there
16 would be more than 30 likely.

17 Q So what was the basis for your assumption that
18 there would be a hundred?

19 A I calculated out the area available for seating on
20 a space-by-space basis, and then the area around the pool bar
21 and on the porch, and everything else that could be used for
22 service, and ultimately came up with 100 seats and the 25
23 pool bar seats.

24 Q Okay, let's talk about that for a minute. You
25 obviously included the area that was indoors that's

Dave Depew Cross (by Uhle)

1 identified as the restaurant. That's, I believe, 750 square
2 feet?

3 A Yes, sir.

4 Q Then the area that's identified as "covered porch",
5 how much, if any, of that did you include in your analysis?

6 A Um, my recollection is -- my recollection is that I
7 used this seating or this -- these square footages here, and,
8 that is, that we would have 750 square feet of restaurant;
9 500 square feet of kitchen; 560 square feet of seating out on
10 the porch.

11 And then I did some measurements on the pool deck
12 and extracted the pool -- the area of the pool -- since
13 obviously you're not doing some seating out in the pool.

14 Q So what figure did you come up with for the pool
15 deck?

16 A Well, I can go back to my notes, if you want. But
17 my -- without taking a bunch of time to look for it --

18 Q Just looking for a rough number.

19 A Well, I -- I don't recall off the top of my head,
20 Mr. Uhle. I can tell you that I took a scale out and
21 measured it and then extracted the area, the interior area of
22 the pool. And I don't recall the numbers off the top of my
23 head. I can go back and look through my notes and attempt to
24 reconstruct that for you if it's important.

25 Q Did you also -- did I understand you to say that

Dave Depew

Cross (by Uhle)

1 you included the kitchen?

2 A Yes, sir. That's included when you calculate
3 restaurant usage. The kitchen -- the size of the kitchen has
4 an impact on the number of seats and the amount of service
5 you're able to calculate for a restaurant.

6 Q But you couldn't put -- actually put tables in the
7 kitchen?

8 A No, sir. I didn't calculate that for tables.

9 Q So how much did you assume -- how much square
10 footage per seat or per table?

11 A Well, normally you can take a table and an area
12 around a table that's around 7 by 7 or 8 by 8. So somewhere
13 in that range. And that will give you approximately six
14 persons on a round table.

15 Q Did you look at fire code regulations to determine
16 the ratio for those?

17 A I did not.

18 Q You recall the testimony from Mr. Strothers which
19 established a maximum amount of square footage that could be
20 put on this site with these uses and still get a septic tank
21 permit?

22 A I recall his testimony. I had certain questions
23 about it. But yes, sir, I do recall him testifying.

24 Q Would you agree that if the number of seats shown
25 on the plan resulted in anything like the 5,600 gallon per

Dave Depew

Cross (by Uhle)

1 day figure that you've shown here that, based on Mr.
2 Strothers' analysis, that the Department of Health would not
3 approve a septic tank permit?

4 A Again, I'm not an expert in obtaining septic tank
5 permits, so I just simply don't know.

6 Q With regard to your testimony --

7 Well, let me do this first. On ancillary uses.

8 A Are we on page 6?

9 Q We're now starting on page 5.

10 A Yes, sir.

11 Q Do I understand your testimony to be, with regard
12 to the reference to the subordinate use 10 percent standard,
13 that you're suggesting that that should be applied as an
14 analogy to the Lee Plan rather than that there is a
15 regulation that actually does currently limit it to 10
16 percent?

17 A What I -- what I --

18 If I understand your question, my answer is no.
19 And an explanation, I would say that we have a standard
20 that's in the Land Development Code. And without attempting
21 to get into the, what I consider to be something of a swamp,
22 to be involved in as to whether that applies or doesn't apply
23 to the planned developments, I was trying to say, "Look, the
24 only standard that's in there says 10 percent is a
25 subordinate use." And if the staff can require special

Dave Depew Cross (by Uhle)

1 exceptions on top of planned developments, then there is no
2 reason that the subordinate use isn't going to be applicable
3 to planned developments either. But, in any event, whether
4 it's determined to be applicable or not applicable, that's
5 the only standard that's in the code at this point. So,
6 something at least closer to 10 percent than greater than the
7 principal use. Somewhere it's got to be in that range
8 between 51 percent and 10 percent. It's got to be within
9 that range in order to avoid the situation of the tail
10 wagging the dog. That was the point I was trying to make.

11 Q Let me -- let me go back a little bit. The
12 significance of the ancillary use issue, would you agree, is
13 that it relates to the commercial site location standards and
14 whether they apply to this project?

15 A Yes, sir.

16 Q And you note in the bar down here, it says
17 "Commercial Site Location Standards" under your 5th bullet
18 point, that the Lee Plan has no definitions of, among other
19 things, ancillary use.

20 A Correct.

21 Q So for purposes of determining whether this project
22 is an ancillary use or not, you can't rely on any literal
23 language in the Lee Plan; is that a fair statement?

24 A In terms of definitions, I think that's correct.
25 Yes, sir.

Dave Depew Cross (by Uhle)

1 Q Okay. So to go back to the original question, is
2 it fair to say that you have abstracted language from the
3 Land Development Code that relates to subordinate uses, and
4 suggested that it should be applied as a standard in this
5 case because it's the only analogous one that you could find?

6 A No, sir. That's not fair to say.

7 Q Okay. Please explain then.

8 A What I'm trying to do with that presentation
9 and discussing that was to give a little bit more of an idea
10 of how we're going to try and approach this problem. We have
11 a difficulty with the Land Development Code in that there is
12 some question with regard to an accessory use, an ancillary
13 use, something that is subordinate and customarily incidental
14 to the principal use. There's -- I think, given the -- what
15 we went through this morning, and to some extent last time,
16 there's some clear difficulties with those particular terms
17 and how they're applied.

18 So what I was trying to do was provide some
19 information to give a different perspective as to how you can
20 start looking at those terms. Because if they're not defined
21 in the Plan and if they're not defined in the Land
22 Development Code, then I've always been taught that the next
23 thing you do is you go to the various planning texts and
24 literature that is applicable to the field of study that
25 we're in and see if there is something in those.

Dave Depew Cross (by Uhle)

1 So, what I tried to do was present to this forum
2 and to the Hearing Examiner what some other folks have
3 thought about ancillary, accessory, customarily incidental
4 and subordinate to. And what I'm saying is that, while I
5 can't sit up here and tell you it's 12 percent, it's 10
6 percent, it's 25 percent, I can tell you there's -- there's a
7 gradiation there that, once you surpass it, the tail starts
8 wagging the dog as opposed to the dog starts wagging the
9 tail. And I was giving the Hearing Examiner the benefits of
10 my research on this without trying to say, "Hey, this is the
11 objective standard." Because I have not been able to
12 determine that there is a specific objective standard.

13 I can tell you, though, that in the literature
14 there is a clear recognition that the ancillary, the
15 subordinate and the accessory uses, in some instances, grow
16 to surpass the activity that takes place on a site that is
17 attributed to the principal use. And, in my professional
18 opinion, and in my experience in doing this sort of stuff
19 over the last 25 years, this is the type of situation we
20 have here, where the ancillary use, the use that is
21 customary, incidental and subordinate to the principal use --
22 the principal use is a hotel/motel. That's what the request
23 is for. But the activity on this site is going to be a
24 restaurant and bar. The hotel and motel is now a small
25 component. And especially when you consider that the

Dave Depew Cross (by Uhle)

1 hotel/motel is not going to be fully occupied 365 days a
2 year. We recognize that. It's not going to be fully
3 occupied like that.

4 Q So --

5 A But the restaurant's going to be open all the
6 time. Even if not a single one of those rooms is occupied,
7 that restaurant's going to be open. And it's going to be
8 serving the public. There are going to be people coming and
9 going 'til whatever hours of the night that the thing can
10 operate.

11 Q To go back to the question. First of all, the 10
12 percent standard in 34-3021 is not included in the Lee Plan --

13 A That's correct.

14 Q -- so you're throwing it out as a possible
15 objective standard. Is that a fair statement on it?

16 A Yes, sir. I'm saying that is one -- one end of the
17 spectrum.

18 Q Okay. Just as a matter of clarification, I'm on
19 page 6 now, and where it says "Professional Standards;
20 Accessory Use" and we have -- this is the upper left-hand
21 corner.

22 A Yes, sir.

23 Q The first definition of an accessory use is one
24 that's customarily incidental and subordinate.

25 Now, wouldn't you agree that when you look at a

Dave Depew Cross (by Uhle)

1 hotel and a restaurant, that they are not, in fact,
2 customarily incidental and subordinate?

3 A No, sir, I would not.

4 Q Isn't it quite frequently found that there are
5 hotels that don't have restaurants, and there are restaurants
6 that don't get attached to hotels?

7 A Yes, sir.

8 Q So, how can you then conclude that hotels and
9 restaurants are customarily incidental?

10 A I'm -- I'm applying it based on this
11 application and what's being presented to us -- what was
12 presented to us in the first two days of hearings, what
13 was presented to us in the application. And all along we
14 have been told that this is - and the staff even said that
15 this morning - this is a use that's associated with the
16 hotel/motel. It's ancillary to, it's an adjunct to, if you
17 will, the hotel and motel.

18 Q What I want --

19 A It cannot be a free-standing activity.

20 Q I'm trying to get at the distinction between
21 accessory and ancillary uses. Would you agree that those are
22 not totally synonymous terms?

23 A Yes, sir, I would believe -- I would agree that
24 those are not synonymous.

25 Q And would you agree that, to illustrate the

Dave Depew Cross (by Uhle)

1 question, that a pool would be an accessory use under most
2 circumstances; but that a restaurant, while it could be an
3 ancillary use, would not be an accessory use?

4 A See, that's where it starts to break down, so I'd
5 have to say no, I don't agree with that. A pool can be a
6 free-standing use. We have many community pools around Fort
7 Myers. I still remember the one that used to be out in front
8 of the hospital. It was a free-standing use. It was a
9 free-standing recreational use. It wasn't an ancillary use.

10 Now, if you say it's an accessory use to a
11 single-family house, yeah, a pool is an accessory use. Just
12 like --

13 Q And, in fact, doesn't the Land Development Code
14 have a series of regulations under accessory uses which
15 discuss pools?

16 A Yes, sir.

17 Q So, normally a pool -- not always, but normally a
18 pool is an accessory use; would you agree?

19 A The vast majority of pools are accessory uses, yes,
20 sir.

21 Q Are restaurants, in the average case, accessory to
22 a hotel? Or are they ancillary?

23 A I'm afraid I can't answer the question when phrased
24 like that. Most restaurants are not ancillary to anything.
25 Most restaurants are free-standing.

Dave Depew Cross (by Uhle)

1 Q That is absolutely -- that is my point.

2 When you talk about the staff report failing to
3 provide objective conditions limiting commercial uses, would
4 you agree that doing a comparison of square footages for
5 particular uses is, in fact, an objective standard?

6 A It can be, yes, sir.

7 Q At this point I think I would like to start asking
8 you some questions about Tarpon Lodge.

9 A Okay.

10 Q Now, in Tarpon Lodge, we've identified that the
11 parcel was not located at any major intersection; did we not
12 agree to that?

13 A Correct.

14 Q The Tarpon Lodge approval was for both a restaurant
15 and a hotel. And the hotel was to be built in three phases;
16 was it not?

17 A Yes, sir.

18 Q And the hotel was 50 units, if all three phases
19 were built, but not otherwise?

20 A Yes, sir.

21 Q And the restaurant was roughly 2700 square feet, I
22 think, was the number? A little less or a little more?

23 A This one says 2680 square feet.

24 Q Given that that particular parcel didn't comply
25 with the commercial site location standards, did you testify

Dave Depew Cross (by Uhle)

1 at any time at that hearing that there was a problem with the
2 definition of ancillary and so we needed to create an
3 objective standard like the 10 percent standard that you're
4 proposing here?

5 A I don't recall.

6 Q If you would please look at the schedule of uses.

7 A I've got them here.

8 Q Can you please read the language following
9 Restaurant Group III?

10 A "Restaurant Group III. Not to exceed 2,680 square
11 feet. To be operated in conjunction with the hotel/motel use
12 only. This should not be construed to mean that the
13 restaurant is an accessory or ancillary use that would
14 restrict the size of the restaurant to 10 percent for the
15 total square footage of the project."

16 Q Thank you.

17 Moving on to --

18 A Can I answer something else along with that?

19 Q No.

20 A Okay.

21 Q Not unless somebody else asks you.

22 A Okay.

23 Q The next item here under Professional Standards;
24 Accessory Use, you have a computation which includes the
25 lodge building, the porch, the pool bar, the pool deck area

Dave Depew Cross (by Uhle)

1 used as a restaurant/bar. You would agree, I think, that
2 there are portions of the lodge building that clearly are
3 used for the hotel or for uses other than the restaurant;
4 would you not?

5 A I would agree that it says, on your current site
6 plan, that certain square footages are allocated to different
7 uses over there, but I didn't see any conditions to that
8 effect in the staff analysis.

9 Q But if it's included on the approved Master Concept
10 Plan, does that not operate as a condition that's enforceable
11 by the County?

12 A Generally speaking, unless there is an
13 administrative amendment that would be processed with no
14 notice to any of the surrounding property owners, that would
15 be a regulation. But, again, that doesn't -- that doesn't
16 rise to the level of a condition as established by the staff
17 and the -- ultimately the zoning resolution.

18 Q Under the next box there, you were discussing the
19 case that's near and dear to my heart, I believe --

20 A (Laughter).

21 Q -- that went to the Hearing Examiner not very long
22 ago about special exceptions and extra layers of review for
23 them?

24 A Yes.

25 Q I believe you were complaining about an

Dave Depew Cross (by Uhle)

1 inconsistency of staff treatment; were you not?

2 A Well, I was pointing out that, you know, we had a
3 project in an urban designation that was being asked to get
4 special exceptions on top of a planned development. And here
5 we've got one in a non-urban character -- characterized
6 designation that's not being asked to go get a special
7 exception on top of the planned development rezoning. And I
8 -- I do think that that's an inconsistency in the way these
9 projects are being treated, yes, sir.

