VOLUME 3
THE OFFICE OF THE LEE COUNTY
HEARING EXAMINER

CASE NO.: DCI2023-00051

IN RE: SOUTH SEAS ISLAND RESORT
MIXED USE PLANNED DEVELOPMENT
_____/

VOLUME 3

PROCEEDINGS:	PUBLIC HEARING
BEFORE:	Donna Marie Collins Chief Hearing Examiner
DATE:	February 21, 2025
TIME:	9:00 a.m. to 4:06 p.m.
LOCATION:	Lee County Board of County Commissioners Board Chambers 2120 Main Street Fort Myers, FL 33901
REPORTER:	Deborah M. Bruns Florida Professional Reporter

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VOLUME 3

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P R O C E E D I N G S

HEARING EXAMINER COLLINS: Good morning. The date is February 21st. We are on our third day of hearing for the South Seas Island Resort MPD. We are in the public input portion of the hearing. We have heard from David Mintz and Ken Suarez. I believe Jerry Murphy is the next witness.

MS. BERKEY: We changed.

HEARING EXAMINER COLLINS: You changed the order? Okay. So we are going to go to Katie Berkey, I'm assuming, since you're in the hot seat?

MS. BERKEY: (Nods head.)

HEARING EXAMINER COLLINS: All right. I just want to re-administer the oath today just in case we have people here that were not already sworn in. Please raise your right hands. Do you swear or affirm the testimony and evidence you place into the record will be the truth?

(Participants respond en masse.)

HEARING EXAMINER COLLINS: Thank you.

MS. BERKEY: Good morning. I just want to check the audio. Can everyone hear in the back? Testing.

(Participants respond en masse.)

MS. BERKEY: Thank you.

Good morning, Madam Hearing Examiner. For the

record, I'm Katie Berkey. I'm a land use attorney at Becker & Poliakoff here in Fort Myers. I'm also board certified in city, county, and local government law. And I am here today as legal counsel of 12 associations listed here: Bayside Villas Condo, Beach Cottages Condo, Beach Villas III Condo, Gulf Beach Villas Condo, Land's End Village Condo, Marina Villas Condo, Sandrift POA, Seabreeze at South Seas Plantation Condo, South Seas Plantation Beach Home Condo, South Seas Plantation Homesites Association, Sunset Beach Villas Condo, South Seas Villas Condo, which was formerly known as Tennis Villas, and I'll refer to all 12 of these entities as either my clients or the Associations throughout my testimony today. And as Mr. Suarez already noted for the record, collectively there's 526 multi-family units between these 12 associations.

HEARING EXAMINER COLLINS: 526 you said?

MS. BERKEY: 526.

And if I may, I'll start by submitting into the record my PowerPoint slides, and then my aggrieved and affected -- aggrieved and adversely affected party status letter that was previously transmitted to County Staff on the 11th, with copies to the Applicant and Mr. Mendez.

HEARING EXAMINER COLLINS: Do you have copies for

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the...

(Berkey Exhibit 1 submitted.)

MS. MONTGOMERY: Thank you.

HEARING EXAMINER COLLINS: The printout of the PowerPoint will be Berkey Exhibit 1.

Okay. You know that I've denied all requests for affected party --

MS. BERKEY: Yes --

HEARING EXAMINER COLLINS: -- status; right?

MS. BERKEY: -- and I was going -- yes. I was going to touch on your denial and put some testimony into the record with respect to that, but I appreciate the decision has been made.

HEARING EXAMINER COLLINS: Well, I'm very interested in keeping this hearing moving. I feel confident that there's going to be no deprivation of due process rights for these residents to be considered participants and not parties; so I'm not interested in listening to a protracted legal dissertation on why they should be reclassified.

MS. BERKEY: And I'm not seeking to classify. I'm just explaining their proximity to the project, being within the notice radius. I'm happy to start, and feel free to let me know if I need to keep moving on.

HEARING EXAMINER COLLINS: Right. I don't think

there's a dispute that, as residents and property owners within South Seas, that they will be impacted in some way by the Board's decision in this case; but their property rights are not going to be taken away. There's no risk of loss of property rights. So the risk of deprivation in any way, in terms of elevating their status beyond -- anything beyond an adjacent property owner is not something I'm going to entertain.

MS. BERKEY: I think, fundamentally, interconnectiveness and reliance on the shared access road and easements make them fundamentally different in this case. So not just a matter of proximity, but I was going to touch briefly on what makes them different and more affected than the public generally.

HEARING EXAMINER COLLINS: Okay.

MS. BERKEY: But I promise to not belabor the point.

HEARING EXAMINER COLLINS: You may begin.

MS. BERKEY: Thank you.

So to briefly just summarize what's in the aggrieved and affected party status letter, there are a number of enclosures, the first being a map delineating the Associations in relation to the master concept plan and the proposed boundary and in relation to the Applicant's variance report; résumés for Jerry Murphy,

who you'll be hearing from immediately after me; as well as Drew Roark, who will be testifying later as to traffic impacts; the Applicant's January 7th post-sufficiency submittal and our objections to that document; past objection letters from both the Associations and the Captiva Civic Association; select plats and easement grants applicable to the access road known as South Seas Plantation Road; and a deviations review dated January 28th conducted by Mr. Roark, who, again, you'll be hearing from later; substantive objections to the application at large; and just a brief summation.

All right. And as you're aware, Madam Hearing Examiner, Section 163.3215, Florida Statutes, defines an aggrieved or adversely affected party as any person that will suffer an adverse effect to an interest protected or furthered by the Comp Plan, including interests related to health and safety, police and fire protection, densities or intensities of development, transportation facilities, and environmental or natural resources greater in degree than the general public at large.

As further detailed in our request, which again was already transmitted to the Applicant and County Staff, Florida law recognizes adjacent and neighboring

property owners as adversely affected by proximity to proposed increases in allowable uses, density, and intensity, and have standing to challenge an application for same.

Each of the Associations and their respective members are aggrieved and adversely affected not only because they are within the notice radius, the 500-foot notice radius -- this is an excerpt from the variance report map from the Applicant which shows where each of my 12 association clients are located, but also they are fundamentally interconnected with the resort property, what's known as the South Seas Resort development, or SSRD, established by the 1973 rezoning, subsequent County actions, and then again memorialized in 2002 Administrative Interpretation.

Second, individual property owners within SSRD have investment-backed expectations and reliance on the commitments of the unified PUD concept plan for the total 304 acres regarding the maximum number of units, open space, the resulting character, the development pattern, and the quality of life for over the last 50 years, to which Mr. Murphy will speak further during his testimony.

Third, the Applicant and the Associations share an access roadway and easements, as I mentioned, the

entire extent of which is not within the proposed MPD boundary and which is not fully owned or controlled by the Applicant, particularly at the sound end, and yet the entire length of the access road is subject to deviation requests numbers 3 and 15, as to the internal right-of-way buffers and road standards respectively.

For these reasons, the proposed rezoning will impose construction and post-construction noise, fugitive dust, vibrations, loss of use and privacy; will unreasonably overburden and infringe upon ownership and existing easement rights, which are to be considered in local decision-making pursuant to the Lee Plan property rights element and in violation of the Land Development Code; will generate traffic and corresponding roadway maintenance costs at a level far in excess of what historically has been endured by the Associations or currently; and could impact vested rights of the Associations and their members, as -- other owners within the SSRD that have not been recognized as a party to the application, as Mr. Murphy will detail further, as well. Said differently, the Associations and their respective members will suffer special damages different and greater in degree than the public generally.

Now turning to the substantive objections. As a

preliminary matter, the easements are still not accurately reflected on the Applicant's MCP dated the 11th. For example, the MCP includes reporting information of OR Book 1848 at page --

THE REPORTER: Could you slow down, please.

MS. BERKEY: Oh, certainly.

HEARING EXAMINER COLLINS: Sometimes when we read, we tend to speak faster.

MS. BERKEY: And it is up on the slide there for reference, too, but OR Book 1848 at Page 807 and OR Book 1970 at Page 30 in the Lee County public records, but these don't correspond to easements that are applicable to the application property.

There's also a surveyed easement along the east side of proposed Tract A-1 that isn't shown on Applicant's boundary survey or master concept plan, and that is recorded at OR Book 48 at Page 532, a 30-foot-wide road easement. We ask that Applicant provide further information as to why that easement was not included.

The Lee Plan property rights element, in accordance with Section 163.3177(6)(i), Florida Statutes, provides that easement rights are to be considered in local decision-making. LDC Section 34-371(a)(4) provides that all applications for PD

zoning include the identification and depiction of easements affecting the property, whether recorded or unrecorded. This is so the general public and beneficiaries of easements and owners of abutting properties can know the various property interests applicable to the application and assess the impacts of the application on their corresponding rights.

The 2002 Administrative Interpretation limits development to 912 total hotel and residential units and up to 5 acres of commercial on the south end only. The 2003 settlement agreement, to which the County was a party and to which Mr. Mintz already spoke, also --

MS. MONTGOMERY: Your Honor, for the record, this is a new day. I'm going to interpose the objection to the discussion regarding a settlement agreement on a matter not before you. And I understand it's a standing objection for the rest of today.

HEARING EXAMINER COLLINS: Okay.

MS. MONTGOMERY: Thank you.

MS. BERKEY: The settlement agreement limits current and future development of dwelling units and hotel units to the historical limit of 912 and -- of 912 and was recently held in circuit court to be valid and binding.

The conditions and development standards within

the ADD, in conjunction with the 912-unit cap under the ADD, and further memorialized again in the settlement agreement, was intended to prevent and mitigate adverse impacts and incompatibilities with the surrounding areas.

The Applicant's claim that certain deviations incorporated into the 2002 Administrative Interpretation related to open space, parking, and buffering are vested for a new application seeking to now substantially increase building heights and allowable units is flawed and foreseeably results in adverse impact and incompatibilities. The Applicant cannot have it both ways and be vested and then seek to build on without corresponding mitigations to offset those increased impacts.

The Applicant is the minority owner of about 120 acres within the SSRD, which is the subject of the rezoning application, but the remainder of the total 304 acres is owned by others who are within the SSRD and subject to the ADD, but who have not consented to or joined in on this application.

See also the Applicant's PowerPoint presentation, I believe it was Applicant's Exhibit 2, at slides 17 through 20 and 22 through 69, which, as you may recall, included the tract-by-tract review of the communities

within the SSRD.

The Applicant acknowledges in written materials and oral testimony that access road, South Seas Plantation Road, is constrained due to existing native vegetation and existing development abutting the road outside of the proposed MPD. And Ms. Crespo also stated during her testimony on the 14th that the overall resort property is long and linear and surrounded by existing development, which makes it spatially constrained as a function of the layout and being surrounded by waterbodies on all sides. However, Lee Plan Policy 5.1.2 prohibits residential development where physical constraints or hazards -- like flood, storm or hurricane hazards -- environmental limitations, or other characteristics may endanger the residential community, or require density and design to be adjusted accordingly to account for those constraints and hazards.

This policy is violated due to the inadequate access to accommodate the proposed increase in allowable units and the dilution of existing easement rights serving adjacent existing residential developments within the SSRD. There are also obvious hurricane and evacuation hazards presented by the proposed development which will be discussed in greater

detail by subsequent speakers.

The Applicant and the Associations share the access roadway and easements, again, the entire extent of which is not within the proposed MPD boundary and which is not fully owned or controlled by the Applicant. You'll see circled in red, this portion is outside the MPD boundary, and over which the Applicant only owns an easement interest or several easements, and yet the entire stretch of the road is subject to Deviation Request 13 and 15 as to internal right-of-way buffers and road standards, respectively.

And see also the Applicant's boundary survey at sheets 10, 13 -- I'm sorry, 10, 11, 13, and 14, and that's Attachment B to the Staff Report.

HEARING EXAMINER COLLINS: So is it your position that since it's not within the confines of the property they own, they have no responsibility to do anything other than to leave it in the condition it's in?

MS. BERKEY: The --

HEARING EXAMINER COLLINS: Because that's the flip side, either they're going to try to meet Code in terms of what's planted alongside of it; but if you're saying it's not theirs to do anything with, then it just stays the way it is. Is that your --

MS. BERKEY: Well --

HEARING EXAMINER COLLINS: -- position?

MS. BERKEY: -- Deviation 15 is to stay how it is without including pedestrian facilities and other things, citing to constraints. My -- my position is that it's constrained and should remain capped at 912; so additional improvements wouldn't be necessary to account for these additional impacts. It should just remain to the historical development pattern of 912.

During Ms. Crespo's presentation as to Deviation 3, in particular on the 14th, which is at slides 106 to 109, she stated that Deviation 3 can only apply to the Applicant's portion of their road in the MPD; but the master concept plan shows Deviations 3 and 15 as applying to the entire road, including portions that are owned and operated by others who haven't consented or joined in to the application. Deviation 3 also relies on existing vegetation on property owned by others -- the existing vegetation on property owned by others outside of the MPD boundary.

LDC Section 34-202, sub A, provides the submittal requirements for all applications that require a public hearing, and includes the Applicant submitting a signed statement under oath that he is the owner or authorized representative of the owner of the property subject to the request, and that he has full authority to secure

approval required and to impose covenants and restrictions on that property.