10 Q But in that particular case you also complained
11 about the second layer of regulations?

12 A Yes, sir, I did. I think it's unnecessary. But I
13 still think that there's a clear inconsistency in how this
14 project is being treated. This project is not being treated
15 like the standard rezoning request.

16 Q But in that particular case the bottom line was
17 that you made an argument that you did not believe that a
18 second layer of regulations was appropriate?

19 A Correct.

20 Q Moving on to the next box here, I need some
21 clarification. Are you -- this particular box doesn't make
22 any reference to the Outer Islands land use category. And I
23 need to know if in here you are making an argument that the
24 hotel use --

25 A Can you tell me which box?

Dave Depew Cross (by Uhle)

1 Q This one right here (indicating).

2 A Okay.

3 Yes, sir.

4 Q It's entitled Commercial Site Location, but I'm not
5 sure that that's really what it's addressing.

6 So, are you making an argument in here that this
7 project, the hotel use, is inconsistent with the Outer
8 Island's land use category?

9 A No, sir. What I'm making -- the argument on that
10 particular box is that 6.1.8 allows - and this is the Lee
11 Plan Policy 6.1.8 - allows certain commercial activities to
12 take place in non-urban designations. And from that
13 standpoint the question is: Does 6.1.8 in some way negate
14 the commercial site location standards found in 6.1.2.?

15 Q Is your --

16 Again, just to clarify here.

17 Are you making an argument that this particular
18 project is inconsistent with Policy 6.1.8?

19 A No, sir. I'm saying that it --

20 Oh, I'm sorry. I'm saying that 6.1.8 doesn't
21 apply. Not that it's consistent or inconsistent, but that it
22 doesn't apply.

23 Q Okay. Well, as long as you're not arguing that
24 it's inconsistent with 6.1.8, I can leave that alone.

25 On page 7, in your box entitled "Deed Restriction".

Dave Depew Cross (by Uhle)

1 A Yes, sir.

2 Q Where in that particular quote is there a
3 limitation on the use of the properties, since it appears to
4 me that it indicates that certain parties will consent to
5 certain activities. I don't see any reference to any
6 restrictions.

7 A I'm going to leave the legal interpretation of that
8 to you. All I can tell you is, from the standpoint of
9 reading over that in plain English, it says that the property
10 is going to be used in accordance with the C-1 zoning
11 classification.

12 Q Doesn't it say that the Island Club and mortgagee
13 hereby consent to certain activities so long as certain
14 things happen?

15 A Yes, sir, it does.

16 Q So it does not say that property owner is
17 prohibited from doing anything on the property; does it not?

18 A Again, I'm going to leave the legal interpretation
19 to -- to the right folks.

20 Q Again, on page 7, in the middle right box here,
21 there is a reference to golf carts can take guests to the
22 beach, but no parking areas at the gulf beach.

23 A Yes, sir.

24 Q Is this a -- this kind of off-site parking
25 requirement, is that something that you would normally look

Dave Depew Cross (by Uhle)

1 at when you analyze a zoning case?

2 A Yes. You would normally look at it if off-site
3 parking has an impact on the public health, safety and
4 welfare. And, in that sense, I think that when you look at
5 the performance criteria and the criteria that the rezoning
6 request must be judged by, you have to take a look at whether
7 or not there are going to be impacts overall to the community
8 and the neighborhood in which the property is located.

9 Q When you do zonings in the, let's say, the
10 Summerlin Square area, do you typically analyze the projects
11 to see if there is adequate parking in Lynn Hall Park to
12 satisfy the people going to the beach from these projects?

13 A Generally speaking, no, sir.

14 Q If, hypothetically, you did a hotel project in the
15 Punta Rassa area, would you --

16 A Why don't we say one along San Carlos Boulevard?

17 Q Well, I'm referring to another one here.

18 A Oh, okay.

19 Q I'll just go ahead and put this in the record.

20 Could you please identify this resolution. And
21 I'll submit to you that I have marked here there is the
22 Hearing Examiner opinion attached to it?

23 A Yes, sir. This is Resolution Z98-019. And it is
24 with regard to a hotel development, a commercial plan
25 development, on behalf of McGregor Point Limited. And that

Dave Depew Cross (by Uhle)

1 was approved by the County Commission on May 4th, 1998. It
2 is case No. 97-09-070.03Z01.01. And it was heard on March
3 12th, 1998. And rendered by the Hearing Examiner, it
4 appears, on April 6th, 1988 -- 1998, sorry.

5 Q And you were the planner on that case; weren't you?

6 A Yes, sir, I was.

7 THE HEARING EXAMINER: Can I just for the purposes
8 of marking it, it will be Applicant's Exhibit No. 15.

9 I haven't got 14, other than talked of marking it.

10 MR. UHLE: I've got that over here.

11 THE HEARING EXAMINER: Just so I don't lose track
12 of them.

13 Does he need this copy?

14 MR. UHLE: He might just for a little bit.

15 THE HEARING EXAMINER: I'll give it back to you
16 then.

17 MR. UHLE: You might want to let him hang on to
18 both of those until he's done.

19 THE HEARING EXAMINER: Okay, that's fine.

20 Q (By Mr. Uhle) That particular approval was for a
21 hotel at approximately 24 units per acre; was it not?

22 A Yes, sir, it was.

23 Q And that was located basically right at Punta
24 Rassa; was it not?

25 A Yes, sir, it was -- it accessed the roadway that

Dave Depew Cross (by Uhle)

1 goes around to the condominiums on the north end of Punta
2 Rassa. It was right on the water, and it actually had
3 riparian rights, dockage. There was kind of a crunched-up
4 dock that was on the waterfront that ultimately they, at that
5 point, I don't know if they decided to do anything with it
6 now, but at that point they intended to rebuild. To attempt
7 to get permits and rebuild.

8 Q Did you do an analysis, at the time, of the impacts
9 that that project would have on parking on Sanibel Island,
10 given that people would undoubtedly go to the beach on
11 Sanibel from that location?

12 A I did not. The Sanibel Planning Department did,
13 though.

14 Q Does that show up in the Hearing Examiner opinion?

15 A Um, I don't know. I haven't read this in years.

16 Q Going on again with -- on the page 7 on the
17 right middle block, it talks about no guaranteed access to
18 Island Club's Marina facilities, no dockage for a proposed
19 fishing lodge. Again, is it fair to say that you're assuming
20 that there is no agreement that permits Mr. Scott to use the
21 docks that are located on the parcel to the northeast, as
22 shown on the Master Concept Plan?

23 A No, sir. What I'm assuming is that there has been
24 nothing submitted in the file that demonstrates that he has
25 some sort of agreement for dockage. And there was no

Dave Depew Cross (by Uhle)

1 testimony here that demonstrated to me that there was an
2 agreement for dockage.

3 Q But you don't personally really know. You're just
4 relying on the absence of testimony at this point; is that
5 correct?

6 A That is correct.

7 Q With regard to the -- I don't remember exactly
8 where this fits in your presentation, but your cross-section.

9 THE HEARING EXAMINER: Back on Page 4.

10 MR. DEPEW: Page 4.

11 Q (By Mr. Uhle) What assumption did you make with
12 regard to the height of what I assume is the lodge building
13 over at the left-hand side of the graphic?

14 A I believe it was 35 feet.

15 Q Is that also the general standard for building
16 heights on North Captiva?

17 A I believe it is, yes, sir.

18 Q So if this property were to be developed under the
19 current C-1 zoning, one could build buildings of that height
20 basically anywhere on the property that complied with setback
21 requirements?

22 A Yes, sir.

23 Q So under that particular scenario, the building
24 that you've shown actually could be located much closer to
25 the property line than it's been shown on this particular

Dave Depew Cross (by Uhle)

1 cross-section; is that not true?

2 A That's true.

3 Q I think the last question I have for you is on
4 page 9. It's the bottom right. And I would just like to ask
5 you, when you talk about this being an intrusion into an
6 existing family neighborhood, you would agree this property
7 is already zoned C-1; would you not?

8 A Yes, sir.

9 Q And is that not also the zoning that the Island
10 Club has?

11 A Yes, sir, it is.

12 MR. UHLE: No further questions.

13 THE HEARING EXAMINER: Okay, thank you.

14 Why don't you let me have those two exhibits before
15 I lose track of them. The two exhibits.

16 MR. DEPEW: Oh, yes, sir.

17 THE HEARING EXAMINER: If I don't, I don't get them.

18 MR. DEPEW: This was the Punta Rassa Hotel, and
19 this one, with two pieces, is the Tarpon Lodge.

20 THE HEARING EXAMINER: Thank you.

21 Okay, any --

22 Yes, Mr. Brookes.

23

24

25

Dave Depew Cross (by Brookes)

1 CROSS-EXAMINATION

2 BY MR. BROOKES:

3 Q Mr. Depew, I believe you wanted to explain one of
4 your answers regarding Tarpon Lodge and the ancillary use
5 condition that was attached to that appeal.

6 A Yes, sir.

7 I need that --

8 THE HEARING EXAMINER: I'll clip it all together so
9 I don't lose track of it.

10 A Sorry.

11 Yes, sir. The language that I read, under Mr.
12 Uhle's questioning, said that the restaurant Group III was to
13 be operated in conjunction with the hotel/motel use and not
14 to construe the restaurant as an accessory or ancillary use.
15 That would restrict the size of the restaurant to 10 percent
16 of the total square footage of the project. So, you see, the
17 staff was prepared to apply that to a planned district. And,
18 in this instance, they said we're not, we want to make sure
19 this is something operated in conjunction, not as an
20 ancillary.

21 Whereas, over here in this one today, we have, um,
22 the uses that are ancillary to the hotel/motel. And what I
23 was trying to get at was, again, that there is some rather
24 significant, shall we say, indeterminate language associated
25 with these concepts that is not clear in the Land Development

Dave Depew Cross (by Brookes)

1 Code, and is not clear through some of the history of the
2 utilization of these elements in the Land Development Code in
3 past decisions.

4 Q And if we were to apply that same concept here
5 where the applicant and staff has said this is an ancillary
6 use, then they would be limited to that 10 percent?

7 A Yes, sir. If that logic is followed through like
8 that.

9 Q Is there any conditions in this application or in
10 this staff report that would limit the number of seats for
11 the restaurant and pool bar?

12 A No, sir.

13 MR. BROOKES: No further --

14 Oh.

15 No further questions.

16 THE HEARING EXAMINER: Thank you. Mr. Ciccarone.

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Dave Depew Cross (by Ciccarone)

1 CROSS-EXAMINATION

2 BY MR. CICCARONE:

3 Q Mr. Depew, I think you testified that you've been
4 doing what you've been doing for about 25 years now in Lee
5 County?

6 A Yes, sir. (Laughter). Depressing sometimes when
7 you say it like that but --

8 Q I know the feeling.

9 Approximately how many Lee County zoning cases have
10 you handled, either on behalf of the County or as a request
11 to the County during this 25 years?

12 A Certainly hundreds. Maybe up in to over a
13 thousand. I mean, it's a lot, a lot of cases. I did a -- I
14 base this on an interrogatory a couple years ago. They asked
15 me how many condemnation cases I've been involved in in the
16 last ten years, and it was over 400. So zoning cases are --
17 have got to be a similar number there. I mean, it's a lot of
18 cases.

19 Q Would it be accurate to say, in your opinion, that
20 you have more experience with Lee County zoning cases than
21 any planner currently active in Lee County?

22 A I can't think of another practicing planner in Lee
23 County that has more. I'm not saying there isn't one, but I
24 -- I don't -- I don't recall one off the top of my head
25 that's got more cases that they've done.

Dave Depew

Cross (by Ciccarone)

1 Q In the Lee County zoning cases that you've been
2 involved in, did any of them involve requests for ancillary,
3 accessory or subordinate uses?

4 A Yes, sir, they did. In fact, Tarpon Lodge was just
5 pointed out right here a few moments ago. That had a
6 subordinate use or a conjunctive use, if you will, associated
7 with it.

8 Q Can you quantify that number of cases where that
9 issue was raised?

10 A I can't. But there has been some.

11 Q I mean, are we in the hundreds?

12 A Probably not. Maybe in the -- maybe in the dozen
13 or so. But not -- probably not more than that.

14 Q In these cases, during these 25 years, has the
15 County, to your knowledge, ever attempted to make a
16 distinction among ancillary, accessory and subordinate uses?

17 A I don't recall one. The terms have been used
18 fairly interchangeably. I would say that accessory uses, as
19 applied to single-family, clearly apply to things like pools
20 and garden sheds and whatnot. But when you're talking about
21 larger commercial or industrial developments or, for that
22 matter, even larger residential developments, I have seen the
23 County refer to accessory uses to the activity, ancillary
24 uses to the activity and subordinate uses to the activity
25 fairly interchangeably. It's not been terribly precise.

Dave Depew Cross (by Ciccarone)

1 Q Can you confirm that you sat through Mr. Kelner's
2 cross-examination testimony this morning?

3 A Yes, sir, I can.

4 Q Did you understand the distinction that he was
5 drawing among the definitions of ancillary, accessory and
6 subordinate uses?

7 A No, sir, I did not.

8 Q Regardless of how the definitions are applied, in
9 those cases where you've had to deal with these uses -- and I
10 believe you said the County has tended to treat them as more
11 or less interchangeable and synonymous -- how has the County
12 applied limits on the percentages or amounts of such uses in
13 relation to the principal use within these planned
14 developments where the issue has arisen?

15 A Um, probably can't give you case citations, but I
16 can recall cases, for example, where we have been limited to
17 a certain amount of, for example, retail uses and an
18 industrial classification or an industrial request because
19 the retail is intended to be ancillary to the industrial
20 use. And percentages were actually established in those
21 cases. And so there have been things like that that have
22 occurred to me over time.

23 Q Have there been instances when the County has
24 attempted to or asked you to apply the 10 percent limitation
25 in Section 34-3021 in the case of planned developments?

Dave Depew

Cross (by Ciccarone)

1 A I seem to recall there have been, yes, sir, in
2 various cases. I'm not sure that I'd say there has been one
3 in a hotel/motel situation. I don't recall one of those
4 specifically. But I do recall there have been cases that
5 they have said, you know, "Hey this is what this section
6 says, so we're going to approve 10 percent. If you want more
7 than that we're going to argue with you about it."