Again, the Lee Plan property rights element recognizes the right of a property owner to physically possess and control his interest in the property, including easements. The Applicant is not the owner of the full extent of the road, nor the properties along the road which have existing vegetation, which they're citing to as the roadway buffer in light of Deviation 3, nor is the Applicant the authorized agent for any of the 12 associations or other owners impacted.

The Applicant, again, can't impose deviations or other conditions on property it doesn't own without the consent of those owners as an authorized agent. So these deviations, in our opinion, are not supported by the LDC or --

HEARING EXAMINER COLLINS: So do those property owners own the underlying right-of-way, or are they also similarly situated as easement holders?

MS. BERKEY: And I have a table that will show the distinction on a forthcoming slide. So I'm happy to walk you through on that southern segment --

HEARING EXAMINER COLLINS: I'll wait -- if that's part of your presentation, I'll wait.

MS. BERKEY: Okay, thank you.

So, again, these deviations are not supported by the LDC or the Lee Plan, including Lee Plan Policy 23.2.6 requiring all specific requirements for deviations set forth in the LDC to be met.

The portions of the road outside the proposed MPD boundary on the south end, over which the Applicant only holds an easement interest, are inside the condominium properties of Beach Cottages, Beach Villas III, Gulf Beach Villas, South Seas Plantation Beach Home, and Sunset Beach Villas; but yet they are tagged with Deviation 3 and 15 despite them not having consented to or otherwise joined in on the application. The Applicant doesn't have the authority to secure deviation approval or otherwise impose covenants applicable to these areas outside of their road ownership.

The remainder of these Associations not listed in that table and their members -- which are Seabreeze, Marina Villas, Land's End Village, Sandrift, South Seas Plantation Beach Homesites, Bayside Villas, and South Seas Villas Condo -- are the beneficiaries of an ingress and egress easement or easements over and across the access road.

The various land use decisions over time, including those as to the 912-unit cap, contemplated

the access road, in its then existing condition, to serve the maximum development potential of 912 units inclusive of hotel and dwelling units. So while the access road has served the project for decades, which is a quote from the Applicant's revised schedule of uses, and perhaps has been adequate to serve the approved resort and low-density residential traffic within the resort and the immediately adjacent existing residential developments, the development would be extensively changed if the rezoning is approved.

The Applicant has not substantiated its claim that this constrained private road is adequate to serve a 40-percent increase in allowable number of units on the resort property, an increase from 912 to 1,268, and the existing surrounding uses likewise served by the road.

The Applicant has also, in my opinion, cherry-picked the most generous segments of the access road to highlight in an effort to substantiate their need for Deviation 15; but these two cross sections from their revised deviations justification from January 7th are on property not owned or controlled by the Applicant. They're within the condominium property of Beach Cottages Condo as to the third roadway segment, and Sunset Beach Villas as to the fourth roadway segment. The access road on the north end is

far more constrained than what the Applicant's selected cross sections show.

HEARING EXAMINER COLLINS: Okay. Could you go back there.

MS. BERKEY: (Complies.)

HEARING EXAMINER COLLINS: What page is this, 13?

MS. BERKEY: Uh-huh.

HEARING EXAMINER COLLINS: And this is illustrating what exactly?

MS. BERKEY: For Deviation 15 for their justification that they submitted on January 7th, they had four roadway cross sections to show the constrained nature of the access road. Two of their selected cross sections are on condo property outside of the road that the Applicant owns.

HEARING EXAMINER COLLINS: Right, but they have easement rights over it.

MS. BERKEY: They do.

HEARING EXAMINER COLLINS: Right, okay.

MS. BERKEY: I'm -- and Mr. Roark will testify to this further, but the road is -- these are more helpful to the Applicant's case than other portions of the north side segment of the road that they own, which are much more constrained and narrow. So it's not a full picture of the road's condition to support the

deviation request.

HEARING EXAMINER COLLINS: So this document that's a little insert on page 11, is this the entire road easement?

MS. BERKEY: No, that's specific to the east side of Tract A-1 by the Rauschenberg --

HEARING EXAMINER COLLINS: So where's the document that creates the road easement?

MS. BERKEY: On table 1 on slide 12, the easement instruments are noted in that far right column, and they're within the agreed --

HEARING EXAMINER COLLINS: But they're not provided?

MS. BERKEY: They're provided in the second exhibit I submitted into the record. So what's in your binder is what's noted in that far right column, and then also the plats that submit the portions of the road into the condominium property is in that second column.

HEARING EXAMINER COLLINS: And which tab is the easements that govern?

MS. BERKEY: The plats that submit the portions of the access road to the south are Exhibits G, H, I, K, L, M, N, O, and P, and then the road access easement itself is Composite Exhibit J.

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HEARING EXAMINER COLLINS: So this is the entire length of the road that easement -- grant of easement?

MS. BERKEY: At least as to the southern segment where the road is within the condo properties.

HEARING EXAMINER COLLINS: And this is the area that you're contending --

MS. BERKEY: That the -- at least those five should have consented and joined into that location as the underlying owner of the road. That MPD boundary is the footprint of the rezoning that they're seeking today, but the deviations apply to property immediately adjacent owned by others who have not consented or joined in on the application or authorized the Applicant to apply deviations to the property they own.

HEARING EXAMINER COLLINS: So the alternative would be to leave it in its existing condition; correct?

MS. BERKEY: That's what Deviation 15 is, is to leave it in its existing condition, where it was contemplated to serve a maximum of 912, but then increasing by 40 percent.

HEARING EXAMINER COLLINS: Well, the number 912 wasn't established in 1973.

MS. BERKEY: Correct, but when the 1973 rezoning happened, the easements were already in place and that

was relied upon to support the 912, and then everything since then has considered the road in its then existing condition.

HEARING EXAMINER COLLINS: Okay, continue.

MS. BERKEY: As detailed further in the deviations for review conducted by Mr. Roark dated January 28th related to the Applicant's January 7th post-sufficiency submittal, which is enclosed with my request letter as Exhibit Q, which Mr. Roark will discuss further in his presentation, as well, the access road with the requested Deviation 15 will include substandard bike lanes and no pedestrian facilities or sidewalks at all. Mr. Roark's review also notes several errors in the Applicant's January 7th post-sufficiency --

MS. MONTGOMERY: Madam Hearing Examiner, I'm going to object to this testimony at this time because there's no foundation for this. There's no testimony on the record --

HEARING EXAMINER COLLINS: Right. I'm going to give it the weight -- afford it the weight that it should have.

MS. MONTGOMERY: Thank you.

MS. BERKEY: And Mr. Roark will be speaking today versus on subsequent hearing days; so you will be hearing from him shortly.

HEARING EXAMINER COLLINS: You're saying -- just -- I'm trying to -- I'm going to have to go through all this when this hearing is over, and I'm trying to mark the pages on your PowerPoint that would be illuminated further by the tabs in your book, and I just want to confirm --

MS. BERKEY: Sure.

HEARING EXAMINER COLLINS: -- that page 14, that detail will be provided in tab Q?

MS. BERKEY: Oh, yes, slide 14 is Exhibit Q to my request letter.

HEARING EXAMINER COLLINS: And that's in the binder?

MS. BERKEY: Correct.

HEARING EXAMINER COLLINS: Okay, thank you.

Okay, continue.

MS. BERKEY: Sure. And beyond the errors in the post-sufficiency submittal from the Applicant with respect to Deviation 15 that Mr. Roark identified in his professional opinion, the Applicant is requesting many substandard variations and in some cases complete exceptions. These variations to the minimum standards, combined with the increase in vehicular -- which, again, includes what the Applicant has noted as trolley and an inconsistent number of employee shuttle vans,

golf carts, regular automobile traffic, as well as bicycle and pedestrian traffic, will likely increase the probability of crashes, worsening the safety and operations of the roadway. Without alternative designs or mitigating measures for these substandard conditions, there is an increased risk of worse operational performance and safety.

The Applicant describes South Seas Plantation Drive as privately maintained with open drainage in a suburban area; however, the segment of the road just north of the intersection with Bayside Villas to approximately the intersection with Sandrift is within the Wetlands Future Land Use designation.

Increased traffic significantly harms the environment by generating not only higher greenhouse gas emissions, leading to worsened air quality, but also noise pollution and contributing to climate change. Water pollution and wetlands issues are also of crucial importance in the transportation and environmental nexus. Fuel and other fluid, like hydraulic fluids, oil, cleaning agents, and grease, and particle deposits from tires and brake pads, for example, run off from roads resulting in damage to water resources. Not only that, but also damage to vegetation, trees, and natural habitat. It is not

plausible that additional traffic trips would, quote, enhance environmental resources within and immediately adjacent to the proposed MPD boundary, as asserted by the Applicant in their January 7th post-sufficiency submittal.

I have detailed past objection letters to the Applicant and County Staff submitted into the record today, which I believe are E and F in what I submitted --

HEARING EXAMINER COLLINS: Okay, hang on.

MS. BERKEY: -- into the record.

HEARING EXAMINER COLLINS: You're on slide 16 now?

MS. BERKEY: Yes.

HEARING EXAMINER COLLINS: And you're saying this corresponds to tab E and F?

MS. BERKEY: Correct.

HEARING EXAMINER COLLINS: Okay. Thank you for indulging me with this.

MS. BERKEY: Absolutely, I'm happy to do so.

The ADD provides physical extents of the 5 commercial acres permitted by the 1973 zoning resolution on the south end only with frontage directly onto Captiva Drive, and that's the excerpt from the '73 -- the plotted geographic area from '73, the -- the -- I don't want to say combined, but on the south

end immediately facing Captiva Drive on the left-hand side, as compared to the current proposal on the right. The Applicant instead now is splitting the commercial uses about 2 and a quarter acres on Tract I-1 on the north end, and the remaining 2.75 acres on the south end at Tract A-1.

HEARING EXAMINER COLLINS: So when you say "commercial uses," are you specifically meaning the hotel?

MS. BERKEY: Correct.

HEARING EXAMINER COLLINS: Okay.

MS. BERKEY: This split of what was 5 acres on the south end only to now disjointing them half -- about half on the north end and half on the south end contravenes the current zoning and also generates adverse impacts to the northern segments of the access road and those adjacent property owners that weren't previously contemplated and, in my opinion, in violation of Lee Plan Policy 5.1.5 as to the protection of existing residential areas.

And to just briefly conclude, and as the forthcoming experts will further support, the proposed rezoning is not approval -- approvable as it violates the LDC and the Lee Plan.

Approval will worsen traffic and hurricane

evacuation times and unreasonably overburden the already constrained access road, which, again, the road is partially owned and controlled by others who are not co-applicants to the application and partially outside the MPD boundary, but yet still subject to Deviations 3 and 15.

The access road is also partially within the Wetlands Future designation.

The proposed development, if approved, will adversely impact natural resources, worsen safety and operational performance of the access road without alternative designs and without any mitigation measures for the substandard road conditions, as Mr. Roark will speak to later, and increase road maintenance costs as a result of the substantial increase in allowable units without the Associations' consent and joinder, and without them deriving any benefits from the rezoning if it's approved, making them just innocent bystanders to this application as it advances.

The Applicant is not entitled to the rezoning being sought.

The Applicant will continue to derive ample benefits and development potential in the form of the 272 total vested units, inclusive of dwelling and hotel units, with 25 unbuilt units pursuant to the 2002

Administrative Interpretation and, again, memorialized further in the settlement agreement.

Given the very strict current limits on development on Captiva, a fragile and vulnerable barrier island with constrained internal access, recently damaged by three hurricanes, the Applicant is very fortunate to have the vested rights to the 272, and they shouldn't be entitled to another additional unit.

Simply put, where the access road serving the proposed development is recognized as constrained, and the entire project is constrained due to surrounding existing development, and it's long, linear in nature, surrounded by water, the Applicant must abstain from additional development.

And as confirmed through the substantial, competent evidence provided to you so far, and that you'll continue to hear as the hearing progresses, the Applicant has not provided a complete application, still failing to correctly identify all material easements and having omitted the Associations as indispensable parties, in violation of Lee Plan property rights element and LDC Sections 34-371 and 34-202, sub A.

The rezoning would yield incompatible development

that is detrimental to the surrounding neighborhood, especially to the Associations within the SSRD and who share the access road and easement rights with the Applicant, in violation of the Lee Plan.

Accordingly, the Applicant has not sufficiently demonstrated that the request meets each of the applicable review and approval criteria; and with these considerations in mind, we respectfully request that you recommend denial of the application to the County Commission.

And just for an administrative note, in an effort to streamline the proceedings, legal counsel from the objectors are collectively combining questions of the Applicant and Staff so you get it in one final document on behalf of all counsel, and those will come to you as part of Mr. Grosso's testimony later on behalf of CCA.

HEARING EXAMINER COLLINS: Okay, thank you.

MS. BERKEY: Thank you.

HEARING EXAMINER COLLINS: Did you provide the court reporter with a copy of your letter in this binder?

MS. BERKEY: Yes, I did. Yours is bound and the others are binder clipped.

HEARING EXAMINER COLLINS: I just wanted to tell her that she read mainly from that letter. So if you

had difficulty catching everything she said when she was on a roll, you can look in there and probably find --

THE REPORTER: (Nods head.)

HEARING EXAMINER COLLINS: Okay, thank you.