8 Q So, if I understand your testimony, am I correct in
9 saying that it has been your experience that, contrary to
10 what position the staff is taking in this case, that in the
11 cases in which you have been involved where planned
12 developments are at issue, the staff has said to you that
13 34-3021 is relevant and needs to be addressed with respect to
14 the cap to be placed on the ancillary uses that are being
15 requested?

16 A Yes, sir.

17 MR. CICCARONE: No further questions.

18 THE HEARING EXAMINER: Any follow-up, Mr. Uhle?

19 MR. UHLE: Yes.

20 Unfortunately, I need my Tarpon Lodge case back.

21 THE HEARING EXAMINER: All right.

22 ///
23 ///
24 ///
25

Dave Depew

Recross (by Uhle)

1 RECROSS-EXAMINATION

2 BY MR. UHLE:

3 Q Dave, can you once again read the language that
4 starts with "This should" --

5 A Yes, sir.

6 Q -- tied to the Restaurant Group III?

7 A "This should not be construed to mean that the
8 restaurant is an accessory or ancillary use that would
9 restrict the size of the restaurant to 10 percent of the
10 total square footage of the project."

11 Q So, in other words, what that condition says is
12 there isn't, in fact, no 10 percent limitation on Tarpon
13 Lodge. Is that not the case?

14 A Yes, sir. That's what it says with regard to
15 Tarpon Lodge.

16 Q So what was the figure?

17 A I don't know. I didn't do the calculation.

18 Q Was it discussed during the hearing?

19 A During the hearing? Not that I recall. No, sir.

20 Q So you weren't troubled by the lack of an objective
21 standard during that particular hearing?

22 A No, sir. Because the issue had been addressed in
23 our earlier discussions with staff and was addressed, in
24 essence, through the project itself as it went through the
25 three phases. When you figured out the square footage of the

Dave Depew

Recross (by Uhle)

1 50 rooms, we were well within the guidelines to demonstrate
2 that that was an ancillary use.

3 Q And what guidelines were those?

4 A Either the 10 percent or whatever other guidelines
5 that we were discussing with the staff. Because there was
6 discussion about whether or not what we were proposing was
7 ancillary. The restaurant and -- was an ancillary use,
8 versus a conjunctive use. You'll note that the verbage in
9 the sentence before that says it's to be operated in
10 conjunction with the hotel/motel use only.

11 Q Absolutely.

12 But with regard to the square footage analysis, was
13 there any comparison of the restaurant square footage to the
14 hotel square footage, either in the overall project or in any
15 of the individual phases, to try to establish a ratio during
16 that hearing?

17 A During the hearing, no, sir, not that I recall.

18 Q Was there before the hearing?

19 A All I can tell you is that my recollection is that
20 we had discussions with staff regarding the size of the
21 restaurant versus the size of the hotel and how they related.

22 Q The bottom line was that there was no 10 percent
23 rule applied to that particular case?

24 A That's correct. There was not.

25 MR. UHLE: No further questions.

Dave Depew

Recross (by Uhle)

1 THE HEARING EXAMINER: Any other follow-up?

2 Yes, Miss Henry.

3 MS. HENRY: I don't know if Mr. Kelner may have any
4 questions. I don't know if he's --

5 MR. KELNER: No.

6 THE HEARING EXAMINER: Okay, thank you.

7 MR. KELNER: I'm sorry, I got some question, sir.

8 THE HEARING EXAMINER: I --

9 MR. KELNER: I thought you were referring to that
10 just last statement.

11 THE HEARING EXAMINER: No, just in general.

12 Give your name for the record.

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BY MR. KELNER:

Q Bryan Kelner, for the record.

On page 3, at the top, we show compatibility. And it says proposed --

THE HEARING EXAMINER: Page 3 of what?

MR. KELNER: Of the presentation.

MR. DEPEW: Of the PowerPoint slides?

Q (By Mr. Kelner) It talks about the proposed Master Concept Plan removes virtually all vegetation from the site. In the photo in the frame it says "View from property south of subject". And I would assume that's the subject property you're referring to?

A Yes, sir. That picture was taken from the second floor balcony of the Powell residence, directly south of the subject.

Q Is that vegetation in that photograph on the subject property?

A Yes, sir, it is.

Q If I look at the property line there on the show, it seems that this area right in here, the road moves to one side and this is the right of way. And when I look at this picture here, that vegetation appears to be right to the right-of-way, so --

A Yes, sir. What you're -- what you're missing, I

Dave Depew

Cross (by Kelner)

1 think, is if you --

2 And this is hard to see here. But if you look,
3 this vegetation is overhanging. That's the road
4 right-of-way. But there is an area underneath the vegetation
5 that's overhanging that goes back up in there a few feet.
6 And so, depending on where you're looking, the trees -- I
7 mean, you can see the two cabbage palms. You see this
8 cabbage palm here. Which I believe is that cabbage palm. I
9 think that's a cabbage palm.

10 I'll go over there and just check.

11 That's a sea grape. I'm sorry. And there is a
12 ficus. I don't see the ficus. But there is a cabbage palm
13 along in here somewhere. That's a large ficus.

14 At any rate, you can see that the road is there.
15 And then there's a grass area kind of before the vegetation
16 starts back up along in here. So what you're seeing is this
17 outside edge right along this edge of the property.

18 Q The -- I was looking at that because it is a bit
19 confusing, because I can see this outline of the road here
20 showing where the road is. So when I look at the edge of the
21 road in the picture there, it appears that that vegetation
22 would be all in this area in here, very close to the road.

23 Um, also you mentioned in your presentation that
24 the applicant could build a five-unit motel/hotel under the
25 present conditions of the C-1 zoning?

Dave Depew Cross (by Kelner)

1 A Yes, sir. What I was referring to is that he could
2 get five lodging rooms out there. He could do it as a
3 boarding house or some other mechanism that it could operate
4 in the sense of a hotel/motel.

5 Q But he couldn't build a motel/hotel?

6 A And call it a motel/hotel? No, sir, I believe he's
7 restricted from doing that.

8 MR. KELNER: That's the questions I have.

9 THE HEARING EXAMINER: Okay, thank you.

10 Any follow-up?

11 Okay, thank you, Mr. Depew.

12 MR. DEPEW: Thank you.

13 THE HEARING EXAMINER: Anyone else want to speak?

14 Or anyone else have a presentation they want to make?

15 Yes, ma'am. You want to come back up.

16 Okay, sure.

17 MR. CICCARONE: Did he fill out the necessary slip?

18 MR. MELVIN: I filled out a slip during the last
19 meeting. And the meeting ran long and we had to leave.

20 THE HEARING EXAMINER: Okay, have I sworn you in?

21 MR. MELVIN: Okay.

22 THE HEARING EXAMINER: No, have I sworn you in?

23 MR. MELVIN: No, you have not.

24 THE HEARING EXAMINER: Let me ask you to raise your
25 right hand, please.

Mick Melvin Statement

1 Do you solemnly swear or affirm the testimony
2 you're about to give in this matter is the truth, the whole
3 truth and nothing but the truth?

4 MR. MELVIN: I do.

5

6 Thereupon,

7 MICK MELVIN,
8 after being first duly sworn, was examined and
9 testified as follows:

10

11 THE HEARING EXAMINER: Please give your name and
12 address.

13 MR. MELVIN: My name is Mick Melvin. And the
14 address is 603 Bokeelia, Florida. Because we do not have a
15 post office box on the island.

16 I'm from Indiana, also.

17 Here with my wife, Betsy. We flew down yesterday
18 just to make this presentation.

19 We have three homes on the island -- two homes and
20 my son has one. And it's kind of important to show you where
21 these homes are. We've been here since 1979, and we are
22 residents for the past 20 years.

23 If I could show you where these homes are --

24 THE HEARING EXAMINER: Certainly.

25 MR. MELVIN: -- it does have a bearing on what I

Mick Melvin Statement

1 want to say.

2 Our home is here. We have another house that we
3 rent that's here. And my son has a house that's here. And
4 we have some friends on this side and this side of the
5 island.

6 This is good fishing area, so that's primarily
7 where I'm heading.

8 MR. CICCARONE: Could we let the record reflect the
9 fact that he's identifying the extreme, I guess, northern tip
10 of the island, in his testimony?

11 THE HEARING EXAMINER: That's fine. Thank you.

12 MR. CICCARONE: Thank you.

13 MR. MELVIN: We're -- Betsy and I are pretty much
14 non-political. We don't get involved in things so much. We
15 pretty much stay on the north part of the island.

16 We are quite concerned about this because it does
17 involve fishermen, we feel, more than anything else. We feel
18 that these -- the island is pretty much family-oriented. And
19 it's pretty serene and things have gone along well.

20 We're worried about the fishing cabins not having
21 any cooking facilities. So you're not -- you're not
22 attracting to families, families coming out. It's going to
23 be a lot of stag fishermen, a lot of men.

24 And beach access has been a problem on our island
25 for years. In fact, I've made 40 signs, had them made and

Mick Melvin Statement

1 brought them down. "No beach access." What we feel will
2 happen, these fishermen -- and whether there's beach access
3 on the airstrip or not, I don't know. I don't really think
4 there is. I think there is one beach access to the
5 southwest.

6 Instead of walking around this beach, by the
7 airport, up to the tip, they'll drive their golf carts right
8 up to our property, park right behind our house. Those
9 houses are close to the road. The road's about six feet
10 wide, just wide enough for a fire truck to get through, so
11 you have to get off the road. They're going to park there,
12 they're going to walk underneath our houses, and they're
13 going to walk out on the beach with their coolers and chairs
14 and pole holders and so forth, and park on the beach in front
15 of the houses.

16 And the worst part is at 1:00, 2:00 in the morning
17 they're going to be problems. And those are things that I
18 wouldn't wish on my worst enemy. But a renter may call me at
19 1:30 and say, "I can't sleep. My kids can't sleep."
20 Sometimes the women come down first, the men come on
21 weekends. So they're frightened when these people are
22 underneath the house. And they do pull off the road and they
23 do park right behind our house.

24 And we have this also from renters who rent homes.
25 And but they'll spend 1500 to 2,000 a week. These people are

Mick Melvin Statement

1 going to be spending \$80 a day, or whatever, and have a few
2 beers. And you go down there at 1:30 in the morning, you're
3 taking your life in your hands. I mean, that's -- that not
4 fun.

5 We have a -- we've had some problems in the past.
6 My neighbor's from Germany, has about 20 lots, and he's given
7 me power of attorney over his property and his dock and his
8 parking area because they use that a lot. Um, there'll
9 probably be more of that in that area up there.

10 We've also had people -- we've had up to 19 people
11 on his dock, that we had to go over and talk to and escort
12 off the dock or ask them to leave. Sometimes that gets kind
13 of hairy.

14 And we had a neighbor, on our right, where we had
15 16 people, including a sheriff, and they were up 'til about
16 3:00 in the morning butchering a shark. We went to the back
17 bedroom, couldn't sleep there. So I called the owner and she
18 set that straight right away. But she's since passed on.

19 So those are our problems. These people that come
20 out are going to have no vested interest for the island.
21 It's -- and they're going to just keep coming. They're going
22 to just keep coming. And the beach access is a major, major
23 problem.

24 I think this pretty much sums up my feelings. We
25 are concerned. We did send a signed statement with about 60

Mick Melvin Statement

1 names of people protesting.

2 Just a short -- hurricane evacuation and pollution
3 from septic overage are major concerns. But our primary
4 concern is the threat of increased violent trespassing by
5 fishermen, since the proposed project will be a fishing camp,
6 not a family vacation spot.

7 I sent copies of this.

8 THE HEARING EXAMINER: I have a copy of that.

9 Thank you.

10 MR. MELVIN: Okay.

11 Also, to go along with this, um, there's some
12 property -- the property that's listed up here and the docks,
13 I understand the last meeting Grady -- it was said that Grady
14 had eight docks. I don't know if he has eight or six. I
15 have two of those docks. And I also have a 20-foot
16 easement.

17 If I can show you that on the chart?

18 THE HEARING EXAMINER: Sure.

19 MR. BROOKES: Could we ask him to mark which docks
20 are his so later, for appellate purposes, we'll have that?
21 Or if there's some way to designate which --

22 MR. MELVIN: They're on the south side of the
23 property. It's this dock right here, and both sides of that
24 (indicating).

25 MR. BROOKES: For the court reporter, if you could

Mick Melvin Statement

1 describe a little more. It's not --

2 THE HEARING EXAMINER: I think we're pretty clear,
3 it's the south side on the property that's on the Master
4 Concept Plan.

5 MR. MELVIN: Yeah.

6 THE HEARING EXAMINER: There's only one on the
7 south side.

8 MR. MELVIN: Yeah, this is north. This is south.
9 It's this dock right here.

10 MR. BROOKES: Okay, it's the property that's shown
11 on the site plan, but not within the property description of
12 the application?

13 MR. MELVIN: Okay, that could be.

14 MR. BROOKES: It's the south side dock.

15 MR. MELVIN: But there's --

16 Now, we have a 20-foot easement along here all the
17 way back to the road. So I just want to make that clear.

18 Mr. Jenkins, who testified at the last meeting, was
19 concerned about his area here and the fact that people might
20 come in there and park. And we haven't given anybody
21 permission to park there. That's strictly private property.

22 MR. BROOKES: When you say park there, you mean --

23 THE HEARING EXAMINER: Let him testify and then you
24 can ask him questions, please. We're getting too disruptive
25 here.

Mick Melvin Statement

1 MR. BROOKES: I'm sorry.

2 MR. MELVIN: Bring their boats -- bring their boats
3 in when nobody is there.

4 Or, you know, we spend six months in Florida.
5 We're Florida residents, um, pay taxes. Um, and then six
6 months in Indiana. So sometimes they know when you're not
7 here and they'll go ahead and use your dock.

8 And we have one boat anchored in one of those, but
9 I don't know if you can get under it or not. But it's a
10 small 16-foot boat.

11 So, I had a just received a card from June Hewitt,
12 who is a very good island person, been there 20 years. Her
13 husband's been dead for about 12 years. And she uses the
14 house for rent to kind of carry her on. She has a lot of
15 renters from Scotland that come over and they rent like three
16 times a year. And she says, "I hate the project," in a
17 note.