MS. BERKEY: Thank you.

HEARING EXAMINER COLLINS: We take for granted that they have to take it all down, right, when we start speaking very quickly.

Thank you, Ms. Berkey.

MS. BERKEY: Thank you.

MS. MONTGOMERY: Madam Hearing Examiner, can I ask a question?

HEARING EXAMINER COLLINS: (Indicating.)

MS. MONTGOMERY: And the question is, under the Administrative Code legal counsel doesn't provide competent and substantial evidence. They provide argument. So I'm -- so I have no right to cross-examine Ms. Berkey if what she made is strictly legal argument. If she's submitting that she was testifying to facts, then there's some questions I would have.

HEARING EXAMINER COLLINS: Right. And I understand it's difficult, but I feel confident that you can fully cover your disagreements with the

positions she advocated for during her presentation at the close of public input when the Applicant has a full opportunity to put on additional testimony and evidence and experts to address things that were heard --

MS. MONTGOMERY: Okay, but I --

HEARING EXAMINER COLLINS: -- during the public input portion.

MS. MONTGOMERY: -- I do have one question, if I can; and if I can't, then you can tell me but we had a lot of testimony about the road.

It's my understanding my client pays to maintain that road and that the Associations don't contribute anything and don't maintain --

HEARING EXAMINER COLLINS: Right, and you can cover this during your portion following --

MS. MONTGOMERY: Okay. All right.

HEARING EXAMINER COLLINS: -- public input. It will be much more effective at that time.

MS. MONTGOMERY: Okay, thank you.

MS. BERKEY: And may I answer, to the extent I can, you will be hearing from individual leadership of several of the Associations, but I understand that several of them do maintain their portion of the road at their expense as part of the common element.

HEARING EXAMINER COLLINS: Okay. So that

information will be coming with subsequent witnesses, is what you're saying.

MS. BERKEY: If there still remains a question, yes, but I know of at least three that either elect to or affirmatively have the responsibility to provide maintenance, and they do so.

HEARING EXAMINER COLLINS: Okay, thank you.

MS. BERKEY: Thank you.

HEARING EXAMINER COLLINS: Who will speak next?

MS. BERKEY: Mr. Murphy.

HEARING EXAMINER COLLINS: Mr. Murphy.

MR. MURPHY: Good morning, Madam Hearing Examiner, and can I be heard?

HEARING EXAMINER COLLINS: (Nods head.)

MR. MURPHY: For the record, my name is Gerald Murphy. I'm going to give you some qualifications as a matter of introduction. My educational background, I have a Bachelor of Arts in Landscape Architecture from the University of Florida, a Master of Arts in Urban Planning -- Urban Regional Planning from the University of Florida, and a Juris Doctorate from UF Law.

My professional experience, I was a planner with Lee County from 2000 to 2004, during which time I became certified as a professional planner by the American Institute of Certified Planners, which

certification I maintain, during which time I was charged to work with Mr. Tim Jones, Chief Assistant County Attorney for Land Use, to research and memorialize the history and status of development entitlements for the South Seas Resort, which effort was ultimately formalized in ADD 2002-00098, executed by Lee County Community Development Director Mary Gibbs.

Subsequently, I was a director of the Department of Community Development for the Town of Fort Myers Beach from 2004 to 2009, during which time the town was impacted by Hurricanes Charley, Frances, Ivan, and Jeanne in 2004, which introduced me to emergency management and planning and the National Flood Insurance Program and the NFIP's substantial damage and substantial improvements requirement, which duties I performed again in preparation for and in the aftermath of Hurricanes Katrina, Rita, and Wilma in 2005; Hurricane Dean and Tropical Storm Olga in 2007; and Tropical Storm Fay and Hurricane Ike in 2008.

In 2006 the National Association of State Floodplain Managers, ASFPM, awarded me the certified floodplain manager credential, which certification I maintain. I am currently, and have been for several years, the cochair of the ASFPM Higher Education Policy

Committee and the Academia Regent for the ASFPM Certification Board of Regents, who administer, maintain, and update the CFM exam.

In 2009 I struck out on my own establishing Murphy Planning, working with the Town of Fort Myers Beach, Lee County, including meetings with the Captiva Civic Association and the Captiva Planning Panel, also representing A Living Vision of Alva during the development of the Alva Community Plan, and with Lee County Community Development Staff and other professionals planners on the Lee Plan: New Horizon 2035 - Evaluation and Appraisal Report on the Lee County Comprehensive Plan finalized in 2011.

In 2013 I began working with the University of Florida and the Institute of Food and Agricultural Sciences, or IFAS, Cooperative Extension, working through extension with coastal local governments to improve coastal community resilience and sustainability by amending their comprehensive plans and land development regulations.

I am currently on the faculty of the University of Florida in the Center for Land Use Efficiency, or CLUE, as the state specialized program agent for flood resilient communities.

I have previously qualified as an expert witness

with the Office of Hearing Examiner in the Lee County -- in the Lee County Land Development Code and Lee Plan, land use planning and zoning, while employed by Lee County from 2000 to 2004 and the Town of Fort Myers Beach until 2009.

Most recently, my -- I've been accepted as an expert by the Administrative Law Judge as an expert in land use planning in the Division of Administrative Hearings, or DOAH, proceedings related to Lee County Ordinance 23-22 in a case styled Captiva Civic Association, Inc., et al., v. Lee County, et al., case number 24-1951GM (DOAH February 3rd, 2025).

I mentioned that I have been accepted as an expert in the Lee Plan and the Lee County Land Development Code, but it has been likely more than 15 years since I've testified before the Hearing Examiner, so I wish to submit by current CV and respectfully ask that the Hearing Examiner accept me as an expert in comprehensive planning, land development regulations, stormwater management and floodplain management, and community resilience and sustainability in land planning, the Lee County Comprehensive Plan, and Land Development Code.

May I approach?

HEARING EXAMINER COLLINS: Yes. This is Murphy

VOLUME 3

Exhibit 1.

(Murphy Exhibit 1 submitted.)

HEARING EXAMINER COLLINS: And I need you to speak up, please.

MS. MONTGOMERY: Thank you.

HEARING EXAMINER COLLINS: Do you have anything else you want to put into the record as an exhibit?

MR. MURPHY: I do. I can do that as a composite, or I can do it through the course of my presentation.

HEARING EXAMINER COLLINS: I think it's less disruptive if you just give it to me now, and I can mark it and then follow along.

MR. MURPHY: Madam Hearing Examiner, there will be three exhibits, if you want to recognize that as a composite exhibit.

HEARING EXAMINER COLLINS: Is this the totality of what remains --

MR. MURPHY: What I'm going to give you now.

HEARING EXAMINER COLLINS: -- in terms of exhibits?

MR. MURPHY: Yes.

HEARING EXAMINER COLLINS: I'm going to call it composite, if that's --

MR. MURPHY: That's fine.

HEARING EXAMINER COLLINS: Murphy Composite

Exhibit 2, and this is a series of documents that corresponds to his presentation.

(Murphy Composite Exhibit 2 submitted.)

MS. MONTGOMERY: Thank you.

HEARING EXAMINER COLLINS: Are these in order?

MR. MURPHY: Pardon me?

HEARING EXAMINER COLLINS: Are these in order?

MR. MURPHY: Yes.

HEARING EXAMINER COLLINS: Okay. I'm ready.

MR. MURPHY: Have you made a decision on my request?

HEARING EXAMINER COLLINS: Yes, you may speak as an expert in the Lee Plan and the Land Development Code, and apparently you can speak in the fields that you've mentioned here. I'll have to look at this more carefully later after the case is over; but, I mean, based on what you've said, I'm all ears.

MS. MONTGOMERY: Madam Hearing Examiner, before we start, I want to object to an exhibit in the composite exhibit. There's no foundation for this, and the people who are responsible for this document aren't here, and they're not subject to cross-examination so it is, in essence, hearsay, and it's the Captiva Island Vulnerability Assessment and Adaptation Plan.

HEARING EXAMINER COLLINS: Okay, thank you, noted.

VOLUME 3

You may begin.

MR. MURPHY: Thank you. At this point, before I begin my substantive testimony, I want to make clear that the professional opinions that I provide today are mine, and mine alone, and in no way represent the University of Florida, IFAS Cooperative Extension, or the Center for Land Use Efficiency.

I am appearing on behalf of the Captiva Civic Association, Inc.; Bayside Villas Condominium Association, Inc.; Beach Cottages Condominium Association, Inc.; Beach Villas III Condominium Association, Inc.; Gulf Beach Villas Condominium Association, Inc.; Land's End Villas Condominium Association, Inc.; Marina Villas Condominium Association, Inc.; Sandrift Property Owners Association, Inc.; Seabreeze at South Seas Plantation Condominium Association, Inc.; South Seas Plantation Home -- Plantation Beach Home Condominium Association, Inc.; South Seas Plantation Beach Homesites Association, Inc.; Sunset Beach Villas Condominium Association, Inc.; South Seas Villas Condominium Association, Inc.; RLR Investments, LLC; and Royal Shell Investments, Inc.

I'd like to speak now about my involvement in the planning, zoning, and development history of Captiva

and the South Seas Resort.

I was the primary researcher for the Jones-Murphy memo, which is Attachment P to the Staff Report, and that represents over a year or so effort to memorialize the development entitlements of South Seas.

I was the primary drafter, with Assistant County Attorney Tim Jones, of the Administrative Interpretation ADD2002-00098, which is Attachment Q to the Staff Report, and I am familiar with the instant public hearing application DCI2023-00051. I have reviewed relevant parts of the application, relevant portions of the Code and Plan provisions, worked with other professionals who fully understand and analyze the application. I submitted a comment letter, which is provided in the exhibit, and I have spoke (sic) with Mr. Mendez prior to this hearing.

Now I'd like to speak about the Captiva setting.

HEARING EXAMINER COLLINS: Can everybody hear him? Because I'm having a lot of trouble hearing him.

MS. MONTGOMERY: I'm trying to adjust this to pick it up because he's not picking up well.

HEARING EXAMINER COLLINS: Yes, put that closer to you. Thank you, Jerry.

MR. MURPHY: How's that?

HEARING EXAMINER COLLINS: We'll see, keep going.

VOLUME 3

MR. MURPHY: All right. I'll rearrange a bit.

MS. MONTGOMERY: Just so you know, they instructed me yesterday you shouldn't talk to the top. You should talk to the middle since that's where it picks up the sound. So --

MR. MURPHY: Okay.

MS. MONTGOMERY: -- that might help you.

HEARING EXAMINER COLLINS: Does it help if you tilt it, I wonder?

(Off-the-record discussion)

MR. MURPHY: The Captiva setting: Captiva Island is predominantly development built out, a coastal barrier island, with an overall context of low-density housing and limited commercial, lying predominantly within FEMA's special flood hazard area. It is susceptible to flooding, storm surge, sea-level rise, and with a limited evacuation system far -- 28 miles or so -- from shelter and non-evacuation zones. It's served by one two-lane constrained road, Captiva Drive, connected by one two-lane bridge at Blind Pass to one two-lane San-Cap Drive, with a couple of options ultimately to one two-lane, Periwinkle Way, to one three-mile-long causeway to the mainland, still in the evacuation zone, which causeway failed in Hurricane Ian in September of 2022, less than three years ago.

I'm now going to excerpt from the Brizaga report, which is the second exhibit that I submitted:

Storm surge inundation maps for the island reveal dramatic and extensive vulnerability to the storm surge across the entire island.

Utility development is relatively inadequate for future population growth. These factors cause many assets to be considered vulnerable to most of the hazards included in this study, especially those that are flooding based. In fact, many properties on the eastern side of the island, which is lower than the west, are always experiencing upwards of a few weeks of influenced -- tidal flooding annually. Excuse me.

There is compounded by the relatively high -- this is compounded by the relatively high groundwater, the proximity to tidal waterbodies, and geology of the barrier island means that the ground has a decreasing capacity to handle stormwater. As sea levels rise, so too will the groundwater, further decreasing the ability of the ground to absorb stormwater.

The Brizaga report, I believe, is mentioned in the Staff Report, and I want to say that I concur in the Brizaga report's conclusions, and they are accurate, in my professional opinion.

Now I'd like to speak about the historic

development pattern of Captiva Island and South Seas:

I'm very familiar with this as I was the planner that was called on to review the historic development pattern and entitlements, prepare a memorandum and administration interpretation for South Seas, and I have recently reviewed that history.

Since the adoption of the 1973 Zoning Resolution Z-73-202, which is Attachment N to the Staff Report, for more than 50 years of development and redevelopment, the zoning of the 304-acre South Seas has continuously and consistently limited the maximum number of hotel and residential units together to 912. That is 3 units per acre.

This density cap of 912 units has been continuously confirmed and enforced by County Zoning decisions for the South Seas up until -- I'm sorry, from 1973 to present.

Historic development pattern and land use pattern on South Seas, defined by the 1973 zoning resolution memorialized in ADD2002-00098, and the actual development on the ground has been consistent with those regulations.

I researched and drafted what is referred to as the Jones-Murphy memo and ADD2002-00098 in response to a request from the Board of County Commissioners to the

Department of Community Development and the County Attorney, to summarize and clarify the status of development on South Seas. I reviewed then past, current, and potential future development on South Seas for the Department of Community Development and prepared ADD2002-00098 under the direction of the County Attorney. Since 2002 and currently, ADD2002-00098 controls development on South Seas at 912 units per -- I'm sorry, at 912 units, including hotel rooms, the same unit cap established in 1973.

The January 31, 2001, memo from Assistant County Attorney Tim Jones contained, quote, a determination of the existing density and intensity of development at South Seas and the amount of development authorized by Zoning Resolution Z-73-202 but unbuilt. The memo states County Planner Jerry Murphy reconstructed an understandable and -- quote, reconstructed an understandable and comprehensive picture of the history of this project, closed quote.

The memo consisted primarily of a report written by me entitled, "Review of the Status of Development at South Seas Plantation." Beginning, quote, I have been asked to review develop -- I'm sorry, review documents and personally field-verified representations provided by Mariner's -- Mariner Properties Development, Inc.,

its predecessor and successors in interest, collectively Mariner, regarding the status of development at South Seas Plantation. The core question is, quote, how many units remain undeveloped within the zoning district created by Resolution Z-73-202.

MS. MONTGOMERY: Madam Hearing Examiner, at this point in time I'm going to -- the ADD and the memo are an attachment to the Staff Report, they speak for themselves, so this is redundant and not at this juncture relevant to the issues before you.

HEARING EXAMINER COLLINS: Okay. Your objection is noted.

Are you reading from some document that I have in my possession?

MR. MURPHY: No.

HEARING EXAMINER COLLINS: Okay. Please --

MR. MURPHY: I can provide this document to you --

HEARING EXAMINER COLLINS: It would be helpful to me and also to the court reporter, if they're your speaking notes and you're staying within them, you know, and not excluding parts.

MR. MURPHY: I have them on a jump drive, and if you will permit me, at lunch I can have printed copies made for the four entities that have been receiving --

HEARING EXAMINER COLLINS: Yes.

MR. MURPHY: -- copies.

HEARING EXAMINER COLLINS: If you would indulge me, that would be helpful to me when I review this later, and especially to the court reporter, who tries very hard to be accurate; but when folks are reading, it's a natural instinct, we speak faster than if we're in conversation, and it makes it more challenging, and I want to ensure that this record is complete.

MR. MURPHY: Understood.

HEARING EXAMINER COLLINS: Thank you for understanding.

MR. MURPHY: Would that be acceptable, for me to print these at lunch?

HEARING EXAMINER COLLINS: A printed document, yes.

MR. MURPHY: That would be your preference?

HEARING EXAMINER COLLINS: Yeah, and I'll mark that as an exhibit of yours.

MR. MURPHY: Okay. I'll be happy to do that after the lunch break.

HEARING EXAMINER COLLINS: Okay. And then just to let you know, I'm going to take a break at 10:30 for the court reporter. If you're not done then, you can just resume after the break.

MR. MURPHY: Okay. What time is it?

HEARING EXAMINER COLLINS: It's 10:00. It's only 10:00.

MR. MURPHY: Okay. I lost my place.

I conducted a visual review of the actual development at South Seas that Mr. Jones and I found to be consistent with the 1973 zoning resolution. The memo explains that the zoning district created by the 1973 zoning clearly evidences the -- quote, clearly evidences the BoCC's intent for the development to be guided by a planned unit development or PUD plan. The purpose and intent was to allow for site design flexibility, not to allow an increase in the 912 unit cap that included both residential and hotel guest units.

This small-scale clustering and site planning flexibility was not allowed by the prior conventional zoning and provided a significant benefit to the developer, who was no longer constrained to the conventional zoning district requirements for lot sizes, large setbacks, single-driveway entrances, and other requirements, and could cluster the development units.

Quote, the County clearly worked with the developer to establish a unique development plan for a

world-class resort destination within the parameters of the conventional RU-3 (RM-2 as converted) zone, closed quote.

The memo explained, quote, under the specific limitation of density, 304 acres at 3 units per acre would result in 912 as the maximum number of allowable residential units.

The memo explained, quote, Z-73-202 established a planned unit development, PUD, zoning district limited to 3 dwelling units per acre, for a maximum of 912 units, and 5 commercial -- 5 acres of commercial development, all within 304 acres, closed quote.

The 5 acres of commercial area are for the ancillary commercial needs of residents and guests, not hotel units beyond the 912-unit cap. There is no reasonable interpretation otherwise.

The Jones-Murphy memo resulted in the formal Administrative Interpretation, ADD2002-00098, dated July 30th, 2002, that memorialized the 1973 zoning resolution limiting current and future development within South Seas to 912 units, carrying over the same limitations that have applied since 1973.

ADD2002-00098 documented the, quote, as built-as approved, closed quote, status of development at South Seas, and clarified, guided, and regulated future

development at the resort. It confirmed the 1973 zoning resolution stating, quote, current and future development, closed quote, will be limited to a, quote, carefully planned and tightly controlled, closed quote, development density of 912 units.

ADD2002-00098 explains to the County, quote, adopted Resolution Z-73-202, which changed the zoning district to a unique zoning district described particularly as, quote, RU-3 using a PUD concept as a guide with special limitation of 3 units per acre and special permit for up to 5 acres of commercial property and, inter alia, limited the development density for this zoning district to 912 units. Staff determined, and the developers have agreed to that.

Contemporaneous to the adoption of Resolution Z-73-202, the developers made the following representations which constitute enforceable conditions:

A, development will evolve over a number of years with several very basic guides (sic): Very low-density development utilizing a number of small-scale clusters, carefully planned and tightly controlled development. Emphasis on pedestrian traffic, not automobiles.

B, the project will be limited to 912 residential units, 304 acres at 3 units per acre, and 5 acres of

commercial development.

7, quote, likely to take an additional three to five years to complete the development in accordance with the approved master plan, closed quote.

Total approved dwelling units, 912; total developed dwelling units, 877; total undeveloped dwelling units, 35.

The 2002 South Seas RMPD is approved with the following conditions:

5a., current and future development within the South Seas RD will:

1, be limited to a development density of 912 units utilizing a number of small-scale clusters.

4, emphasize pedestrian movement, not automobile traffic.

And, 7, provide and maintain a balance of dwelling units, amenities, and service facilities for the benefit of the entire community, South Seas owners and guests, Captiva, and Lee County.

B, the final phases of development in the South Seas RD include three basic types of projects in accordance with the South Seas RMPD -- RMPD, I'm sorry, and allowed limits:

2, development of small-scale clusters of residential units.

3, improvement to guest facilities.

These include development and redevelopment of resort service facilities and guest facilities, including utilities and other infrastructure.

The list of development clusters and total unit count in ADD2002-00098 includes hotel guest units counted as part of the 912-unit cap. ADD2002-00098 uses residential units, DUs, residential DUs, and units interchangeably. ADD2002-00098 listed each development cluster, identified 877 units of the 912 as having been built, and 35 units as remaining to be developed. It identified multiple hotel buildings and referred to all units as DUs, and set the following condition, quote, current and future development within South Seas RD will be limited to a development density of 912 units utilizing a number of small-scale clusters.

Under ADD2002-00098, individual development clusters could exceed 3 units per acre as long as the overall gross density did not exceed 3 units per acre. Thus, the existence of development clusters at South Seas exceeding 3 per acre does not mean the historical development pattern is greater than 3 units per acre.

The then owner of South Seas, the predecessor in interest to the Applicant, and their lawyers -- the same law firm representing the owners at that time and

the Applicant -- were involved in my review and consented to ADD2002-00098.

HEARING EXAMINER COLLINS: You can just call it the ADD.

MR. MURPHY: Okay.

South Seas was required to comply with Section 33-1678(c) if it did not comply with ADD2002-00098, which also limited density to 3 units per acre for hotel units and dwelling units.

The 912 hotel and residential unit cap of the ADD was never amended.

I'd like to make a brief mention of the ADD amendment process. The Applicant's agent, Ms. Crespo, indicated that the County Attorney's Office determined the Applicant could not avail themselves to the procedures memorialized for amendment to the South Seas RD in the ADD.

The ADD is an official County interpretation of the substance and procedures for amending the South Seas RD, signed by the Community Development Director, and approved as to form by the Assistant County Attorney Land Use Chief Tim Jones. This memorialized procedure was utilized on the occasions of conversion of certain employee units -- housing units to an 80-unit hotel and multiple-family units in

ADD2008-00082, December 30th of 2008.

The other approvals that have occurred under ADD -- the ADD are ADD2003-00077A, ADD2004-00077, Z -- Resolution Z-05-013, ADD2006-00041, Resolution Z-05-13B, ADD2008-00082, ADD2014-00203, ADD2015-00015, which I have submitted into the composite exhibit.

Actual development at South Seas has complied with the density limits of the 1973 rezoning resolution and the ADD and has never exceeded 912 units.

Details of the 1973 zoning resolution are important. Quote, the petition submitted will result in a downzoning from 3,900 units to 912 units, but will provide flexibility of development by allowing cluster concepts under an overall RU-3 type zoning.

The application explained, quote, an RU-3 zoning classification will allow development of the remainder of the property by using cluster home concepts. This will allow the creation of pockets of higher density, groupings of beach homes and villas on land suitable for development. Clustering higher density into smaller areas will then allow the remaining areas to be used for green belt separation and undisturbed mangrove and bayou preserves. RU-3 zoning will allow this kind of very flexible development because it does not require minimum lot sizes, large setbacks, single

driveways, entrances, et cetera.

The approved application request represented that, quote, we wish to limit the overall density...with our desire to create a very low-density high-quality resort community. In addition, low-density development is desirable in view of provisions of utility systems, maximizing traffic flows, open space requirements, preservation of natural areas, closed quote. And, quote, as a result, we wish to limit development to 3 units per gross acre or 912 units on the 304-acre parcel. Within that overall limitation, we wish to have the flexibility to develop pockets of higher density, while leaving other areas completely untouched. The Applicant represented that, quote, the requested density represents a maximum limitation, not necessarily a figure which will ever be reached.

The Applicant presented that South Seas -- represented that South Seas Plantation, quote, has the capability of becoming one of the finest resort residential areas in the country on a small and private scale. The plans are to accomplish this objective by focusing on very low density.

The Applicant represented, quote, the zoning petition is in keeping with the concern for the island's standard of development. We support the need

for an overall master plan for the islands. As shown, the request is well within all recommended limits.

The 1973 zoning resolution limited units to 912, inclusive of hotel room units. The approved master development plan provided for 120 hotel rooms, 792 residential units, and a 5-acre commercial area and an 18-hole golf course.

The 5 acres of commercial use are for the ancillary commercial needs of the residents and guests, not hotel units beyond the 912-unit cap. There is no reasonable interpretation otherwise.

Since at least the 1973 zoning resolution for South Seas, hotels have always been subject to a dwelling unit density limit instead of commercial bulk intensity standards.

The 1973 zoning resolution was approved prior to the adoption of the Lee Plan in 1984.

I'd like to speak now on hotel and dwelling units included in the 912, the 5 acres and height, and Captiva rules.

The 912-unit cap for the 304 acres at South Seas under ADD2002 -- under the ADD, and at all times before and after, includes both dwelling units and hotel rooms.

The number of hotel and residential units at South

Seas has never exceeded the 912 cap, and no amount of development behind the 912 has ever been the historic development pattern.

The 5 acres of commercial set aside and identified in ADD2002 -- the ADD, I'm sorry, was not for residents or hotels. It was for ancillary uses to support residential and hotel guests.

The ADD states, quote, the following development standards applicable to the South Seas RD, based on standards that have been applied since its inception in 1973, are approved.

With regard to building heights, these standards are applicable to all new structures except those being replaced under existing build-back provisions of the Code. The maximum height to the top of a parapet wall, roof, or midpoint of a pitched roof of no less than a 4-to-1 and no more than 7-to-1 shall be the lesser of 35 feet above the grade surrounding the building at its foundation or 42 feet above mean sea level. These were the same building height limits that applied to all of Captiva at the time.

The ADD said any aspects of development it did not specifically address would be governed by the Land Development Code.

Long-standing building height limits are a major

component of the historic development pattern on Captiva and are instrumental to the island's ambience, character, and low-density nature.

At the time of the info-gathering process for the 2002 Jones-Murphy memo and the ADD, the development densities on Captiva within and outside of South Seas, they were the same.

The ADD was consistent with the regulations applicable to all of Captiva, which limited density to 3 acres (sic) for hotel rooms and dwelling units.

For the rest of the -- for the rest of Captiva, the historic pattern is that hotel and residential units have both been limited to 3 units per acre since at least 1982, when Ordinance 82-44 downzoned all of Captiva to conform to the South Seas density limit of 3 units per acre for dwelling units and for hotels, currently located in Code Sections 33-1628(c) and 34-1805.

The number of pre-Code buildings at South Seas that exceeded the ADD height limits is extremely limited. The number of buildings outside the gate of South Seas that exceed the Code's build heights by a small amount is also limited. The historical designation hotels are not tall and were built consistent with the Code heights regardless of the

number of stories.

The proposed 45-foot building heights will allow buildings that do not maintain the historic building heights and would allow at least an additional story on each structure, and in some cases the potential for two stories of parking below flood.