18 It's -- it's of concern to the people on the north
19 side because it seems to be an ever-increasing problem. And
20 you face some people and finally they leave, and hopefully
21 they won't come back there. But, with this, there is going
22 to be people all the time more and more. And maybe that's
23 life, but that's my story.

24 THE HEARING EXAMINER: Thank you.

25 Mr. Brookes, did you have any questions for him?

Mick Melvin Cross (by Brookes)

1 MR. BROOKES: Yes, a couple questions.

2

3

CROSS-EXAMINATION

4

BY MR. BROOKES:

5

Q Is your easement shown on that site plan that was
6 submitted with the application?

7

A No.

8

Q And did the applicant ever ask you for permission
9 to use your easement to go from the boat docks to their
10 property?

11

A No.

12

Q And did they ask you for permission to depict their
13 docks on their site plan?

14

A Pardon?

15

Q Did they ask your permission to show your docks on
16 their site plan --

17

A No. No.

18

Q -- as boating access?

19

A No. I have a --

20

Q And do you object to that?

21

A I object to that.

22

Q Okay.

23

A I have a warranty deed here, if you like. It's got
24 the -- it says that I own the docks and that I have an
25 easement.

Mick Melvin Cross (by Brookes)

1 THE HEARING EXAMINER: Fine. If you want to submit
2 that, I'll take a copy of that and mark that as Melvin
3 Exhibit No. 1.

4 Thank you, sir.

5 And I'll make a copy of this.

6 MR. UHLE: I would very much like to see this.

7 MR. CICCARONE: I would, too.

8 THE HEARING EXAMINER: Okay. I'll let you.

9 Let me mark it, then I'll leave it for everyone to
10 see. And I'll make copies of it.

11 Mr. Brookes, any other questions?

12 MR. BROOKES: No, sir.

13 THE HEARING EXAMINER: Mr. Brookes, any other
14 questions?

15 Any questions, Mr. Uhle?

16 MR. SCOTT: You're --

17 THE HEARING EXAMINER: Okay, wait. You're not --
18 you have an attorney here asking questions for you. If you
19 want to ask questions, ask them through him, please.

20 MR. CICCARONE: I'm just looking for the --

21 THE HEARING EXAMINER: I'm going to mark it first.

22 MR. UHLE: Not at the moment.

23 MR. CICCARONE: Hang on just for a second. We
24 don't know if we have questions until we see it.

25 THE HEARING EXAMINER: I just want to mark this so

Mick Melvin Cross (by Ciccarone)

1 I don't lose track of it.

2 He was showing the second page basically. I think
3 that has the substantive information on it.

4 MR. CICCARONE: Okay.

5 MR. UHLE: At some point I'm going to need a break
6 to review that and discuss it with my client.

7 THE HEARING EXAMINER: Certainly.

8 MR. CICCARONE: If I may, Mr. Hearing Examiner?

9

10 CROSS-EXAMINATION

11 BY MR. CICCARONE:

12 Q Mr. Melvin, it's not clear to me how title is held
13 to these docks and how people acquire rights in them. Do you
14 know the answer to that question?

15 A That was written into the warranty deed -- warranty
16 deed, as we presented here. This was not included in the
17 sale. And I purchased the property from Mr. Bartholomew, who
18 used to own this entire piece of property.

19 Q (By Mr. Ciccarone) Again, the piece of property
20 that you're talking about that you purchased is --

21 A Is KW. It's lot KW. It's this piece of property
22 here (indicating).

23 Q So --

24 MR. BROOKES: Could the record reflect that he's
25 circling the entire parcel that has the docks attached to it?

Mick Melvin Cross (by Ciccarone)

1 Q (By Mr. Ciccarone) That's my question. If I
2 understand what you've just circled, you've identified the
3 property that, on the site plan, sort of looks like a
4 parallelogram. What would you call that? Not a
5 parallelogram.

6 MR. KELNER: Trapezoid.

7 Q (By Mr. Ciccarone) -- trapezoid that's contiguous
8 to the northeast corner of the subject property; is that
9 correct?

10 A Yes.

11 Q All right, and it's your testimony that you own
12 that?

13 A It's my testimony that I own those two docks and
14 that I have an easement.

15 Q To get to your two docks over that property; is
16 that what you're saying?

17 A Right.

18 Q You have an easement to get --

19 A To get to the dock.

20 Q All right.

21 THE HEARING EXAMINER: Okay, you're saying you at
22 one time owned the entire property, but --

23 MR. MELVIN: Right.

24 THE HEARING EXAMINER: -- but now you only own the
25 southern portion and the easement?

Mick Melvin Cross (by Ciccarone)

1 MR. MELVIN: Right.

2 THE HEARING EXAMINER: You sold off the other
3 portions?

4 MR. MELVIN: Sold it to Grady.

5 THE HEARING EXAMINER: Okay.

6 MR. MELVIN: Yes.

7 MR. CICCARONE: Well, if I might, Mr. Hearing
8 Examiner, I think all the attorneys need to study this --

9 THE HEARING EXAMINER: Okay, why don't we take a
10 break. I'll make copies of it for everyone, and then we'll
11 come back and we can do that.

12 MR. CICCARONE: Okay.

13 THE HEARING EXAMINER: We'll go off the record for
14 10 minutes.

15 MR. CICCARONE: And if you could just stay a little
16 bit so we can ask you about this. This is something we
17 haven't seen before, and we're trying to understand it.

18

19 (Whereupon a recess was taken from 2:37 to 2:49 p.m.)

20

21 THE HEARING EXAMINER: All right, we're back on the
22 record.

23 Mr. Ciccarone?

24 MR. CICCARONE: Mr. Hearing Examiner, while you
25 were out, the attorneys and this particular witness had a

Re Dock

1 conversation trying to figure out, basically, how dock rights
2 work here. And let me summarize what I think we all agree
3 on. And if anybody disagrees they can say so. I'm just
4 trying to speed this up.

5 I think the understanding is that the witness owns
6 the southern-most dock in that trapezoidal area. He has the
7 slips on both sides of it.

8 He has a 20-foot, non-exclusive access easement
9 across the trapazoidal area so he can get from his dock to
10 the Island Club. And I think that's what these documents
11 reflect.

12 And I understand that Mr. Uhle will introduce to
13 you a document that purports to give the applicant the use of
14 eight of these slips in the same area, and establishes the
15 applicant's fee interest in the trapezoidal area.

16 And the reason we're having this discussion is
17 we've been trying to figure out what the applicant's rights
18 are to get to the docks. And this probably is the easiest
19 way to do it. And then I would just leave it up to Mr. Uhle
20 to expand upon that.

21 I would have no questions of this witness then.

22 THE HEARING EXAMINER: Okay.

23 Do you have any questions of this witness?

24 MR. UHLE: No, I don't have any questions.

25 THE HEARING EXAMINER: Sir, unless you want to add

Re Dock

1 anything else?

2 MR. MELVIN: No.

3 THE HEARING EXAMINER: Thank you, very much.

4 MR. UHLE: And in order just to address this issue
5 now, I was kind of holding it back anticipating this by
6 asking questions about whether there was an agreement or
7 not. Well, there is an agreement, and here it is.

8 THE HEARING EXAMINER: All right, thank you.

9 And if I'm correct, this should be Applicant's
10 Exhibit No. 16, I think. Again, if I've numbered them
11 improperly, I'll correct the numbers when I go through the
12 proper file.

13 Are there any -- anything else?

14 MR. BROOKES: Your Honor --

15 THE HEARING EXAMINER: Mr. Brookes?

16 MR. BROOKES: -- it makes it a little bit difficult
17 if Mr. Uhle is introducing the agreement. And I wanted to
18 ask questions about the agreement, but lawyers can't
19 testify. So perhaps this is more appropriately introduced
20 through the use of the applicant or the witness, Mr. Grady,
21 to introduce the agreement.

22 THE HEARING EXAMINER: Unless -- It's up to the
23 applicant if he wants to put his witness forward. If not, I
24 can't compel him to testify. So if you want to ask
25 questions, you can either bring them up in -- as part of the

Re Dock

1 presentation, part of the closing argument --

2 MR. BROOKES: Okay.

3 THE HEARING EXAMINER: -- whatever you want to do.

4 MR. CICCARONE: Wouldn't we ordinarily do that when
5 Mr. Uhle puts his rebuttal on? I think we sort of jumped the
6 gun by questioning one of the witnesses. But I believe Mr.
7 Uhle has rebuttal opportunities, and that might be the best
8 time to explain this document and cross-examine with respect
9 to it. I'll certainly have no objection to waiting until
10 then.

11 THE HEARING EXAMINER: Okay, thank you.

12 Miss Henry.

13 MS. HENRY: Just one point, Mr. Hearing Examiner.
14 Before the break, I spoke with Mr. Uhle --

15 THE HEARING EXAMINER: Tell us who you are
16 on the record, please.

17 MS. HENRY: I'm sorry. I'm Joan Henry, Assistant
18 County Attorney.

19 With respect to that trapezoidal area, its border,
20 the boundary's shown with the dark line. And for purposes of
21 not giving the impression that it's included in the request
22 for rezoning, I would ask that a condition be included in
23 your recommendation that would state that the final Master
24 Concept Plan will change that line for the trapezoidal area
25 to lighten it, just so it doesn't, again, give the appearance

Re Dock

1 of being a part of the subject property. I discussed that
2 with the applicant, I don't think he has an objection to it.

3 THE HEARING EXAMINER: Okay, thank you.

4 MR. UHLE: Now, I think, whether we do it through a
5 note or different colored lines or whatever isn't important.
6 But given the history of the case it would be useful to call
7 it out and indicate that it's not part of the legal
8 description.

9 THE HEARING EXAMINER: Okay. Thank you.

10 Mr. Brookes?

11 MR. BROOKES: Your Honor, if it's not part of the
12 application, then those docks can be sold to someone else,
13 and the hotel -- or the hotel could be sold to someone else,
14 and the two would be split apart. Right now they're saying
15 it doesn't make any difference because Mr. Grady owns the
16 hotel and he owns some of those dock slips. But,
17 theoretically, if they're not part of the application, or
18 tied together in some way, they can't be counted on for
19 continued access for the hotel if it's sold to someone else.

20 THE HEARING EXAMINER: I understand that. But, in
21 effect, they never were part of the application. So how we
22 designate that --

23 I understand --

24 MR. BROOKES: Exactly.

25 THE HEARING EXAMINER: -- your objection. What I'm

Re Dock

1 saying, we're just talking about how they're going to
2 designate it on the Master Concept Plan, rather than its
3 impact, its effect. Its legal effect.

4 MR. BROOKES: Okay.

5 THE HEARING EXAMINER: Yes. Anyone else like to
6 speak?

7 And what I would like to do is, anyone who has not
8 spoken, have them go first.

9 And anyone who has spoken, please confine yourself
10 to today's hearing rather than going back and rehashing what
11 we've already gone over.

12 Miss Bakhtian. If you would like to, certainly.

13 ///

14 ///

15 ///

16

17

18

19

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21

22

23

24

25

Mitra Bakhtian Statement

1 Thereupon,

2 MITRA BAKHTIAN,

3 having previously been sworn, gave the following

4 testimony:

5

6 MS. BAKHTIAN: Mitra Bakhtian.

7 THE HEARING EXAMINER: Why don't you come up here
8 to the microphone, please.

9 And, for the record, you were sworn at the last
10 hearing, or the one before that, so you are sworn.

11 And give your name and address in the record one
12 more time, please.

13 MS. BAKHTIAN: Mitra Bakhtian. Fort Myers,
14 Florida.

15 THE COURT REPORTER: Could you spell your last
16 name, please.

17 MS. BAKHTIAN: B-a-k-h-t-i-a-n.

18 THE COURT REPORTER: Thank you.

19 THE HEARING EXAMINER: I'll give you a list when
20 we're finished.

21 THE COURT REPORTER: All right. Thank you.

22 MS. BAKHTIAN: I guess the biggest issue that I'm
23 having a problem with is that this is a private island and
24 there is a lot of little parts and pieces coming up about
25 trespassing and accesses, as we're hearing, for the dock and

Mitra Bakhtian Statement

1 so forth.

2 One of the impressions we got with Mr. Uhle,
3 speaking about evacuation to do with the airstrip and the
4 taxi service or the boats that would take you out of there,
5 uh, I almost feel that's a wrong impression that we're
6 getting that there is going to be adequate protective
7 services to remove the residents from the island. That
8 airstrip, um, at the most - I don't know, I could be wrong -
9 I've seen seven to 10 private small planes there. And
10 probably, usually, one to three out there. So I wouldn't
11 consider that a viable evacuation route.

12 And also, to do with the taxi services, there were
13 two companies, one of which is no longer operating. And the
14 other one, Island Girl Charters, is over-tasked right now and
15 trying to accommodate as many residents and visitors to the
16 island. And as one of the visitors here today was
17 indicating, he almost -- he and his family almost did not get
18 on because -- even during this low season they cannot - most
19 of the time they probably could - but there are times that
20 they just cannot accommodate the people coming to this island.

21 Um, the other issue would be the beach access.
22 Although it kind of seems like there's plenty of points that
23 you could get onto the beaches, if you look at the platting,
24 you recognize that all the lots literally run into the water,
25 to the edge of the water. So if you are walking on the

Mitra Bakhtian Statement

1 beaches, and your feet are not wet, you're considered
2 trespassing at that time. The beaches are private.

3 And having only one designated beach access, which
4 has been referred to at the southern-most, western point by
5 the Eisner's home - who have also submitted an objection to
6 this - as it is, with the island not even half developed yet,
7 they are experiencing problems of parked carts there that are
8 coming onto their property rather than the small area that's
9 designated for parking. It's gotten to the point that some
10 of the people had requested of the State Department of
11 Beaches, the Fill Flood (phonetic), I believe, to consider
12 taking two other state lands and converting those to beach
13 access. And as of a couple of weeks ago, we received a fax
14 refusing that. So the State will not accommodate any more
15 beach accesses on this island. And still it stands that
16 there is that one and there is that much problems there. And
17 you have received a letter from the Eisner's indicating this.