My professional opinion on the heights:

35 feet above BFE plus -- and by plus I mean with freeboard or the four feet that are allowed in certain areas -- would mirror the historic low-density residential development pattern of -- I'm sorry. The proposed 45 building limits (sic) will allow buildings -- two stories of parking below flood.

35 feet above BFE plus would mirror the historic low-density residential development pattern of Captiva and also the pockets of higher density within the entire resort, 304 acres.

And particularly, the development pocket that was formerly employee housing that, due to the proposed building envelope crossing the coastal construction control line, that BFE may be as high as 22 feet to the first supporting element and would portend two stories of parking structure below BFE, and an overall height of approximately 65 feet, and that would not be in keeping, nor would 45 feet above BFE be in keeping

anywhere except for the few historic buildings identified by the Applicant as being nonconforming for height.

I'm of the opinion that 35 feet above BFE can accommodate everything the Applicant needs to do for resilience. If the County's desire is to allow for increases in height to accommodate BFE plus, do that, but there's no need to allow 45 feet above BFE plus.

Now I'd like to talk to why the instant planned development request is inconsistent with the Captiva Community Plan provisions.

Goal 23: The relevant remaining goal text:

Quote, protect the coastal barrier island community's history, closed quote.

Quote, achieve through land use regulations...that encourage the use of vegetation, limit noise, light, water and air pollution, create mixed use development of traditionally commercial properties, and enforce development standards that maintain the historic low-density residential development pattern of Captiva, closed quote.

It is my opinion that an aquatic center will be noisy, and if it is open after dark, it will increase light.

Additional units above the historic 912,

particularly hotel rooms above the 912 cap on development units will increase air pollution from additional vehicular trips.

Redevelopment of the historic 5 acres of traditional commercial development, specifically described and located in the ADD at the south end of the South Seas RD as a mixed-use would be appropriate, but would not include additional units, particularly hotel rooms, above the historic 912 units.

Approval of the proposed MPD with 4 -- I'm sorry, with 193 residential units and 435 hotel units does not enforce development -- does not, quote, enforce development standards that maintain the historic low-density residential development pattern of Captiva, but rather would entail more intensive use of the commercial area and propagate that commercial use deeper within the South Seas Resort.

The request is for 193 residential units and 435 hotel units. There is no other resort on Captiva or Sanibel Island with this many hotel units; so it is not in keeping with the historic low-density residential development pattern of Captiva provided in Goal 23 and the historical development pattern limits of Policy 23.2.4.

Historically, the 5 acres of commercial property

was excluded from density calculations at South Seas RD because there were no residential or hotel units. So the separation and relocation of a portion of the commercial acreage into the interior of the resort, and the development of hotel uses within the commercial area is not in keeping with the historic development pattern.

And, therefore, their request DCI2023-00051, in my opinion, is not consistent with the goal.

I'd like to now discuss the problems with extracting the 128 from the 304.

Rezoning raises troubling issues regarding the legal status of the existing residential development on the resort not owned by the Applicant. The 304 acres and the 912 units, including hotel rooms of the South Seas Resort, represent a unified planned development that was partitioned and sold off to hundreds of individual property owners on South Seas, unrelated to Timbers, who have for over 50 years relied on the master plan's binding commitments regarding the maximum number of residential and hotel units, open space, and resulting character, development patterns, and quality of life. The approved 912 units were required to be clustered on portions of the property to preserve open space and the integrity of the resort as a whole. The

Applicant's 120 acres were allocated 272 units. The building heights, densities and intensities of use and open space cannot be changed piecemeal. The Applicant can't simply extract its 120 acres out of the 304-acre 912-unit master planned and built development as though they are not part and parcel of that master planned development. To allow one of the South Seas property owners to more than double its unit allocation, from 272 units to 631 units, is fundamentally incompatible with the as-built resort and is unlawful.

Code Section 34-612(2)(h) pinpoints the fundamental reason why an increase in the density in this almost built-out master planned development cannot be approved, quote, the purpose and intent of the various planned development districts is to further implement the Lee Plan while providing some degree of flexibility in planning and designing developments by...providing a process and record on which developers, public officials, the general public, and the consumers of development may rely, closed quote.

This rezoning would undermine reliance of the County and Captiva residents by allowing substantially more development that exceeds the cap and final PUD development plan approved in 1973 and confirmed through the long-term development of the property and the ADD.

The South Seas Resort development is a complex property construct that isn't and should not be unraveled for a myopic redevelopment project generally incompatible with existing internal and external South Seas RD entitlements and vested property rights based on the commitment of existing buffers and open-space areas. These relationships between the native island landscapes and the resort development were established by Lee County Resolution Z-73-202, subsequent County actions, and memorialized in the ADD. The Applicant's determined obliviousness to existing South Seas Resort entitlements and property rights ignores the complex South Seas RD-wide weave of property right commitments and concessions, and is disruptive to the South Seas RD neighborhood and the larger established Captiva Community Planning and its citizens.

Applicant's response to Staff concerns for the allocation of density among the several proposed redevelopment tracts underscores the Applicant's desire to enjoy the flexibility accorded to the County -- accorded by the County to the South Seas RD, while ignoring the forward-looking vision of the historical developer and the County under prior pre-disaster approvals, to increase the density and intensity of the property above the long-held 912-unit density cap to

develop 631 new units on the limited access, flood and storm vulnerable barrier island with associated impacts on the planning community.

The Applicant refers to tracts, but they are really areas within the overall resort that draw their conformity to density and all other aspects of the Code from their integrity to the resort used to account for the development units and the concept plan.

During the presentation of Deviation 3, internal right-of-way buffers, it sounded like Alexis stated "right-of-way portion we don't own."

The complex and integrated nature of the resort: The Applicant has included South Seas Plantation Road in their application but apparently does not own unencumbered and fee simple title.

Quote, LDC Section 34-371, General requirements. All applications for planned development zoning or master concept plan approval must follow the required detailed -- the requirements detailed in Article II, Division 6, of this chapter, and the requirements set forth in this application.

Section 34-373, application for PD, requires that the Applicant comply with Section 34-202 (sic), application requirements for public hearings and administrative actions, sub (a), which states, quote,

initiation of application. An application for rezoning, mine excavation planned development, et cetera, may be initiated by, sub (1), a landowner or his authorized agent, for his own property. Where there is more than one owner, either illegal or -- either legal or equitable, then all owners must jointly initiate the application for petition. Or the County.

Granting the Applicant a development increase in its minority portion of the resort would cause a serious breach of the 912-unit cap integral to the resort master plan, will violate the intent and impact of the clustering, and cause existing property owners -- existing properties not owned by the Applicant to exceed the Lee Plan's density limit of 3 units per acre, rendering the existing structures on the remaining 184 acres of the resort nonconforming relative to the 3-unit density limit. If those residential units are destroyed or substantially damaged, redevelopment would be subject to current density limits, which would not allow for those units to be replaced.

I would like to refer to the Applicant's slide, which is Applicant's Exhibit 1, that reviews the various areas on the resort to demonstrate how the request will make these other areas nonconforming for

density, open space, setbacks, stormwater, et cetera.

The properties within the South Seas RD, their development and property interests are tied up by the PUD and the resort concepts with regard to: Access to private properties, lakes and stormwater, open space, access to resort amenities, solid waste collection, and utilities.

I'm now referring to Applicant Exhibit 1, slide 25, pocket 2 -- these are all the areas that would become nonconforming if this planned development is approved.

Slide 25, pocket 2, Bayside Villas; slide 27, pocket 3, Tennis Villas or South Seas Villas; slide 31, pocket 5, Beach Villas; slide 33, pocket 6, Beach Cottages; slide 39, pocket 9, Sandrift; slide 41, pocket 10, Plantation Beach Club; slide 45, pocket 12, Plantation Bay Villas; slide 47, pocket 13, Harbourview Villas; slide 49, pocket 14, South Seas Club; slide 55, pocket 17, Marina Villas; slide 59, pocket 19, Cottages at South Seas; slide 61, pocket 20, Plantation House; slide 63, pocket 21, Seabreeze; and slide 65, pocket 22, Land's End Villas. And the majority of those slides show how the nonconforming density would be calculated.

It is implausible and impossible to ignore the

long-standing vesting -- vested property rights of the owners of other properties within the South Seas RD.

This resort -- this request's focus on the subject property, as described, ignores the actual integrity of the resort -- and I think that was demonstrated very well by Mr. Suarez yesterday -- and it ignores the negative effects approval of this request would have on the conforming status of the rest of the resort properties and the property owners as they exist today.

The adoption of the instant request inordinately burden these properties -- I'm sorry. The adoption of the instant request will inordinately burden those property rights by:

Placing the occupants of the requested 435 hotel units -- in addition to the 912 units limited by the 1973 zoning resolution and all subsequent quasi-judicial and administrative determinations since 1973 -- within the South Seas RD Resort. This was never contemplated by the owners of the property who bought and developed in reliance on this development cap.

The historic cohesiveness of the buildings and the resort amenities, for example, the golf course, South Seas Plantation Road, waterbodies, et cetera.

And in my professional opinion, the

interrelationship of the described property subject to this planned development request is such that rezoning a portion of the resort, and not its entirety, will result in an inordinate burden on the properties not included in the instant request.

Rezoning would also violate the Lee Plan's property rights element, in re, the other owners' easement interests.

Claimed, quote, inactive easements and the, quote, complexity and history of the property, closed quote, do not justify providing -- do not -- do not justify not providing accurate easement data to the County until the time of development order.

The question raised by the Hearing Examiner about the deviations and easement associated with the Beach House amenity only highlight the litigiously precarious situation in which we now find ourselves.

And that concludes my testimony, and I have one question: Why don't we know if the easement may or may not be used?

MS. MONTGOMERY: It's 10:30.

HEARING EXAMINER COLLINS: I'm going to allow a ten-minute break for the court reporter, and we'll resume -- Mr. Murphy, I think you should return to the seat. I suspect there may be some questions.

MS. MONTGOMERY: There are a few.

HEARING EXAMINER COLLINS: And we will resume with the cross-examination of your testimony, and then we will go to the next witness. I'm not sure if we're still following this list, but whoever comes up next I'm assured is planned by your group.

MR. MURPHY: Okay.

HEARING EXAMINER COLLINS: Ten minutes.

(Recess from 10:32 a.m. to 10:45 a.m.)

HEARING EXAMINER COLLINS: Okay. We're back on the record. We're resuming with the public input portion of the hearing.

We are now at the stage where Mr. Murphy will be cross-examined by Ms. Montgomery.

MS. MONTGOMERY: Before I go, did the County have any questions? I don't want to --

MR. MENDEZ: I do not.

MS. MONTGOMERY: Or do you want to go?

MR. MENDEZ: No questions, thank you.

MS. MONTGOMERY: Okay.

Mr. Murphy, you indicated that you were the initial author of the Administrative Interpretation 2002-00098; is that correct?

MR. MURPHY: With Assistant County Attorney Tim Jones, yes.

MS. MONTGOMERY: Let me start kind of like at the very beginning of the ADD. It says that this interpretation was done pursuant to Section 2-1 of the Land Development Code. Section 2-1 says where there's -- a question arises as to the meaning or intent of a section or subsection of this Code, referring to the Land Development Code --

MR. MURPHY: Excuse me, Madam Hearing Examiner, I can't hear Neale.

HEARING EXAMINER COLLINS: And --

MS. MONTGOMERY: Can you hear me now?

HEARING EXAMINER COLLINS: -- slow down --

MR. MURPHY: Yes.

HEARING EXAMINER COLLINS: And slow down because when you read, you speak faster --

MS. MONTGOMERY: I know.

HEARING EXAMINER COLLINS: -- and it's harder.

MS. MONTGOMERY: The administration interpretation submits that it was done pursuant to Section 2-1 of the Land Development Code, and so what I want to know is, under Section 2-1, an application is supposed to be submitted. Was an application submitted by anyone requesting an administrative interpretation?

MR. MURPHY: No, we were directed by the Board of County Commissioners -- or the County Attorney's Office

and the Department were directed by the Board of County Commissioners. I just got the job.

MS. MONTGOMERY: And in that section it also says that the only thing you can use this section for is to obtain an interpretation when there's lack of clarity regarding a section or subsection of the Land Development Code. What section or subsection of the Land Development Code was in question?

MR. MURPHY: I'm not -- not certain of that. I think it was the status of South Seas.

MS. MONTGOMERY: If that section of the Code doesn't allow an interpretation of something other than a section or a subsection of the Land Development Code, then that interpretation wasn't provided for by the rules; correct?

MR. MURPHY: I can't answer that. That would have been a decision made above my pay grade at the time.

MS. MONTGOMERY: Okay. Well, let's turn to your memo. I'm assuming you have it.

MR. MURPHY: I don't. I can go get it.

MS. MONTGOMERY: That probably would be good.

HEARING EXAMINER COLLINS: Which memo are you speaking of?

MS. MONTGOMERY: His memo, which is an attachment to the Staff Report. It is Attachment P.

HEARING EXAMINER COLLINS: "T" as in Thomas?

MS. MONTGOMERY: "P" as in Paul.

MR. MURPHY: I apologize. I have the memo now.

MS. MONTGOMERY: Okay, thank you.

Before I get to that, you've made many references to the zoning resolution from 1973 that rezoned the property. Did that zoning resolution identify 304 acres?

MR. MURPHY: The resolution did not, but the resolution refers to the request, and the request did.

MS. MONTGOMERY: The resolution, which is binding, does not refer to any acreage, does it?

MR. MURPHY: I'm sorry?

MS. MONTGOMERY: The resolution does not have any reference to acreage.

MR. MURPHY: The sheet that the resolution is on does not, but it references the request, and the request is the application, and the application specifically identifies 304 acres and 912 units.

MS. MONTGOMERY: The zoning resolution also does not reference 912 units, does it?

MR. MURPHY: There is a one-page zoning resolution, which is very short and has a typo, but it also specifically references the request. The request is the application, and the application package clearly

has Bob Taylor saying that they want to limit the development to low density, 3 units per acre, 304 acres times 3, 912 units, including residential units and hotel units.

MS. MONTGOMERY: And when you did your memo, which is Attachment P, you were concerned about the fact that there wasn't a clear or precise number of acres; is that correct?

MR. MURPHY: Are you referring to a specific page?

MS. MONTGOMERY: Well, you have several pages so, I mean, in general -- since you wrote this, and you testified extensively about what it meant today, I was wondering if you were equally aware of the fact that you have several pages of concern about the legal description and -- errors in the legal and uncertainty about the acreage.

MR. MURPHY: We wanted to confirm it, yes. There was no uncertainty about the representation. We just wanted to make sure what those acres were.

MS. MONTGOMERY: Okay. I'm going to refer you to page 6, determining the number of units, and, quote, on its face the subject zoning resolution did not specify a precise number of approved units so a precise determination of the number of units which remain to be developed within the property must look beneath the

face of the resolution.

So you didn't know, based on a clear, plain meaning what the number of acres were or the number of units?

MR. MURPHY: We understood from the representations included in the application that there were 304 units (sic). The legal descriptions have been problematic in Lee County since my experience with it, and that was not dissimilar with the zoning resolution for '73, and that's why we did the research.

MS. MONTGOMERY: Well, and -- you still didn't have certainty, because even on page 7 you stated, the legal description attached to the subject resolution, however, contains no such acreage calculation, and in 1973 the application for public hearing form was less detailed than that currently employed by the County.

So you said the subject application represented the property as 304 acres, but it's unclear whether the topographic information which would be required today was then required -- or requested by Staff. So you only have that representation. You had no survey or other information to determine the actual number of acres like we have to do today.

MR. MURPHY: We -- yes, exactly. We were unable to find a survey document in the file, just the legal

descriptions. That's not dissimilar to Ordinance, what is it, 22-33 that has no acreage calculation with it.

MS. MONTGOMERY: Let me ask you a question. The zoning resolution, which you indicated is a one-page document, rezoned the property to RU-3 with a special permit for commercial -- of 5 acres of commercial.

MR. MURPHY: And a PUD concept as a guide.

MS. MONTGOMERY: Okay. RU-3 was conventional zoning, was it not?

MR. MURPHY: I'm sorry?

MS. MONTGOMERY: RU-3 was a conventional zoning district.

MR. MURPHY: It was.

MS. MONTGOMERY: And conditions can't be placed or shouldn't legally be placed on a conventional zoning district; is that correct?

MR. MURPHY: I understand that to be the law, but that was not what the County Commission did.

MS. MONTGOMERY: And you did understand it to be the law, and you knew that the County had an issue in litigation where the County was told by the circuit court that you can't put conditions on conventional zoning because it violates Hartnett v. Austin.

MR. MURPHY: I'm not aware of that court determination.

MS. MONTGOMERY: Okay. In your memo, in a footnote at the bottom of page 2, you reference the Spyglass decision. Do you see that reference?

MR. MURPHY: I see that reference, and I note that I said arguably that is not the case here, as Staff and all the decision-making bodies were presented with the same information, and the full-scale concept plan was acknowledged by the Board of Commissioners at the zoning hearing.

MS. MONTGOMERY: Well, your reference of the Spyglass determination was that the court didn't allow conditions to be put in conventional zoning, and then you go on to provide three options of how the Board might deal with that. But you knew at that point in time that that was a problem because you went through considerable discussion about whether that was appropriate.

MR. MURPHY: Yes.

MS. MONTGOMERY: And I will say for the record, I know exactly what happened with the Spyglass decision because --

MR. MURPHY: Again, I can't hear you.

MS. MONTGOMERY: Okay.

Let me ask you a question. Whatever the real number of acres were in 1973, if you know, did it

include wetlands?

MR. MURPHY: Yes.

MS. MONTGOMERY: And were wetlands treated differently or the same as uplands in 1973, when it came to density?

MR. MURPHY: I don't believe they were.

MS. MONTGOMERY: They weren't what? They were treated the same, or they were treated differently?

MR. MURPHY: They were treated the same, as I'm aware.

MS. MONTGOMERY: Okay.

MR. MURPHY: There was no -- there was no Comprehensive Plan at that time, and so there was no future land use map, and the wetlands were included.

MS. MONTGOMERY: Okay.

MR. MURPHY: I will point out now that one of the aspects that makes for additional nonconformities and problems in going forward with development at South Seas is that most of those wetlands are now owned by other parties. In the area -- era from 2013 to 2018, I believe the property at the time converted most of those properties to the United States for the Fish and Wildlife, and then the rest to the Florida Gulf Utilities -- FGUA, whatever.

MS. MONTGOMERY: Yeah, I'm glad you brought that

up because it's my understanding that that was an outgrowth of an attempt at a zoning action in 1995 where they ended up going to the Board three different times, but I didn't see in your history any mention of the Harbor Point and those zoning efforts. Why didn't that get included in your legislative history?

MR. MURPHY: I can't answer that. I don't know. It probably was not something that came up out of the research.

MS. MONTGOMERY: There were three zoning resolutions. There was the original one, an A, and a B, so it would have been part of the County records. So you have no independent, now, recollection of those actions?

MR. MURPHY: No, ma'am.

MS. MONTGOMERY: And so you have no independent recollection that an outgrowth of that was the dedication of the Harbor Point property to an agency for preservation?

MR. MURPHY: No.

MS. MONTGOMERY: So if that property was part of the --

MR. MURPHY: What year did you say?

MS. MONTGOMERY: It wasn't donated in '85, but the --

MR. MURPHY: Oh, okay, okay. Then I wouldn't have been aware of it.

MS. MONTGOMERY: Yeah, the zoning resolutions all had an '85 number on them.

So you mentioned the fact that there wasn't a Comprehensive Plan in 1973. So when the County adopted its first future land use map, do you know how Captiva was designated, what Uplands Future Land Use category?

MR. MURPHY: Can you say that again?

MS. MONTGOMERY: Do you know what Uplands Future Land Use category was placed on Captiva in 1984?

MR. MURPHY: I don't at this point, no.

MS. MONTGOMERY: Okay.

MR. MURPHY: I could refer to an old map or something but...

MS. MONTGOMERY: If I were to tell you that it was urban community, what density would that yield?

MR. MURPHY: I don't have the Lee Plan in front of me.

MS. MONTGOMERY: Okay. So if I told --

MR. MURPHY: Is it urban or suburban?

MS. MONTGOMERY: Urban community. And if it was urban community, that would be 6 units an acre, wouldn't it?

MR. MURPHY: I would have to have the Lee Plan to

consult to answer accurately.
MS. MONTGOMERY: Okay. So -- but you did say that you're an expert and very knowledgeable in the Lee Plan and the Land Development Code; correct?
MR. MURPHY: Yes. I don't know it by heart.
MS. MONTGOMERY: Then later it was changed to outlying suburban. Does outlying suburban grant 3 units an acre of uplands and wetlands or just uplands?
MR. MURPHY: Again, I don't have the plan in front of me to answer.
MS. MONTGOMERY: So if you assume with me that it only allows 3 units an acre of uplands, and it's 1 unit per 20 on wetlands, then any reliance on 304 acres for -- at 3 units an acre would be incorrect under the scenario at that point in time. You couldn't get there.
MR. MURPHY: Post '73?
MS. MONTGOMERY: You spent a considerable period of time expressing concern about nonconformity; and if there is a nonconformity, wouldn't that nonconformity have occurred when the land use map was adopted that said you could only have 1 unit per 20 on wetlands and 3 units an acre on the uplands?
MR. MURPHY: Yeah, it would -- it would apply, but, again, the zoning resolution had been passed by

the Board of County Commissioners, and the developer had developed in reliance on it and was primarily -- practically built out by the time that we did the determination.

MS. MONTGOMERY: Well, let's go back in time. In 1984 when the County adopted a future land use map, many people had zoning resolutions that yielded much higher densities, and they were not allowed to keep that density after the adoption date of the plan; correct?

MR. MURPHY: I believe that to be true.

MS. MONTGOMERY: And if they wanted to keep that -- that density, they had a year to file for a vested rights determination; correct?

MR. MURPHY: I -- I don't know.

MS. MONTGOMERY: Assume with me that that's true, that they had the right, within a year after the '84 Comprehensive Plan, to file for a vested rights determination. Did any of your clients, who you now say are complaining, did any of them file for a vested rights determination?

MR. MURPHY: I'm not aware.

MS. MONTGOMERY: Okay. So if they didn't, they didn't take the steps that they needed to to protect their rights.

MR. MURPHY: Again, I'm not aware.

MS. MONTGOMERY: Let's go back to the RU-3 zoning. You had some discussion about where hotel units could be or couldn't be. If we go back to the 1973 zoning resolution that was zoned RU-3, did RU-3 permit hotels and dwelling units and restaurants and other amenities that might serve a hotel?

MR. MURPHY: That's my understanding.

MS. MONTGOMERY: So there could have been a hotel anywhere on the property under the RU-3 zoning.

MR. MURPHY: Yes.

MS. MONTGOMERY: And that was true up until 1978; correct?

MR. MURPHY: It was true until it converted to RM-2.

MS. MONTGOMERY: In -- in 1978.

So after 1978 there was no such thing as a special permit, and there was no ability to do commercial.

MR. MURPHY: In RM-2?

MS. MONTGOMERY: Correct. So for the record, the property -- tell me if you agree, that the property is zoned RM-2, TFC-2, and CM.

MR. MURPHY: With the caveat that the PUD, as a guide, and the 5 acres of commercial were part of the original resolution that had been approved and relied

on and developed in accordance therewith.

MS. MONTGOMERY: Those -- they may have, but the County, without apparently consent of the property owners, converted that property to RM-2 and no special permits. So there was no ability after that, if you follow the Land Development Code, to do commercial.

MR. MURPHY: That is not my understanding. My understanding is that the County still understands the property to be in conformance with the 1973 zoning resolution.

MS. MONTGOMERY: If you wanted to have zoning that was correct and actually met the Land Development Code, would it not be appropriate, under today's rules, to obtain a planned development that clearly permitted and allows the flexibility you speak of?

MR. MURPHY: Theoretically, yes. With regard to this property, no, I don't believe so. I think the intertwining of rights and responsibilities within the entire 304-acre PUD are so intertwined that you cannot divorce the 120 acres without causing severe issues and inordinate burdens upon the remaining properties in the resort.

MS. MONTGOMERY: Well, let me ask you this question. When, in your opinion, was the property zoned PUD?

MR. MURPHY: In '73.

MS. MONTGOMERY: Was there a PUD zoning district in '73?

MR. MURPHY: No, there wasn't, and that's why I think the County Commission did what they did. PUDs were relatively new in the '70s, and everything happens in Florida about ten years later than the rest of the world, or at least it did then. And so Mariner Group decided that they wanted to do something that was different; they wanted the flexibility; and to get that flexibility, they determined that the right way to develop the property on the vulnerable barrier island, not known to be as vulnerable as it is today then, that they would do a concept plan that would allow them flexibility under the RU-3 zoning; and they would have a way to build pockets of higher density but to maintain the mangroves and the other things. So I think that Mariner was way ahead of its time at that point, and the County concurred.

MS. MONTGOMERY: Well, you said that you were the primary author of the administrative interpretation; right?

MR. MURPHY: Yes.

MS. MONTGOMERY: So where did you -- did you rely on the RM-2 property development regulations, or did

you make up property development regulations that were included in the interpretation?

MR. MURPHY: Well, we didn't make anything up. Everything was derived from the application and the way the property had been developed, Mariner's accounting of the unit count over time. I think with each development order they submitted a unit count to make sure that they were within the 912.

MS. MONTGOMERY: But they weren't consistent with anything in the Land Development Code. They were made up special in this interpretation.

MR. MURPHY: They were made up special in the '73 zoning resolution, which referred to a PUD guide. The Board of County Commissioners made them special. Mariner asked for it, the Board approved it, and everybody moved forward in reliance on that.

MS. MONTGOMERY: And let me ask you a question. In the administrative interpretation, there is a reference to building height.

MR. MURPHY: Which page?

MS. MONTGOMERY: Pardon me?

MR. MURPHY: Which page?

MS. MONTGOMERY: 13.

MR. MURPHY: Thank you.

MS. MONTGOMERY: Did you find it?

MR. MURPHY: Not yet.

MS. MONTGOMERY: It has a -- it's in bold and underlined "Building heights" --

MR. MURPHY: On page 13?

MS. MONTGOMERY: Of the ADD, which is Attachment O -- or Q, sorry.

MR. MURPHY: Oh, I'm sorry, I'm on the wrong thing. Oh, that's easy to see, yes.