18 I would say that the -- basically, that takes care
19 of the private side. But the problems stand, I think, that
20 there's decisions being made for the residents of this island
21 and they're not being supported by the County or the State.
22 There are some assurances that have been given to us through
23 the Lee Plan. And, basically, I think the islanders are
24 being burdened with the irresponsible not carrying forward of
25 some of these enforcements of what's being approved, you

Mitra Bakhtian Statement

1 know, for our neighborhoods.

2 Basically, Chapter 7 of the Lee Plan, which is the
3 Conservation and Coastal Management, it talks about
4 evacuation and shelter. And that Policy 7924, on-site
5 shelters for the general public must not be built on barrier
6 or coastal islands. So we have to have something provided
7 for us, whether it's service to get us off the island or some
8 solution.

9 And the "County will assess the impact of all new
10 residential development upon the projected hurricane
11 evacuation network and upon projected hurricane evacuation
12 times, and will require mitigation either through structural
13 provisions or through nonstructural methods or techniques."

14 Um, as far as protection of life and property in
15 the coastal high-hazard areas, this is Goal 75, it's to
16 protect human life and develop property from natural
17 disasters.

18 And Policy No. 1.2. "Rezoning that allow higher
19 densities will not be permitted on barrier and coastal
20 islands if the capacity of critical evacuation routes would
21 thereby be exceeded."

22 Another objection would be that, given these
23 following policies and goals, higher densities on this
24 barrier island are incompatible with the Lee Plan. Allowing
25 additional development or rezoning to higher densities will

Mitra Bakhtian Statement

1 alter and disrupt the already taxed functions of our system
2 in and around our environmentally-sensitive land. With 300
3 more lots still to be developed, additional impervious
4 services and removal and clearing of the natural vegetation
5 and understory will impact already problematic flooding on
6 this major access road.

7 Policy 77.2.8, which is of Goal 77, which is a
8 resource protection, states that, "Promote the long-term
9 maintenance of natural systems through such instruments as
10 conservation easements, transfer of development rights,
11 restrictive zoning and public acquisition."

12 Another objection is that a vital part of our
13 quality of life is our water source. There is already salt
14 water intrusion in our aquifer. Protection of intensified
15 water consumption demands and studies need to insure that our
16 water quality is maintained or improved for the protection of
17 the environment and people.

18 Objective 85.1 states that they should maintain
19 high water quality, "...meeting or exceeding State and
20 federal water quality standards."

21 And Policy 1.2 states that, "New development and
22 additions to existing development must not degrade surface
23 and ground water quality."

24 Goal 87, which has to do with water resources,
25 states that, "The County will continue to support a

Mitra Bakhtian Statement

1 monitoring program of existing baseline conditions of water
2 resources."

3 And another objection is lack of promised services
4 or enforcement of critical codes and regulations has already
5 left many manatees injured or dead in our bay and in the
6 sound where these protected species come for refuge.
7 Permitting this lodge would invite additional daily visitors;
8 nightly motel accommodations, rather than the three-day
9 minimum stay rentals. These specific visitors would be
10 coming and going in their individual watercrafts daily rather
11 than using the mass transport provided by the taxi boats that
12 are economically feasible for longer stays and will
13 expotentially impact this critical wildlife habitat.

14 Goal 77, Policy 7.5 states that the construction
15 and expansion of the docking facilities and boat ramps will
16 be encouraged in locations where there is quick access to
17 deep open waters where the associated increase in boat
18 traffic will be outside areas of high manatee concentration.

19 And Policy 7.7 says that the County will continue
20 to provide a permanent funding source to assist in the
21 enforcement of vessel regulations for manatee protection.

22 Objective 83(1) states that coastal planning areas,
23 in general, will manage the coastal planning area to provide
24 a balance among conservation of resources, public safety
25 capabilities, and development. And that all development with

Mitra Bakhtian Statement

1 the coast -- within the coastal planning area must be
2 compatible with protection of natural systems.

3 One of the other objections is how -- regarding the
4 present anticipated marina boat slip usage, and a necessary
5 and critical part of the success of this lodge will be the
6 water access and docking capabilities provided for these
7 additional visitors. As attested by the taxi boat captains,
8 the marine grass beds are already being destroyed by boaters
9 not knowledgeable or adherent to the rules of markers in our
10 channels. Through the following goals and policies, we are
11 given assurances which should prevent such impacts to our
12 fragile harbor and its ecosystem. Navigational markers need
13 to be enhanced, and water access through some of these areas
14 should be encouraged by the State.

15 And the last thing is that -- that as expected, in
16 the Grady's Lodge case, if this rezoning application is
17 approved, there will follow other rezoning requests for
18 parcels that would seem to be better qualified to be changed
19 for this type of business, with dock spaces already
20 approved. At least one supportive participant of this
21 application has capabilities to do so, and most likely will
22 pursue further intense development through another rezoning
23 request and do it again, with little regard shown for
24 protecting this microenvironment.

25 Again, the residents of this island will be

Mitra Bakhtian Statement

1 burdened with the outcome of these bad decisions. It is
2 urged that this rezoning request be denied.

3 Furthermore, that all future requests of variances
4 and changes to the Comprehensive Land Use plans for this
5 island be brought to the neighborhood level and be subject to
6 review and approval by the citizens of this island.

7 Thank you.

8 THE HEARING EXAMINER: Okay, welcome.

9 Any questions?

10 Thank you, ma'am.

11 Anyone else like to speak?

12 This is your last chance because we go back now
13 -- we're going to go back to the applicant and the staff and
14 I will not be going back to the public. So this your last
15 chance.

16 MR. BROOKES: Will attorneys have an opportunity
17 for closing argument later? Or shall we --

18 THE HEARING EXAMINER: You'll have a chance for
19 closing argument. And if there is any rebuttal witnesses,
20 you'll have a chance to question the rebuttal witnesses.

21 Okay, Mr. Uhle?

22 MR. UHLE: Yeah, just a couple quick rebuttal
23 witnesses.

24 Mr. Scott.

25 MR. SCOTT: Grady Scott, applicant.

Mitra Bakhtian Statement

1 THE HEARING EXAMINER: Have you been sworn? Did I
2 swear you in?

3 MR. SCOTT: Probably have. I'm not sure.

4 THE HEARING EXAMINER: Let me do it again then.

5 Do you solemnly swear or affirm the testimony
6 you're about to give in this matter is the truth, the whole
7 truth, and nothing but the truth?

8 MR. SCOTT: Absolutely.

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Graydon Scott Direct (by Uhle)

1 Thereupon,

2 GRAYDON W. SCOTT,

3 after being first duly sworn, was examined and

4 testified as follows:

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6 THE HEARING EXAMINER: Okay, please state your name
7 for the record.

8 MR. SCOTT: Graydon W. Scott.

9 THE HEARING EXAMINER: Thank you.

10

11 DIRECT EXAMINATION

12 BY MR. UHLE:

13 Q Grady, is the water taxi the only way to get to the
14 island?

15 A Water taxi; aircraft, as mentioned earlier; um,
16 private boat, pretty much.

17 Q And --

18 A Canoes, kayaks. I mean, we got kayakers coming in
19 all the time.

20 Q In the event of the need for evacuation, how do you
21 anticipate evacuation would be handled?

22 A Well, I put together a pretty nice master Plan on
23 the whole thing that I showed you on that. And I'll probably
24 have a contract, which I've mentioned, with Upper Captiva
25 Charters. And I'm not really -- I'm not locking into a

Graydon Scott Direct (by Uhle)

1 contract with any one company at this point because there is
2 several people out there able to do this.

3 But Charlie mentioned to me that he'd be more than
4 happy to do it where I would have the first -- an actual
5 captain that is assigned.

6 And if you look at my hurricane evacuation plan, I
7 have like a commander in there. You know, there is a main
8 command person. And he would be on contract to be there to
9 coordinate the whole thing and to take the people out, if you
10 look into that Evacuation Plan. Except the contract has not
11 been signed with any of these companies yet because there are
12 quite a few different people in it.

13 Also the evacuation route. I'm based on Captiva
14 personally; my office is at McCarthy's Marina. I'm right
15 next to Jensen's Marina. I'm based on Captiva.

16 When I was running Grady's Restaurant up there, I
17 had slips and all on Pineland and all and facilities over
18 there. I probably will be doing quite a bit of stuff that
19 direction. But Captiva has not been mentioned in here
20 whatsoever. And it's another point that you do leave the
21 island from. And that has a complete Evacuation Plan in
22 effect out there. And it's even easier to get off from
23 that. And you also can go to other areas like Punta Rassa by
24 taxi boat. I mean, there is a lot of different options of
25 leaving that island besides going to Pineland Marina or

Graydon Scott Direct (by Uhle)

1 Bokeelia.

2 So, again, you look in that plan there, it's a
3 pretty good in-depth hurricane plan. I have shutting down
4 the store; have the Command Center post; how you set the
5 actual operation post. It has everything in there. There'll
6 be pamphlets given to all the people. You know, when they
7 check in, there'll be hurricane awareness pamphlets as well
8 as I would have for the State Park.

9 And but Mick Melvin and these people concerned
10 about my people up under the houses and all, my lodge will
11 have an on-site manager. There will not be people running
12 around at nighttime and all. Like there is a lot of problems
13 with the unsupervised rentals on the island. And these are
14 pretty much all the concerns that these people are pointing
15 at. There is no -- there is nobody supervising the rentals
16 of people in the houses up there.

17 This is a lodge. How many times in a lodge do you
18 go in and you just start raising cane? You get thrown out of
19 a lodge. Okay? You do.

20 And I've even talked to the Lee County Sheriff's
21 Department, Richard Durling (phonetic) was in here, his
22 brother Mark Durling is affiliated with him and all. And
23 I've offered a spot for the Sheriff in there and they're more
24 than happy to take it. And so is even Kenzie's offered, over
25 at Barnacle Phil's, to where they can have a phone jack and

Graydon Scott Direct (by Uhle)

1 everything else. And I'm making this available because Mr.
2 Powell has concerns about everything else going on there.
3 And I have said that at the Civic Association meeting. So
4 anytime Sheriff Herb -- and I mentioned to Jim Merk, too, he
5 goes out there. He's within 15 minutes by phone to that
6 island. Any time you call Jim Merk, he's there within 15
7 minutes. Now, that's pretty good response time.

8 As far as any other problems up there, I really
9 haven't seen that many.

10 Uh, I hate to hear that Mick's terrified to go out
11 on the end of his dock on the north end, because I've never
12 really seen a problem like that myself. And --

13 THE HEARING EXAMINER: I think you're getting a bit
14 far afield from the question that was asked.

15 A Well, I just wanted to bring some of this up
16 because I think I can clarify some of these other concerns.

17 But my lodge will have management in it. There
18 will be an on-site person coordinating hurricane evacuation.
19 They'll be contracts with either McCarthy's Marina. We have
20 a 48-foot boat down there, the Shell Seeker, which is capable
21 of taking all of my people plus other people off the island.

22 And this stuff is all -- no one is even mentioned,
23 like I said, I'm based out of Captiva. These people are
24 going in and out of -- they're catching ferry boats back and
25 forth to Pineland. So we're in two different islands all

James Strothers

Direct (by Uhle)

1 together.

2 MR. UHLE: No further questions.

3 THE HEARING EXAMINER: Okay, thank you.

4 MR. UHLE: Mr. Strothers.

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James Strothers Direct (by Uhle)

1 Thereupon,

2 JAMES H. STROTHERS,

3 having been previously sworn, was examined and

4 testified further as follows:

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6 DIRECT EXAMINATION

7 BY MR. UHLE:

8 Q Mr. Strothers, do you have with you --

9 THE HEARING EXAMINER: Give your name for the
10 record again, please.

11 MR. STROTHERS: James H. Strothers.

12 THE HEARING EXAMINER: Thank you.

13 Q (By Mr. Uhle) Do you have a copy of the waste
14 water treatment system analysis that you provided the Hearing
15 Examiner at the previous hearing?

16 A Yes.

17 Q Um, just a few questions on that.

18 On the page that's identified as Projected Sewage
19 Flow, do you have that?

20 A Yes, I do.

21 Q Under the main lodge building, do you have any
22 additional information as to whether the main lodge building
23 would be required to provide bathrooms over and above what's
24 suggested under food operation?

25 A Uh, yes. I spoke to the Health Department

James Strothers Direct (by Uhle)

1 concerning this, and what they indicated to me -- and when I
2 raised a question: Does the food operation take into account
3 bathrooms? And they said, yes, that would include the
4 bathroom facilities. So, essentially, what we have projected
5 here, within the main lodge building, of three bathrooms,
6 those flow rates have already been accounted for in the food
7 operation. So, you might say I've been overly conservative
8 by throwing that 600 gallons per day in there because it's
9 already taken into account in another operation.

10 Q Okay. Looking at the page identified as
11 "Authorized Sewage Flow." Do you have that?

12 A Yes.

13 Q As part of your calculation, there is a deduction
14 for shell and dirt paths; is that not correct?

15 A That's correct.

16 Q Do you have any additional information about
17 whether the shell and dirt paths have to be deducted for the
18 purpose of this calculation?

19 A With my conversation with the fella at the Health
20 Department, there was some question as to whether they had to
21 be deducted. It says specifically in there if they're
22 compacted to the point where it would inhibit the flow of
23 sewage or waste water, then you have to deduct it. There is
24 some question here whether these paths are actually that
25 compacted that it would impact it. So, essentially, what

James Strothers Direct (by Uhle)

1 I've done is err, you might say, on the conservative side and
2 taken them out, assuming the worst-case scenario.

3 Q Is it fair to say, if the conservative calculations
4 that you've made turn out to be overly conservative, that the
5 ability exists here to have a restaurant with slightly more
6 seats than what's being proposed, but not a whole lot more?

7 A Yes, that would be safe to say.

8 MR. UHLE: No further questions.

9 THE HEARING EXAMINER: Thank you. Any other
10 witnesses?

11 MR. UHLE: We have no other witnesses.

12 I do have a closing.

13 THE HEARING EXAMINER: Mr. Brookes?

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1 CROSS-EXAMINATION

2 BY MR. BROOKES:

3 Q How many seats did you calculate for the restaurant
4 and pool bar?

5 A We have a 30-seat facility for the restaurant and
6 six at the pool bar.

7 Q And is that a condition of the application that
8 that would be the maximum number of seats that you would have?

9 A I'm not aware if it's a condition or not. That was
10 what was proposed.

11 Q Okay. And it certainly would help if you had that
12 as a maximum number to insure that your calculations are
13 correct.