MS. MONTGOMERY: Did you find it?

MR. MURPHY: Yes, I did.

MS. MONTGOMERY: Does the building height reference allow -- is that consistent with today's standard Building Code and FEMA elevations as to where you start measuring?

MR. MURPHY: No.

MS. MONTGOMERY: So if you want to build the same building you could build under the ADD, under today's regulations, you need to amend the building height.

MR. MURPHY: I think the County's done that.

MS. MONTGOMERY: Pardon me?

MR. MURPHY: I say, I think the County has done that.

MS. MONTGOMERY: Well, the County has -- I would agree with you, Ordinance 23-22 changed the general definition of how we measure height to accommodate FEMA

and the standard building code; correct?

MR. MURPHY: That's my understanding.

MS. MONTGOMERY: But you have testified extensively that this ADD is etched in stone. It doesn't say it's BFE plus one, does it?

MR. MURPHY: No, it does not.

MS. MONTGOMERY: So in order to be consistent with the County's now countywide definition, this has to be changed.

MR. MURPHY: Well, I think it's been changed.

MS. MONTGOMERY: Pardon me?

MR. MURPHY: I think it's been legislatively changed.

MS. MONTGOMERY: The ADD is still controlling, you said so.

MR. MURPHY: In terms of density and intensity, the unit count, yes. The County still has this as their controlling document.

MS. MONTGOMERY: Okay.

MR. MURPHY: But if they've made a countywide change to building heights, then it would be a modification.

MS. MONTGOMERY: We have been advised -- and there are minutes and I have them. I won't bore you with it. But on the record, when the ordinance was being

adopted, it was said, in order to fix this, you have to go through a rezoning to achieve the now starting point under the standard building code and FEMA. So -- so I take it you disagree with the County Attorney's Office.

MR. MURPHY: I'm not aware of those documents.

MS. MONTGOMERY: Okay. You made a reference to the aquatic center and that you didn't think an aquatic center was appropriate. Was that your testimony, or did I not catch all that?

MR. MURPHY: No, that was my testimony.

MS. MONTGOMERY: So I'm assuming your reference to an aquatic center is what we've called the water park.

MR. MURPHY: I think it's been referred to both ways.

MS. MONTGOMERY: The water park is an amenity to the hotel and the resort, which is a current permitted use under the ADD. So what's your objection to the water park?

MR. MURPHY: I think I said that it would not be consistent with the plan provisions regarding light and noise.

MS. MONTGOMERY: Okay. Because I'm assuming you're well aware that there's a development order for the water park, and it's under construction.

MR. MURPHY: Well, I'm not well aware of it, but I

am aware that there have been development orders issued prior to this rezoning application.

MS. MONTGOMERY: And there are noise regulations that apply countywide and some that just apply on Captiva. So this will have to comply with those, will it not?

MR. MURPHY: I would hope so.

HEARING EXAMINER COLLINS: And the County has very stringent photometrical requirements and lighting standards that are reviewed at DO stage. Are you aware of those?

MR. MURPHY: Yes, I am, but I'm also aware that Code Enforcement is relatively lax on Captiva Island.

MS. MONTGOMERY: It hasn't been for us thus far.

HEARING EXAMINER COLLINS: Not consistent with my experience as a Hearing Examiner over Code Enforcement cases, but that's your testimony?

MS. MONTGOMERY: Yeah, I wasn't aware of that either.

And in the Staff conditions, they have an extra layer of lighting restrictions for structures that address sea turtles and migratory birds and songbirds, I think. Are you aware of that condition?

MR. MURPHY: I think I reviewed it in the -- the Staff Report, yes.

MS. MONTGOMERY: Okay. So even though there's strong photometric requirements, you -- what is your concern about lighting?

MR. MURPHY: It would just be additional lighting if the park is open at night. It's not lighting that's there now or was there before.

MS. MONTGOMERY: Okay, so it's just a general concern.

MR. MURPHY: Yes.

MS. MONTGOMERY: Okay.

MR. MURPHY: General concern for lighting, general concern for noise, general concern for air pollution based on additional trips.

MS. MONTGOMERY: You're not an expert --

HEARING EXAMINER COLLINS: It's noteworthy, though, that the permitting framework today is much more restrictive than it was in the '70s when this was first approved and a water park was conceivably permitted, and there would have been no regulation on lighting, noise, hours of operation, or otherwise.

MR. MURPHY: There was no Comprehensive Plan in 1973.

HEARING EXAMINER COLLINS: But there was the Land Development Code, since 1962.

MR. MURPHY: Yes, there was. The language about

noise and light and pollution is in the Comprehensive Plan.

HEARING EXAMINER COLLINS: My -- my -- it's in the Land Development Code, though, and that's what's applicable at development order stage and -- you know, I'm fine with us going along this line, but these are things that can be addressed through conditioning, and there's nothing that would preclude that under any Land Development Code or the Lee Plan. It's, in fact, contemplated under 5.1.5. So I just -- I'd like to know where we're going with this because this is common knowledge.

MS. MONTGOMERY: And let me just ask one more question in light of that.

The area where the water park is now, didn't that used to have tennis courts?

MR. MURPHY: I believe so, yes.

MS. MONTGOMERY: And didn't tennis courts have lights?

MR. MURPHY: I believe so, yes.

MS. MONTGOMERY: I got killed by a Taiwanese player when they had the Avon Futures out there; so I'm keenly aware of the fact that there were tennis courts and lights so...

I think that's -- Madam Hearing Examiner, that's

all the questions I have, thank you.

HEARING EXAMINER COLLINS: Thank you.

Next witness? My list -- are we sticking with the list?

MR. ROARK: Drew Roark.

HEARING EXAMINER COLLINS: Do I have Michael Belle or -- are you Michael Belle?

MR. ROARK: I'm not, Drew Roark.

(Sotto voce between Hearing Examiner and reporter)

HEARING EXAMINER COLLINS: Okay. That's not on this list of speakers in order of presentation. I'm happy to accommodate. I'm just looking to confirm that this individual is meant to be on this list.

MS. MONTGOMERY: I'm sorry, who is here?

HEARING EXAMINER COLLINS: Roark.

MS. BERKEY: And if I may, Katie Berkey. For the record, I gave Miss Maria an updated list this morning --

MS. PEREZ: It's on your --

MS. BERKEY: -- to reflect an updated --

HEARING EXAMINER COLLINS: Drew Roark?

MS. BERKEY: Drew Roark, thank you.

MS. MONTGOMERY: Madam Hearing Examiner, before Mr. Roark speaks, in Ms. Berkey's letter she wanted to tender him as an expert in the Lee County LDC. I would

submit, for the record, he's not an expert in the Lee County LDC.

HEARING EXAMINER COLLINS: Mr. Roark, please state your name for the record and what you intend to testify about.

MR. ROARK: Sure, thank you. Good morning, Drew Roark. I am the owner and founder of Alex Roark Engineering. I am a professional engineer with over 29 years of experience in traffic and transportation engineering, all in Florida. I have completed dozens, if not hundreds, of traffic impact studies, traffic impact analyses, reviews of traffic impact analyses, DRI traffic studies, signal designs, et cetera, et cetera. I have also served as an adjunct professor at the FAMU-FSU College of Engineering, where I taught transportation engineering, which includes traffic impact studies. So I am requesting to be accepted as an expert in traffic engineering and planning.

HEARING EXAMINER COLLINS: Okay. Please proceed.

MR. ROARK: Thank you.

So I am representing RLR, the 12 HOAs, Ms. Berkey's clients, and CCA.

In the interest of speeding this along, I'm going to boil this down to -- you know, not bore you too much with too many details, but there have been some reports

that I have prepared that are in your documents.

We have reviewed both the original traffic analysis and the revised traffic analysis. The revised one is dated January 30th, 2025. The study basically concludes there's no traffic issues and -- however, we believe the study is not competent and substantial evidence.

The study uses the Lee County Public Facilities level of service and concurrency report pretty extensively; however, I'm going to describe some of the issues in the study and why we think it's not competent and substantial evidence.

HEARING EXAMINER COLLINS: Hang on a second, sir. Did you produce a report that's in this binder as a tab or exhibit; and if so, which one is it?

MR. ROARK: Ms. Berkey is going to have to --

HEARING EXAMINER COLLINS: Because I just received this today so I'm not familiar with all the attachments --

MR. ROARK: Yeah.

HEARING EXAMINER COLLINS: -- in it, and I just want to key your testimony to this document from which you're speaking.

MR. ROARK: My testimony is really going to be about the -- the traffic study, the revised traffic

study provided by the Applicant, and I am going to go through my review of Deviation 15 and the issues associated with that.

HEARING EXAMINER COLLINS: And did you prepare a document that's part of this binder?

MR. ROARK: Yes.

HEARING EXAMINER COLLINS: It's okay if you didn't. I just want to key your testimony to the binder.

MR. ROARK: Sure. Ms. Berkey is going to have to help me on where it is in the binder.

MS. BERKEY: Yes. For the record, Katie Berkey, just for the limited purpose of directing you to the appropriate exhibit. And, again, this is from our request for aggrieved and adversely affected party status dated February 11th. Mr. Roark's résumé is at Exhibit C.

The Applicant's post-sufficiency submittal, which Mr. Roark also reviewed, is Exhibit D.

Mr. Roark's January 2025 traffic impact analysis is within tab -- I'm sorry, Exhibit F -- I'm sorry -- yes, Exhibit F at page 205.

And then Mr. Roark's deviations review dated January 28th is at Exhibit Q.

MS. MONTGOMERY: Madam Hearing Examiner, before

Mr. Roark proceeds, can I ask a question? The Applicant, as well as the County, utilized Administrative Code 13-17 for traffic analysis. So since it was done in accordance with the applicable rules, is Mr. Roark submitting he just doesn't think the Administrative Code and following that process leads to competent and substantial evidence?

HEARING EXAMINER COLLINS: Well, my guess is that he has arrived at a different conclusion based on the information, and I am going to listen to what that is and take it into account.

MS. MONTGOMERY: Thank you.

MR. ROARK: Okay. So the study that was done, the revised study, relies heavily on the Lee County Public Facilities level of service and concurrency report; however, the description of the segments of the roadways, including Captiva Drive, were changed in the traffic study from the Lee County database. For example, the study uses, quote, Captiva Drive south of South Seas, unquote, but the Lee County database for Captiva Drive is from Blind Pass to South Seas. This is important because the study is effectively ignoring potentially impacted roadway segments. Also, if the study relies on data from the Lee County report, that data is specific to segments as they are defined in the

report; therefore, this is an error.

One example of why this is important is this includes some discussions with the County that we've had and also some testimony that's been provided by an error from a traffic count that was provided by FDOT in this area. The count was not an error, but it was in a location that has a much higher traffic volume than Captiva Drive near South Seas. The FDOT count is on Periwinkle Way near the causeway.

It is appropriate to not assign a traffic volume to a roadway segment that is significantly different than an adjacent segment. For that same reason, it should not be assumed that a traffic count on Captiva Drive, or its capacity or other factors on this segment, should be assumed for nearby segments like Periwinkle Way. Specifically, the segments of Sanibel, Captiva Road, and Periwinkle Way through the city of Sanibel were not included in the analysis. The study then picks up the Sanibel Causeway and other segments off of the island.

The revised traffic analysis quotes the Lee County Administrative Code 13-17, which are the traffic study guidelines for planned development rezonings which requires analysis of roadway segments where the project trips consume 10 percent or more of the Level of

Service C capacity for the roadway segments. This study shows that 51.6 percent of the Level of Service C capacity is consumed on Captiva Drive, and 32.7 percent of the Level of Service C capacity is consumed on Sanibel Causeway. So therefore, it's obvious that the project's traffic would consume more than 10 percent of the Level of Service C capacity on Sanibel-Captiva Road and Periwinkle Way, which are in between these two segments. So this is another major error.

Additionally, again referring to the quoted Lee County Administrative Code 13-17, which are traffic study guidelines for planned development rezonings, it states, quote, should the level of service result in service levels below adopted minimums, an analysis of the improvements necessary to offset the added traffic impacts, unquote, shall be provided.

In Table 2A of the report, the analysis shows that Sanibel Causeway is at Level of Service F, which is below the minimum standard and is within the project's, quote, area of influence, unquote, which is basically their study area. That is, it consumes more than 10 percent of the Level of Service C capacity, and therefore requires an analysis of the improvements necessary to offset the added traffic impacts. No such discussion or analysis was included. This is another

error.

Other obvious errors in the study include Levels of Service B, C, D, and E, capacities for McGregor Boulevard and Summerlin Road are all identical; however, the study shows that Level of Service E capacity for Summerlin Road east --

THE REPORTER: Please slow down.

MR. ROARK: I'm sorry -- however, the study shows the Level of Service E capacity for Summerlin Road east of San Carlos Boulevard and McGregor Boulevard, quote, west of Summerlin Road, unquote, is 2,940 and 720 vehicles per hour respectively. These are less than the Level of Service B through D values of 3,000 and 1,960 vehicles per hour respectively. The Level of Service E service volumes should technically be higher than Level of Service A through D, but Lee County link-specific service volumes show that Level of Service E should be the same as B through D for these segments. These are errors in the traffic study.