14 I'll withdraw the question.

15 THE HEARING EXAMINER: Okay, thank you.

16 Any other witnesses?

17 MR. UHLE: No, just a closing.

18 THE HEARING EXAMINER: Okay. Do you have any
19 questions or anybody else you want to put on?

20 MR. KELNER: No.

21 THE HEARING EXAMINER: Okay. You want to do your
22 closing argument or wait until everybody finishes?

23 MR. UHLE: I think the public should have to go
24 first.

25 THE HEARING EXAMINER: Okay, fine. I think you're

1 probably right.

2 Mr. Ciccarone, approach to make closing comments?

3 MR. CICCARONE: Sure.

4 THE HEARING EXAMINER: And Mr. Depew, if you want
5 to also.

6 MR. DEPEW: (Laughter) No, sir. Thank you.

7 THE HEARING EXAMINER: I'll include you in that
8 dubious category.

9 MR. DEPEW: I think I said as much as I need to say
10 today.

11 THE HEARING EXAMINER: Thank you.

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Mr. Ciccarone's Closing Statement

1 MR. CICCARONE'S CLOSING STATEMENT

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3 MR. CICCARONE: Mr. Hearing Examiner, I'm not going
4 to recite the evidence and the law to you because I have
5 confidence that you will find your way through the record in
6 this case. But I really need to speak to the County
7 Commissioners and to the public, and the only way I can do
8 that, in effect, is by speaking to them through you. So, if
9 you will bear with me, I need to state some things which I
10 know are clear to you but not necessarily obvious to the
11 Commissioners or to the public.

12 And the first thing that I would point out is what
13 this case is not about. This case is not about the
14 character, the integrity or the identity of the applicant.
15 Quite frankly, I haven't heard anything except good things
16 said about Mr. Scott. And we would not want to suggest that
17 our opposition has anything to do with Mr. Scott.

18 But, by the same token, a recommendation for
19 approval also should have nothing to do with Mr. Scott,
20 because I think the law is quite clear in Florida that the
21 identity of the owner of the property who seeks the rezoning
22 is legally irrelevant; and appropriately so, because the
23 zoning runs with the land. And should some accident befall
24 Mr. Scott before he could develop the property, or should he
25 choose to sell it, which he's free to do, the zoning rights

Mr. Ciccarone's Closing Statement

1 and restrictions flow with the property. And so it's
2 appropriate in this case, as it is in every case, to
3 disregard the identity of the applicant and instead look at
4 the application.

5 And I -- I emphasize this point because I think
6 there's been an effort by the applicant - an understandable
7 one - to portray this case as a Captiva native, if you will,
8 up against the city slickers and lawyers in suits and white
9 shirts. And I guess if I were Mr. Scott I would do the same
10 thing. But I have to point out that that just can't be
11 legally relevant. And we need to look at the application
12 from a neutral perspective.

13 And when you do that, we're troubled a little bit,
14 I think, by the fact that there are some unresolved issues.
15 And, specifically, I believe you will recall that in the
16 cross-examination that I conducted over two days with Mr.
17 Kelner, he made any number of changes to the staff's
18 recommendations; suggested any number of conditions. The
19 applicant has made no response whatever to those. And so I
20 would have to presume that the applicant is not agreeable to
21 any of those.

22 If the applicant is going to inform us differently
23 in closing arguments, then perhaps we need to set this case
24 over for another day so we have a fair opportunity to discuss
25 it. In other words, I don't want to discuss issues that may

Mr. Ciccarone's Closing Statement

1 be unresolved; or, in contrast, may be resolved and we may be
2 in agreement on those points.

3 The fact is conditions have been suggested to you,
4 important conditions, which may very well have an impact upon
5 your recommendation, and maybe even upon the position of my
6 client, and probably would be relevant to the County
7 Commissioners. But, at this point, I have to assume that the
8 application that's in front of you is unchanged,
9 notwithstanding the staff recommendation to make changes to
10 it to add certain conditions having to do with limiting
11 space, limiting noise and so on and so forth.

12 So, with that handicap, let me suggest a framework
13 for how I would analyze this case: It seems to me that there
14 are -- as there are in every case, factual issues and legal
15 issues. I think the legal issues have been pretty clearly
16 drawn out for you. And the obvious one is whether the
17 limitations in Section 34-3021 apply to planned
18 developments. We say yes; the staff says no. That's pretty
19 important because, if they do apply, then we would submit
20 that the 10 percent rule applies. And we would also submit
21 that no Group III restaurants are allowed; no real estate
22 office; no food store Group I. And if COP is a use, no COP.

23 The other legal question is how does one apply the
24 site location standards in the Comprehensive Plan? I think
25 it's clear that the Comprehensive Plan applies to every

Mr. Ciccarone's Closing Statement

1 rezoning, but it's always a bit murky when we try to apply it
2 to a specific case. The question is does 6.1.2 apply in this
3 case? Is this a free-standing restaurant masquerading as an
4 ancillary use to a hotel? Or is this, in fact, a hotel with
5 a bonafide ancillary restaurant?

6 Now, I'm not going to argue the law to you because
7 my arguments really don't count. And, as a matter of fact,
8 nothing counts until the Court of Appeals tells us how these
9 would be resolved.

10 I am suggesting to you, however, that there is an
11 alternative way to resolve the case that avoids creating what
12 I would consider to be legitimate questions of law that could
13 only be resolved in a judicial forum. And this is what I
14 would argue to the County Commissioners:

15 That, yes, you could deny the case based on an
16 interpretation of the law as we have argued it. I don't
17 believe, however, you need to do that in order to deny this
18 case.

19 When you consider the issues that are in front of
20 you, I divide them into two categories: Those that are
21 disputed and those that are undisputed. You've heard a lot
22 of testimony, I think, of a substantial, competent nature
23 regarding compatibility. And I think, as lawyers, we
24 understand that no appellate court will reverse your findings
25 on those factual determinations. And that's appropriate,

Mr. Ciccarone's Closing Statement

1 that's what the law is. So, you're free to recommend
2 approval or denial based upon compatibility.

3 But I would suggest there is something even more
4 basic than that, and that's what tends to get overlooked in
5 cases like this, and these are the undisputed facts. And the
6 undisputed facts are that the existing zoning is consistent
7 with the Comprehensive Plan and provides a reasonable
8 economic use of the property. And I think the law is very
9 clear that under those circumstances the applicant has no
10 right to rezoning. This property does not have to be
11 rezoned. The applicant would like for it to be rezoned. But
12 I believe that the law clearly supports the proposition that
13 in situations like this, all the County need do is articulate
14 a valid policy reason for denial and that denial will be
15 sustained.

16 And the valid policy reason that I submit applies
17 in this case is one that I have personally seen the County
18 Commissioners apply in other barrier island cases, which is,
19 they want to preserve the status quo. They are fearful, as
20 we are fearful, that commercial rezonings like this one are
21 an invitation to change. An invitation to commercialize
22 these islands. What I think is sometimes referred to as the
23 camel's nose under the tent.

24 In the previous hearing in this matter, I believe
25 one of the neighbors even testified as to the number of

Mr. Ciccarone's Closing Statement

1 commercial properties she had and how she was watching this
2 case closely and was very interested in the outcome.

3 And when I've had cases like this in the past, I
4 have always told the Commissioners what I would tell you,
5 which is that there is nothing wrong with the existing
6 zoning. There is no reason to rezone this property at the
7 risk of creating a change in the status quo of the island; in
8 creating a risk of accelerated commercial development; or
9 doing any of the other things which I think the Comprehensive
10 Plan says you are to avoid.

11 If you recall Mr. Depew's testimony, he read you
12 the Comprehensive Plan objective, which basically says we
13 want the barrier islands to stay pretty much the way they
14 are. And the way you do that is simply by denying the
15 application. Now, in this case, you can only make a
16 recommendation, and we would hope that your recommendation
17 would be denial based upon that point. And we would
18 certainly advocate to the Commissioners that they adopt the
19 recommendation.

20 We would not want to attempt to debate the disputed
21 substantial, competent testimony over compatibility. And I
22 have talked with Mr. Brookes about that, and he will address
23 that separately so that we're not redundant.

24 And, as I say, you know what the legal questions
25 are. I think they're legitimate, they're good questions. We

Mr. Ciccarone's Closing Statement

1 have experienced counsel in this room. They disagree over
2 the legal interpretation. To my knowledge, the issue has not
3 been adjudicated. As I understand the rules of statutory
4 construction, I think we're right and the staff, I think, is
5 wrong.

6 But, again, we don't need to go down that road if
7 you agree with me that this application can be denied
8 legitimately, and that denial be sustained on the grounds
9 that we don't need to do any rezoning at all. There is a
10 perfectly good policy reason, legally-justified, for leaving
11 the property exactly as it sits. And that's what we would
12 like to ask you to consider when you make your
13 recommendation.

14 And that concludes my closing arguments.

15 Compliments to Mr. Uhle on a fine presentation.

16 Thank you.

17 THE HEARING EXAMINER: Thank you.

18 Mr. Brookes.

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Mr. Brookes' Closing Statement

1 MR. BROOKES' CLOSING STATEMENT

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3 MR. BROOKES: Your Honor, the cases that talk about
4 that point that where, if the existing zoning is -- if the --
5 is consistent, that you don't have to rezone it. That's
6 Snyder v. Brevard County. I cited to it before and we're all
7 pretty familiar with it.

8 It's interesting to note that the applicant's own
9 planner, in the transcript on page 17, which shows up on page
10 7 of the printed-out transcript, line 8, when asked --

11 THE HEARING EXAMINER: Is that the transcript of
12 the first or the second hearing?

13 MR. BROOKES: Oh, (laughter) good question.

14 The date on here is April 22nd, 2004.

15 THE HEARING EXAMINER: That would be the first one
16 then, I believe.

17 MR. CICCARONE: Yes.

18 THE HEARING EXAMINER: And the second one was in
19 May.

20 MR. BROOKES: Um-hmm. Okay.

21 Page 17, line 7. It's page 7 of the printout.
22 Line 6 and 7:

23 The planner for the applicant was asked earlier
24 what other uses could be made on this property and what was
25 appropriate for this property? And one of the things he

Mr. Brookes' Closing Statement

1 talked about was is residential property on this property
2 appropriate and compatible? And he said the location
3 directly adjacent to a restaurant/outdoor pool bar make it
4 susceptible to all the noises that come from that, making
5 residential uses not a viable option for this property. Yet
6 that's what they're putting those same uses on this property
7 and interfering with those same residential uses that are
8 just below it. So they're saying it's not appropriate for
9 us, but it's okay to push our property and these particular
10 uses down next to the residential uses.

11 Mr. Depew's testimony, as an expert planner, on
12 whether this is compatible with the surrounding uses was
13 excellent. I won't go through all those points. And I
14 direct the County Commission to go back and read that part of
15 the transcript.

16 I would note a few legal points. One is that no
17 boating access has been assured. There has been a site plan
18 that was presented that had someone else's docks on it; that
19 had some docks that belonged to Grady. But those are
20 separate parcels. They're separate warranty deeds. If this
21 is approved, this hotel can be sold to someone else and there
22 is no assurances legally that the hotel could continue to use
23 those docks if both those parcels are sold to two separate
24 individuals. So usually what's happening is we need some
25 kind of unification of title or agreement that those docks

Mr. Brookes' Closing Statement

1 will run with this project and run with the land of this
2 project tying those things together.

3 Typically, in mainland projects that we're sharing
4 parking, we looked for a shared parking agreement. Here we
5 have 10 rooms. We should have at least 10 slips. In
6 addition to the 10 rooms we have a restaurant. People are
7 going to be coming to this restaurant by boat. People that
8 go to Barnacle Phil's now by boat, while they're on the boat
9 for the day, have another choice. They may come here. Will
10 there be a place for them to park? Will it lead to disputes
11 over parking? Will people be tying their boats off to other
12 people's boats on private docks like Mr. Melvin's? Quite
13 possibly. Could disputes arise over that on the dock,
14 literally leading to fist fights or yelling matches on the
15 dock, all as a result of poor planning review by Lee County?
16 Certainly, one of the basic things a planning review on this
17 project is to say where are the boats going to park and make
18 sure somehow that's taken care of.

19 Most importantly, we're going from C-1 to CPD. Um,
20 the Comp Plan outer island designation 1.4.2 says we're
21 supposed to preserve the existing intensity of the
22 development on the island. We're not supposed to do
23 rezonings that intensify development.

24 Under the C-1, they'd get five units. Under this
25 CPD they're asking for 10 units. They would get one unit per

Mr. Brookes' Closing Statement

1 acre if we applied the normal three equivalency units to the
2 hotel, versus a house they'd get 4.5 units. Here again,
3 they're asking for 10 units under the CPD.

4 Under C-1 zoning, they'd have to be 500 feet from
5 the entrance of the bar to the residential house. Because
6 they're going CPD, now they say that 500 feet doesn't apply
7 to them. Even though the Code, I believe, is clear that 500
8 feet prohibition doesn't apply within the PUD, but we're
9 talking about a house that's outside of PUD. And we're
10 not talking about a house that's outside the walls of the
11 gated community, a typical golf course PUD or residential PUD
12 on the mainland. We're talking about a 1.57 acre parcel --
13 or 1.59 acre parcel, and we're simply going to waive the
14 alcoholic beverage prohibition, waive the density, increase
15 both those things, allow this thing to happen simply by going
16 from C-1 to CPD. And that's what the Comp Plan says is not
17 supposed to happen on the outer islands.

18 Septic tanks. It's clear that they could exceed
19 the 5,000 square feet. It's not just a Department of Health
20 or HRS rule, it's actually in the Comp Plan. It's Objective
21 11.2. It's actually in the Land Development Code. They have
22 to show some assurances or place conditions on the property
23 and on the use so that they won't exceed the 5,000 square
24 feet.

25 If they say they're going to have 30 restaurant

Mr. Brookes' Closing Statement

1 seats, they should make it a condition.

2 THE HEARING EXAMINER: You mean 5,000 gallons?

3 MR. BROOKES: I'm sorry, 5,000 gallons - you're
4 correct - gallons per day.

5 If they say that they're going to be limited to 30
6 restaurant seats and 10 -- or six bar stools, then that's
7 what they should put in their application as a condition.
8 Certainly it doesn't make sense to have a wide open, no
9 maximum CPD. There should be some number. Even in a bubble
10 plan you'd put some number in there how many seats.

11 Hurricane evacuation. Um, in the Land Development
12 Code, Section 2-48, if they are going to be evacuating
13 through Pine Island they need to determine and evaluate and
14 have staff analyze whether or not this exceeds the capacity
15 of Pine Island Road between Burnt Store Road and Stringfellow
16 Road. They may have -- and the Lee County may have already
17 exceeded the 800 or 900 additional units. That were not
18 supposed to be rezoning after we hit a certain number under
19 the existing Comp Plan and even under the new Comp Plan.
20 None of that was analyzed. None of that was brought up
21 here. So we don't have any evidence on the record that it's
22 in compliance or consistent with 2-48.

23 Nor do we have testimony that's consistent with
24 Objective 75.1 -- 75.1.2 and the policy of 75.1.4. The
25 hurricane evacuation aspects have been done very poorly for

Mr. Brookes' Closing Statement

1 Upper Captiva Island in general. And also for this
2 additional rezoning it would intensify the uses out there.

3 And if we do allow a hotel in this C-1 zoning to go
4 to CPD, and other C-1 zonings are out there, there will be
5 other hotels on North Captiva. You can't say yes to one
6 person, and someone has a similar situation and say no to
7 them. So we're looking at a number of hotels now being
8 appropriate for the area. So we don't want to let the
9 camel's nose under the tent. This island should remain
10 similar to how it is now. It shouldn't be intensified. And
11 the CPD zoning trick shouldn't be used to intensify what's
12 allowed under C-1. CPD is supposed to be so you can cluster
13 what might be allowed under C-1. So you might vary some of
14 the setbacks or move things around on the property rather
15 than require straight platting of a piece, so that your
16 clustering to preserve environmental features, to preserve
17 unique features of the land. You really shouldn't be using
18 CPD to get more than you're allowed under the straight zoning.

19 Another thing that wasn't addressed is agreements
20 for garbage. The outer islands, as the Commission well
21 knows, suffers terrible problems from the garbage that's
22 generated not only by single-family homes but by other uses
23 on other islands. This island, in particular, has a problem
24 of garbage already that will be exacerbated by additional
25 intensification by allowing restaurants with unlimited

Mr. Brookes' Closing Statement

1 seating, unlimited seating for pool bars, 10 additional hotel
2 units here. And if we took the numbers of available hotel
3 units for those other parcels that are also zoned C-1, that
4 could either get units under C-1 or CPD, literally hundreds
5 of hotel units could go on there, generating tons of garbage
6 that needs to be taken care of. There is no garbage service
7 agreement that was -- that was put into the record here.

8 Um, in short, and in conclusion, I would ask the
9 County Commission to go back again and read that portion of
10 the transcript and look at the PowerPoint presentation that
11 Mr. Depew presented, and his opinion as an expert planner
12 that this would raise compatibility issues with the
13 surrounding residential uses and send this island in the
14 direction that we don't want to be going in. It used to be
15 that we would promote development on our barrier islands.
16 That we've become more conscious to what we're doing there
17 and we want to try to hold the line on this and not let these
18 islands go.

19 Thank you.

20 THE HEARING EXAMINER: You're welcome.

21 Thank you.

22 Mr. Kelner, do you have any closing comments?

23 MR. KELNER: Yes.

24

25

Mr. Kelner's Closing Statement

1 MR. KELNER'S CLOSING STATEMENT

2

3 MR. KELNER: I just have a few brief comments with
4 regard to it.

5 Since the application, of course, was submitted
6 there have been a number of changes that have taken place to
7 it. And the applicant, of course, has revised the conditions
8 somewhat to address some of the concerns that the public's
9 had with regard to this particular rezoning.

10 Such things as deleting the incinerator uses.

11 They've reduced the number of hotel/motel units or
12 cabins from 15 to 10. And this is a minimum number that you
13 can have, also, to qualify as a hotel/motel.

14 They also reduced the cabin height to 20 feet.

15 They limited the background music - there was a
16 concern about that - from 10 to 6 p.m. for the outdoor
17 seating area.

18 And the hours of operation also were reduced or
19 limited within the restaurant itself. And those are from
20 10:00 a.m. to 10:00 p.m.

21 And part of these are the resubmittal that I had, I
22 believe, at the second hearing that we submitted the changes
23 to the application.

24 Also that these hours of operation are consistent
25 with what has been approved, through public hearing, for the

Mr. Kelner's Closing Statement

1 North Captiva Island Club and the Island -- Mango Island Cafe.

2 Also there's conditions in there that stated that
3 the condo -- the hotel/motel cannot be condominiumized so
4 that this doesn't turn into residential units.

5 Also the hotel/motel units cannot be outfitted with
6 cooking facilities or kitchens.

7 Also as a condition, the developer must prove that
8 the project will be serviced by an adequate water supply.

9 Also the applicant, in one of the revised
10 conditions, talked about the developer providing a
11 contribution to the North Captiva Road Commission of \$4,000.
12 Of course, so long as the Commission continues to solicit and
13 use the funds to improve the roads for North Captiva.

14 The staff finds, again, that it's still consistent
15 with the Lee Plan. It's compatible with the surrounding land
16 uses. If you look at the use, considering other uses that
17 can be placed on the subject property, and the square footage
18 of commercial that could go in there - and I believe the
19 staff report we looked at something around 16,000 square feet
20 of commercial, and possibly it could even go higher because
21 parking is not a requirement on a barrier island.

22 And also by showing the schedule of uses, the way
23 we have, and eliminating any free-standing uses, we really
24 restricted to the hotel/motel. And if there is going to be
25 any changes to that, they'll have to come back in for a

Mr. Kelner's Closing Statement

1 public hearing.

2 Also the rezoning to the hotel/motel limits more
3 intensive commercial uses from occupying the property, such
4 as boat rentals, boat storage, contractors and builders,
5 rental/leasing establishments, open storage, vehicle
6 equipment dealers, package stores, convenience food and veg
7 stores and restaurants. And these are referring to the
8 free-standing uses.

9 Also with regard to hurricane evacuation, these are
10 also addressed at the time of local development order
11 approval.

12 And another condition that was mentioned earlier,
13 of course, with regard to the storage of golf cart
14 batteries. And, of course, these may not be stored out of
15 doors.

16 And a condition that was also added in as a
17 recommendation, after the second hearing, was the exact
18 location of building footprints, accessories to driveways,
19 golf cart parking areas be adjusted as necessary to avoid
20 unnecessary destruction of the indigenous vegetation. That
21 no indigenous vegetation will be removed from outside these
22 designated areas. So there is a concerted effort also to
23 maintain the vegetation on site.

24 And basically that's the summation of the staff
25 report.

Mr. Kelner's Closing Statement

1 THE HEARING EXAMINER: Thank you, very much.

2 MR. KELNER: The Staff recommend's the Court's
3 approval.

4 THE HEARING EXAMINER: Thank you.

5 Mr. Uhle, you need a break or do you want to go
6 right into it?

7 MR. UHLE: According to the court reporter. It's
8 going to be a half an hour or so.

9 THE COURT REPORTER: I'm fine.

10 THE HEARING EXAMINER: A half-hour is fine?
11 Okay, fine.

12 THE COURT REPORTER: Yes, for the record.

13 THE HEARING EXAMINER: Thank you.

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Mr. Uhle's Closing Statement

1 MR. UHLE'S CLOSING STATEMENT

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3 MR. UHLE: Matt Uhle, for the record.

4 At long last we're approaching conclusion of this
5 hearing. We're all grateful.

6 There have been a tremendous number of issues
7 thrown at this particular application, ranging from hurricane
8 evacuation to garbage. And I'm not sure that I can even
9 possibly address each one of those in my closing, and I won't
10 try. But I will try to hit what I view as the main points
11 and talk about the evidence.

12 And I would like to start with a certain number of
13 Lee Plan issues. The first issue, I think, is whether this
14 particular application is consistent with the outer islands
15 land use category. Mr. Kelner and Mr. Hutcherson both
16 testified that it was consistent with that land use
17 category. And I think that when you look at it, you'll
18 conclude that that is correct.

19 And one of the unusual features of this particular
20 area is that, notwithstanding the land use category, that the
21 actual development on the property, as delineated by lot
22 lines throughout the area and shown by the density of the
23 residential uses, and by the North Captiva Island Club, that
24 this really isn't a rural area. I mean, it may have some
25 features of a rural area, certainly...dirt roads and so on,

Mr. Uhle's Closing Statement

1 but the development pattern is more consistent with
2 intensities that you would find in an urban area. And that's
3 why I asked Mr. Depew about the four units per acre and what
4 categories do you find them in the Lee Plan? Well, they're
5 -- they're urban category. So that is all part of the
6 background of this.

7 But notwithstanding that, we were sensitive to the
8 need to try to maintain the ambiance of the area. And so I
9 think either Mr. Hutcherson or Mr. Kelner testified, months
10 and months ago, that the effort was made to maintain the
11 appearance of a rural development. And so that's why the
12 additional part of the Master Concept Plan was submitted
13 showing the aesthetic qualities of this particular project.
14 That was directly a response to the language in this
15 particular policy which talks about the rural environment and
16 so on.

17 With regard to Policy 4.1.1, I think the -- just
18 viewing the plan contradicts what Mr. Depew testified on this
19 point. The fact of the matter is that the intensity of this
20 project has been directed to the middle of the property and
21 to the north of the property; not to the south, east and
22 west. And that's based on the fact that the most intense
23 uses are the pool and the building. And the building is only
24 20 feet away from the north property line, and it was put
25 there in an effort to be as close as possible to the North

Mr. Uhle's Closing Statement

1 Captiva Island Club. And the pool abuts that. And all the
2 buildings that provide -- the hotel units are going to be
3 focused in on that particular area. So every effort's been
4 made to try to concentrate the intense uses within the middle
5 of the project. And that's exactly what the Land Development
6 Code and the Lee Plan call for.

7 And with regard to the site location standards,
8 this is a very complicated and rather dreary subject, I have
9 to say, but it doesn't apply to the hotel. It only applies
10 to the restaurant use. That's perfectly clear from the Lee
11 Plan. And so then the question becomes, well, what do you do
12 if you have a use that's essentially a mixed use, that has a
13 restaurant, which on the face of it is a use that's subject
14 to the site location standards, and a hotel which is not?
15 How are we going to handle that? Well, based on the county's
16 experience, including that Tarpon Lodge case, what the county
17 has done is try to determine whether the use that is subject
18 to the site location standards is "ancillary" or not. And if
19 it is ancillary, then it doesn't have to comply -- the
20 project as a whole doesn't have to comply with the site
21 location standards. And that's exactly what happened in
22 Tarpon Lodge. That project didn't comply with the site
23 location standards and it was approved.

24 Does the 10 percent rule apply? Well, it's not in
25 the Lee Plan. So the only way that it can be applied to the

Mr. Uhle's Closing Statement

1 Lee Plan is by some sort of analogy. And it clearly wasn't
2 applied in the Tarpon Lodge case and I'm not familiar with
3 any other case where it was applied. But I think Mr. Depew
4 does raise one reasonable point, which is that it would be
5 useful to have an objective standard to use to establish what
6 an ancillary use is. But I submit to you that the staff
7 implicitly has done that, and they probably did it in the
8 Tarpon Lodge case, too.

9 What they did was try to evaluate the square
10 footage of the hotel, and they compared it to the square
11 footage of the restaurant and they determined it either was
12 or wasn't primarily a hotel. And in both that case and this
13 one they found, by adding up the square footage, that the
14 restaurant use was the lesser of the two uses. And, clearly,
15 if you do the math in this case that's the way it ought to be
16 done.

17 The portion of the lodge building that's
18 attributable to the reception area and to the office clearly
19 is part of the hotel. The parts of the project that are the
20 units obviously have to be considered part of the hotel. To
21 the extent that the pool counts for anything, as Mr. Kelner
22 testified, it was accessory to the hotel and not to the
23 restaurant or the retail, so it ought to be counted as part
24 of the hotel square footage. When it's all said and done,
25 it's clear that the hotel part of this project is larger than

Mr. Uhle's Closing Statement

1 the restaurant. And so the restaurant is ancillary use, and
2 so the project as a whole is considered a hotel for the
3 purposes of the site location standards, and site location
4 standards do not apply to hotels.

5 With regard to compatibility, the evidence on this
6 point is as follows: First of all, the property is already
7 zoned C-1. And there are a wide range of uses on the
8 property that could be put to the property, that are
9 consistent with the Comprehensive Plan, that are as intense
10 or more intense and have as many or more impacts than this
11 project. And those have been laid out for you in the
12 evidence.

13 You've heard a lot of statements about how we
14 already have a reasonable use of this property and that
15 should be used as a basis for a denial. Well, if that were
16 the case, then probably -- if that were the legal standard,
17 then probably 50 to 75 percent of the zoning cases that ran
18 through the system would be denied. Just look at it and say,
19 "Well, the zoning as it stands now is reasonable, it's okay.
20 Even if what somebody proposes is better, that doesn't
21 matter, we're going with what we have because we like what we
22 have." Well, that's not the legal standard. The legal
23 standard is, is this a good idea? Is it as good or better
24 than what's already out there? And we submit to you that
25 given the uses that are already permitted on this property,

Mr. Uhle's Closing Statement

1 comparing them as the staff did to what we're proposing, this
2 is not an intensification of use. It only is in the sense
3 that we're permitting more units, but we're deleting a lot of
4 uses that are more intense or as intense than this. And
5 we're eliminating a range of uses that's permitted today.
6 So, in our opinion, it's not an intensification.

7 We've already established, through the workings of
8 the site plan and through a wide range of conditions
9 involving building heights, limitations on outdoor noise and
10 so on and so on, that we can control compatibility on this
11 particular parcel with this CPD mechanism better than you
12 could with the C-1. All of those kinds of protections could
13 not be available under the C-1 district. So that's another
14 argument in favor of the compatibility of this project.

15 In addition, the testimony establishes that the
16 intensity of this particular project, when compared to the
17 surrounding uses, is no greater. We provided testimony with
18 regard to square footage, with regard to occupancy and with
19 regard to bedrooms. And, as I said at the last hearing, not
20 a one of those is a perfect analogy, but each one of them
21 indicates that this particular request is no more intense
22 than the residential...what really is resort housing use that
23 surrounds the property, to the extent that there are any
24 uses. Most of these lots are still undeveloped today. So,
25 as I pointed out during one of the hearings, it's easy, if

Mr. Uhle's Closing Statement

1 you don't know all the facts, to get the impression that this
2 is some sort of an intrusion into a residential
3 neighborhood. Since it's already zoned C-1, it can't really
4 be an intrusion.

5 But leaving that aside, the fact of the matter is
6 this is not a conventional single-family neighborhood where
7 you have a house on every lot and the people live there 50
8 weeks of the year. That's not what's going on here. The
9 lots are sparsely developed. The ones that are developed
10 have large houses that are being used primarily for resort
11 housing. And so, to that extent, this particular project is
12 very compatible with those uses.

13 With regard to the intensity of the use, that's not
14 directly regulated by the Lee Plan because of the ability to
15 establish different equivalency factors for hotels in a CPD.
16 But suffice it to say that that's really a function, in our
17 opinion, more of what fits on the site, whether the project's
18 compatible and whether it creates impacts on infrastructure
19 or public safety that are unacceptable. And we don't think
20 that any of those can be demonstrated here.

21 With regard to infrastructure, of course, North
22 Captiva raises some unusual issues relating to
23 infrastructure. With regard to roads, normally one deals
24 with road issues by looking at things like the ITE Manual and
25 trip generation rates and service volumes and so on. Not

Mr. Uhle's Closing Statement

1 much of that has much relevance to North Captiva because it
2 doesn't have access to the mainland and the roads aren't
3 paved and so on. But suffice it to say that there is no
4 evidence in this hearing that there is any kind of level of
5 service problem. If you went to the trouble of trying to
6 evaluate the trip generation rates of a lot of these uses
7 that we're deleting relative to a hotel, I think you'd find
8 that we're actually reducing the intensity of the project.
9 But I don't really think that that's terribly important.

10 The real issue on North Captiva is the quality of
11 the roads. That's going to be a problem for all of the
12 people who want to build on these undeveloped lots in the
13 future. It's going to have to be dealt with. We've
14 addressed the issue by agreeing to make a contribution to
15 improve the roads. That's not something we're legally bound
16 to do, but we are willing to do it. And that, to us, is the
17 only known transportation issue that this project is involved
18 with.

19 With regard to the well, we've established through
20 the testimony that there is a well on the adjoining parcel
21 that my client has a two-thirds undivided interest in. The
22 evidence indicates that there is no known problem with the
23 well, per the regulators. But, in addition to that, we've
24 agreed to a condition which requires us to prove that there
25 is no problem with the well and getting enough potable water

Mr. Uhle's Closing Statement

1 during the development order process. So we think we've
2 adequately addressed that.

3 With regard to the septic tank issue, our expert
4 has come in and testified in a manner, as he indicated today,
5 is relatively conservative. His testimony emphatically
6 establishes that we will be -- if the estimates of the amount
7 of intensity of the project are anywhere close to what we're
8 anticipating, that we will be under 5,000 gallons per day.
9 But it also establishes that the capacity for a septic tank
10 permit on this property is less than 5,000 dollars -- gallons
11 a day. So we will be consistent with the Lee Plan. We can't
12 avoid that. And when we get our septic tank permit we will
13 have to comply with the permit.

14 Now, we don't know exactly what we're going to be
15 permitted for because of the conservatism of his analysis.
16 So that's the reason that we don't want to agree to
17 necessarily 30 seats when it may turn out that we can approve
18 35 seats or something like that. But as Mr. Strothers
19 testified, his conservatism means that there might be a
20 slight increase in the number of seats. It won't be a large
21 one. And, in any event, it will all come down to the Health
22 Department and what they can permit. That's the way septic
23 tanks are handled generally and that's the way it ought to be
24 handled in this case.

25 With regard to garbage, there is no reason why we

Mr. Uhle's Closing Statement

1 should have to provide some sort of separate agreement for
2 garbage. I'm not aware of any requirement that when anybody
3 else comes in for a project on North Captiva, that they have
4 to provide a signed separate agreement. The county has a
5 garbage program, and we will be part of the program and we
6 will be treated the same as anybody else.

7 With regard to the possibility of code enforcement
8 issues, there -- as you know, code enforcement is a
9 complaint-driven process. There is no reason to believe that
10 the conditions, on this particular project, as long as
11 they're written carefully and provide objective standards,
12 are any more or less enforceable than any other conditions
13 anywhere else. And, as I pointed out during one of the other
14 hearings, the Mango Cafe approval for their COP has
15 conditions that are similar to the ones that we've proposed.
16 There is no indication that those conditions were any more or
17 less enforceable than the ones that we're talking about today.

18 One of the more unusual features of this case has
19 been the discussion about off-site parking. Suffice it to
20 say that that seems to be based on speculation about behavior
21 of the people who will stay at this particular hotel, whether
22 they'll go to the beach or not, whether they'll take a golf
23 cart or not. I have never seen a zoning case in which
24 off-site parking for an attraction a half mile away or a
25 quarter a mile away, or whatever, was used as a basis to deny

Mr. Uhle's Closing Statement

1 a project. If that were a valid form of analysis, as I
2 implied in my questions to Mr. Depew, it would be fair for,
3 say, somebody developing on Punta Rassa to have to identify
4 if there is a parking problem or not on Sanibel. It's the
5 same thing and it involves the same degree of speculation.
6 And it's not appropriate. And, as far as I know, it's
7 unprecedented.

8 Another issue that was brought out was there were a
9 couple of "procedural issues." One had to do with whether
10 the survey was adequate. Obviously, that has nothing to do
11 with the merits of the case. Our surveyor's opinion,
12 obviously, was that the structure in question is not a
13 permanent fixture. You can argue about that or not, but I
14 don't see where it has any relevance to the merits one way or
15 another, so I don't think it's important.

16 The "restrictive covenant" that was brought to your
17 attention by the opposition, if you read it carefully you'll
18 find it's not a restrictive covenant and, in fact, is a
19 promise by another property owner not to object to certain
20 development activity on the site. It does not bind my client
21 to do anything.

22 There are no known environmental issues in this
23 case. Miss Trebatoski went out on the site, wrote a memo.
24 We have agreed to conditions which limit the removal of
25 native vegetation to the maximum extent possible. We also

Mr. Uhle's Closing Statement

1 have a 50 percent open space requirement which, as Mr. Depew
2 acknowledged, is in excess of what the Land Development Code
3 would require.

4 The -- to the extent that there is an issue about
5 whether we have the ability to access docks, that's been
6 established through the document that we provided to you. I
7 have to say on this point, in listening to the opponents,
8 they -- I'm hearing inconsistent stories from them because,
9 on the one hand, their experts are testifying that there's a
10 problem because we're going to be overloading the water
11 taxi. But, on the other hand, Miss Bahktian is testifying
12 that we're going to primarily cater to people with private
13 boats, and that's going to be an intensification of boat use
14 that's going to kill manatees and kill sea grasses. And it
15 can't be both of those.

16 But suffice it to say that it won't be either. We
17 are not proposing an intensification of the dock use, we're
18 just proposing to keep the use that's already there and to
19 use it as we're legally entitled to.

20 The County Attorney's Office suggestion about
21 calling out that parcel separately on the Master Concept Plan
22 I think is appropriate. It clearly is not included within
23 the legal description. That should be done if this case gets
24 approved on the plan that is attached to the resolution, I
25 have no doubt about that. So we have no problem with that.

Mr. Uhle's Closing Statement

1 With regard to hurricane evacuation, I think if the
2 Hearing Examiner reviews a number of zoning cases involving
3 hotels, I believe including both of the resolutions that we
4 presented today through Mr. Depew, you'll find that the
5 conditions involving an education plan and so on are standard
6 conditions. We're proposing to deal with those in a standard
7 way.

8 Now, Mr. Scott has gone beyond that and basically
9 designed his own evacuation plan. And the fact of the matter
10 is that there are a number of options for evacuation from
11 this property that do not normally exist. And if you're on
12 the mainland, if you're say Tarpon Lodge, you're going to be
13 driving one particular road to get off the island. There
14 really isn't much of an option. But if you are staying at
15 this particular lodge, there are a number of different ways
16 that you can be evacuated, and that does not necessarily
17 involve going to Pine Island, as Mr. Scott testified. Any
18 number of possible ways. And so, doing any kind of analysis
19 of evacuation times is a waste of time. It's simply there
20 are too many options to make that a meaningful exercise.

21 But, having said that, obviously the issue was
22 presented to the county's emergency management people and
23 they came to the conclusion that all we needed to do was pay
24 the hurricane mitigation fee and we needed a plan. And so
25 we've complied with that and that should address that issue

Mr. Uhle's Closing Statement

1 completely.

2 With regard to Mr. Ciccarone's proposed conditions
3 throughout the process, um, I probably don't remember all of
4 them, but I'll address a few of them. At one point he had a
5 suggestion that we needed to have a condition addressing the
6 phasing of this project to make sure that the hotel gets
7 built and it isn't just a stand-alone restaurant. I don't
8 think that's necessary because that's implicit in the
9 approval that's written by the staff that says that the
10 restaurant has to be ancillary to the hotel. But, you know,
11 if you saw fit to write a condition like that, I suspect it
12 would not be a problem. We just don't think it's necessary.

13 Putting on a condition with regard to the square
14 footage allocations on the Master Concept Plan, again, it's
15 our understanding if we put them on the Master Concept Plan
16 we're bound by them. So whether you write a separate
17 condition on that issue or not is of no importance to us.
18 You certainly can, but we think it's covered regardless of
19 whether you do or not.

20 Having a condition relating to the septic tank and
21 the seating for the restaurant we don't think is appropriate,
22 for the reasons that I've described just a few minutes ago.
23 We don't know exactly how many seats we can permit. We have
24 a pretty good idea what the general range is, but in the
25 final analysis that comes down to what we can get approved by

Mr. Uhle's Closing Statement

1 the Health Department, within the constraints of the square
2 footage that we've shown on our Master Concept Plan. That's,
3 obviously, not limitless. We've gone to a lot of trouble to
4 identify exactly what those square footages are. So we think
5 that there are limitations on that in any event.

6 An argument was made that this rezoning represents
7 a "commercialization" of this part of North Captiva. The
8 property is already zoned C-1. You can't commercialize
9 something that's already zoned commercial. I don't see the
10 point in that argument.

11 Finally, to address a few of the items raised by
12 one of the members of the public, I would note that she is
13 not an expert in planning, and was not qualified as such and
14 cannot be qualified as such. And that a number of the
15 policies that she talked about weren't raised by Mr. Depew,
16 which makes one wonder about how legitimate these arguments
17 really are. But, suffice it to say, that I will address a
18 few of them.

19 With regard to Policy 75.1.2, that was an issue
20 that was actually addressed by Mr. Hutcherson. In fact, Mr.
21 Kelner asked Mr. Hutcherson to respond to that in writing,
22 and he did so. And that's included within the staff report.
23 The critical thing about that, I think, is if you look at the
24 Lee Plan, that policy talks about increasing "density." And
25 when you look at the definition of density in the Lee Plan,

Mr. Uhle's Closing Statement

1 it says residential density. And this is not a residential
2 project, so that policy on its face doesn't apply to this
3 particular situation. Even if it did, it's arguable whether
4 this is really an increase in density. But suffice it to say
5 that the policy doesn't apply.

6 On Goal 77, there are a whole series of policies
7 that were discussed under Goal 77. That's an environmental
8 policy series. And basically what I would say is that we've
9 committed to preserve native vegetation on the site. Miss
10 Trebatoski was satisfied that we'd gone far enough with
11 that. We're in complete agreement with the staff on the
12 environmental. And so it's hard to see how it could be
13 argued that we're gratuitously eliminating native
14 vegetation, for example, when we have a condition saying that
15 we'll preserve it under virtually all circumstances, except
16 when we're putting a building pad there. And we'll adjust
17 the building pads to maintain it wherever it is.

18 Um, there's no evidence that there's any problem
19 with water quality. There is no evidence that there is a
20 problem with the well. There is no evidence that the well
21 can't serve this particular project. There is no evidence
22 that the well will create salt water intrusion in anybody
23 else's well.

24 And with regard to all the policies discussing the
25 expansions of marine facilities, we're not expanding

Mr. Uhle's Closing Statement

1 anything. We're just going to use the docks that are already
2 there. And they're not even included formally in the
3 application, so that's not relevant.

4 Bottom line on this project, I think, is that it is
5 consistent with good planning, with LDC and with the Lee
6 Plan.

7 And I would conclude by saying that,
8 notwithstanding the fact that we've been here for a long time
9 and heard a lot of public testimony in opposition, there is a
10 lot of public support for this project and that needs to be
11 considered as well.

12 Thank you.

13 THE HEARING EXAMINER: Okay, thank you.

14 The process now is that I have to review all this.
15 And I will have a recommendation for the Board probably not
16 for three to four weeks, being optimistic. So I'm assuming
17 that this will probably go before the Board of County
18 Commissioners some time in September, at the earliest.

19 And there will be notification that the hearing is
20 going to be held.

21 And anyone who spoke here will have an opportunity
22 to speak before the Board at that particular time when they
23 hold that particular hearing.

24 Okay?

25 Thank you.

1 Hearing is closed.

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3 (End of Proceedings at 4:10 p.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEE)

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5 I, Gary W. Hunter, Registered Professional Reporter and
6 Registered Merit Reporter, for the 20th Judicial Circuit of Florida, do
7 certify that I was authorized to and did stenographically report the
8 foregoing proceedings and that the typewritten transcript of proceedings,
9 consisting of 229 pages, is a true record.

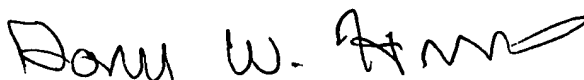
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11 Dated this 2nd day of August, 2004.

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Gary W. Hunter, Court Reporter

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