When the Lee County Public Facilities level of service and concurrency report are within the Lee County report, the level of service standard is E. The Level of Service E peak hour peak direction capacity in the report used for Captiva Drive is 860 vehicles. However, in the Lee County generalized peak hour

directional service volumes database, which is quoted in the traffic analysis as the source for the segment capacities, 860 corresponds to a Class I arterial with a 40-mile-per-hour or higher posted speed limit. The speed limit on Captiva Drive, from Blind Pass to South Seas, is 25 miles per hour. Therefore, this segment should be classified as a Class II facility, which is for 35 miles per hour or slower posted speed limit roadways. Therefore, even using even the generalized Level of Service D capacity for this segment, should be 780, and the generalized Level of Service C capacity should be 330.

However, even using generalized capacities assumes that this road is like other roads that meet all of the standards, other similar two-lane roadways. This road has narrow lane widths, a high level of multimodal activity, including bicyclists, pedestrians, and golf carts, with little to no separated facilities for those other modes. This means that they all share the road. Therefore, the vehicular capacity of this road is significantly less than the generalized capacities used in the analysis.

I previously referenced the count taken by FDOT on Periwinkle Way that was rejected for the segment of Captiva Drive from Blind Pass to South Seas. Another

count was taken recently, I think by the County, on Captiva Drive near 17061 Captiva Drive, which is about a thousand feet north of Blind Pass. There were several pieces of information that we can gather from this count:

Number one, the peak hour of this roadway segment is not typical. The peak hour is clearly weekday from 2:45 p.m. to 3:45 p.m., not one hour between -- as is typical, one hour between 4 p.m. and 6 p.m. That was not taken into consideration.

The peak hour/peak direction traffic volumes are higher than what is shown in the Lee County level of service report and what was used in the traffic study. The Lee County level of service report has the p.m. peak hour/peak season/peak direction volume as 267, which was developed from a count that was taken in 2010, 15 years ago, and grown over that time with an assumed wrong growth rate. The count that was taken last month was the first official count that I'm aware of that was taken within the past 15 years. It shows the actual non-seasonally adjusted traffic volume is higher than what's in the database. It's possible that once it's adjusted for peak season, it will be even higher. This means that the actual volumes are higher than what was used in the analysis.

The peak direction -- the third thing that this count showed was the peak direction in the p.m. peak hour on Captiva Drive is actually southbound. However, the analysis added that -- added the project's entering traffic to the background. The project's entering traffic would be northbound so they're not analyzing the peak direction properly either. This actually helps -- would help the Applicant because their entering traffic is -- is more than the exiting traffic during the p.m. peak hour. However, what I'm showing is that the analysis is flawed, and with the other changes that are needed, the conclusion of the analysis, which is that there are no level of service issues, is also potentially flawed.

So I am going to move to the variation (sic) 15 -- I understand 18 was -- was removed, basically it's a copy of 15, but I'm going to go through our review of Deviation 15, which has to do with their typical sections within the site.

So the revised schedule of deviations and justifications seeks to expand the previously requested Deviation 15 from LDC Section 210 -- I'm sorry, 10-296, street redesign and construction standards.

The Applicant describes South Seas Plantation as a privately-maintained local roadway with open drainage

in -- in a suburban area. Therefore, the typical section -- this is a document that's in -- my review of the variation is in your packet, and I refer to the appropriate typical section from the LDC, which is a suburban local street open drainage typical section.

HEARING EXAMINER COLLINS: Is there a phone ringing?

UNIDENTIFIED SPEAKER: I'm sorry, I'm trying to shut it off.

HEARING EXAMINER COLLINS: Would you please turn your phone off? Thank you.

MR. ROARK: The Applicant is seeking approval for five deviations from the LDC for this section of road. They include right-of-way, sidewalk width, planning area width, shoulder width, and lane width. The minimum standards for right-of-way width is 45 feet; sidewalks, 6 feet; and the planting area, 6 feet; are correctly identified. The sidewalk and planting area standards come from Table 15, which is a suburban local street, and LDC Section 296, and it's referenced in the document what the standards are.

Note that these fall under the commercial use and not residential as proposed -- as the proposed MPD includes commercial uses, and the more intense of the two inform the suburban local street requirements.

The Applicant incorrectly identified the minimum shoulder width as a standard of 5 feet to 8 feet. The correct minimum standard for shoulder width is 8 feet, structurally supported, with 4 feet of the 8 feet as paved shoulder. This is shown in a typical section.

The Applicant also incorrectly identified minimum lane width as 10 to 11 feet. The correct minimum land width standard is 11 feet. This is shown in Table 15 and, again, under the commercial land use.

I also included a table that shows the proposed variations to the minimum standards for right-of-way. The minimum standard is 45. They're proposing 37 and a half, a variance of 7 and a half feet.

Sidewalk, minimum standard 6 feet, proposing zero.

Planting area, 6 feet, proposing zero.

Shoulder, total 8 feet. It's unclear in their -- in their application. Best guess for what they're proposing is 4.8 feet, which is a difference of 3.2 feet, and paved shoulder, 4 feet to 3 feet, minus 1 foot.

The 11-foot lane width standard, it appears that they are proposing 9.4 feet, which is a difference of 1.6 feet.

The Applicant indicates that the proposed deviation includes a minimum shoulder width of 4.8

feet, and in the notes, in the scaled drawings immediately following the deviations letter, indicates the paved shoulder average width is 3 feet.

So there's also a note that the shared on-street bike lane width varies. The paved shoulder represents the bike lane. It should be noted that the paved shoulder width standard is a minimum and not an average. Therefore, the difference in the table that I provided is an average difference, therefore there are locations where there's differences more than 25 percent.

The bike lane minimum width is also 4 feet; therefore, with only an average of 3 feet of paved shoulder, the bike lane minimum standard is also not being met.

For the travel lane for vehicles, it's unclear, based on the documentation, what the proposed minimum lane width is. And based on the typical section for -- for Section 1 in the scaled drawings, the lane width, including the paved shoulder/bike lane is 12.4 feet. With an assumed average pavement shoulder/marked bike lane width of 3 feet, as indicated in the notes, the lane width would be 9.4 feet, with both the bike lane width and travel lane width substandard and adjacent to each other. Combined with the increase in traffic,

bicycle, pedestrian, and vehicular, from the proposed development, the probability of crashes will increase even with low-speed roadways.

Finally, the Applicant's narrative describes the roadway as, quote, a highly functional multimodal, unquote, roadway. However, the proposed road includes substandard bike lanes and no pedestrian facilities or sidewalks at all.

There are -- there also appears to be several errors in the documentation. On the scaled drawings for Section 1, for example, the notes indicate, quote, overall travel lane width 19.7 feet and --

HEARING EXAMINER COLLINS: Are you talking about the road inside the project?

MR. MURPHY: Yes.

-- and, quote, individual travel lane average width equals 9.8 feet. However, the typical section on the same page for Section 1 shows two 12.4 travel lanes. Also, subsequent sections, 2 through 4, have the same notes with typical sections showing different lane widths, 13.3, 13.4, and 13.4 again respectively.

Number 2, the last bullet in Deviation 15 refers to right-of-way width, which apparently was meant to refer to lane width; then also indicates the minimum width is 12.4 feet, but that would exceed the minimum

of 11 feet. However, the 12.4 feet includes the paved shoulder/bike lane.

In summary, in addition to the errors in the document, the Applicant is requesting many substandard variations, and in some cases complete exceptions. These variations to the minimum standards, combined with the increase in vehicular, bicycle, and pedestrian traffic, will likely increase the probability of crashes, worsening the safety and operations of the roadway. However, the narrative did not include any discussion of the impact on safety or operational performance. That's what's typically done when you're doing variations and exceptions. You have to describe how you're going to mitigate, or what the issues would be with these -- with these variations or exceptions, and they didn't discuss that in neither the near term -- at all, or the -- or the long-term or any cumulative effects.

The alternative -- there were also no alternative designs. They didn't appear to be considered. So without alternative designs or mitigating measures for these substandard conditions, there's an increased risk of worse operational performance and safety.

And, finally, the Lee Plan calls for supporting multimodal transportation systems appropriate to future

suburban areas. South Seas is in an Outlying Suburban Future Land Use. Policy 39.2.2 says that future suburban areas should have a network of motor vehicle, bicycle, and pedestrian facilities, pedestrian-friendly design, and provide sidewalks along all roads. The Applicant's requested deviations do none of these things, and, in fact, furthers the noncompliance with the Lee Plan.

That's all I've got.

MS. MONTGOMERY: Mr. Roark?

MR. ROARK: Yes.

MS. MONTGOMERY: Did you have the occasion to visit the site?

MR. ROARK: Yes.

MS. MONTGOMERY: When did you visit, and how many times?

MR. ROARK: I visited last week once.

MS. MONTGOMERY: Okay. Did you do any surveying or measurements or anything of that nature when you were there?

MR. ROARK: No, I did not.

MS. MONTGOMERY: Are you familiar with Section 34-941(7) of the Land Development Code?

MR. ROARK: No, I'm not.

MS. MONTGOMERY: That's the section that describes

what has to be submitted with a zoning TIS.

MR. ROARK: Okay. Administrative Code 1317?

MS. MONTGOMERY: No, this is the Land Development Code; but if you're not familiar with it, I'll move on.

Are you familiar with what's called a development order in Lee County?

MR. ROARK: A development order? Sure, uh-huh, yes.

MS. MONTGOMERY: Okay. Are you familiar with Section 10-286, which describes what has to be required for -- what kind of traffic impact statement has to be filed for a development order? Are you familiar with that?

MR. ROARK: Not specifically, no, but I'm familiar with -- with what is typically required, yes.

MS. MONTGOMERY: And Section 10-287 requires a traffic mitigation plan at the time of local development order. Are you familiar with that section?

MR. ROARK: Yes -- well, yes, generally, yes.

MS. MONTGOMERY: Let me ask you a question. Have you ever submitted a zoning TIS in Lee County?

MR. ROARK: Not in Lee County, not me personally, no.

MS. MONTGOMERY: So you've never had to go through the process and comply with the rules?

MR. ROARK: No, no -- well, actually, the truth is I don't know. I don't remember. I've done dozens, literally hundreds. I do remember getting the airport out of the DRI process several years ago.

MS. MONTGOMERY: Okay.

MR. ROARK: Yeah.

MS. MONTGOMERY: All right. I don't have any further questions, thank you.

HEARING EXAMINER COLLINS: I have one question. I recall during the testimony earlier that the speed limit on the road within the community was unusual. It was a low number.

MR. ROARK: Yeah. Are you talking about 19 miles per hour?

HEARING EXAMINER COLLINS: 19 miles per hour.

MR. ROARK: Yeah, that's not done typically. Everything is --

HEARING EXAMINER COLLINS: Does that like factor into your consideration of some of these widths and -- and the fact that the road is going to be shared, that it has this unusually low speed limit?

MR. ROARK: The low speed limit is a good thing from a safety perspective. That certainly helps. The issue is even with those low speed limits, when you mix modes, like specifically vulnerable users like

pedestrians and vehicles, it's not a good thing. That increases the chances -- it doesn't take very much speed at all to cause a fatality for a pedestrian. And if you're going to increase the traffic, and you're mixing all these modes together, the more -- the more you mix them together, the more conflicts you have, the greater the probability that that is going to occur. So the speed is good as long as people -- you know, 20 miles an hour is actually -- you know, you'd be surprised the serious injuries that can be --

HEARING EXAMINER COLLINS: So aside from the deficiencies you found in the TIS, these conditions exist today; right? So you're saying that this condition that exists today with the remaining development potential under existing approvals -- they're here to change the existing approvals.

MR. ROARK: Yeah.

HEARING EXAMINER COLLINS: That's an existing condition. And so your position is if the TIS anomalies are corrected, based on the things that you pointed out, that that would disclose what exactly in connection with this request?

MR. ROARK: Specifically to the TIS, there's a requirement to demonstrate that the traffic impacts will be mitigated. And in their own study, they're

showing that --

HEARING EXAMINER COLLINS: Right, that's external. I'm --

MR. ROARK: Yeah, okay. So internally --

HEARING EXAMINER COLLINS: -- focusing on --

MR. ROARK: -- the variations are -- you know, basically there's a -- design component requirements, typical section requirements, that they're asking for variations to them and --

HEARING EXAMINER COLLINS: But they're existing conditions.

MR. ROARK: They are existing conditions, they are existing conditions; but as you increase the traffic beyond -- you know, I'm not here to argue about what's approved --

HEARING EXAMINER COLLINS: Right.

MR. ROARK: -- and what's not approved --

HEARING EXAMINER COLLINS: Continue.

MR. ROARK: -- but if you --

HEARING EXAMINER COLLINS: I'm trying to crystallize your conclusions.

MR. ROARK: Yeah. If you -- if you do approve something that's more -- presumably they're applying for more development, which is going to create more traffic, you're -- without providing those

facilities -- and it's -- this -- this road is also particularly heavily utilized, by their own description, is a heavily utilized multimodal corridor, but you're mixing them all together. That's where the problem comes in. And the policy and goals of the County, which are to create these multimode facilities, you would think that you would want -- of all places to do it, you would do it in a place where you have heavy multimodal use. So that's kind of the issue, it's a safety issue and a goal issue.

HEARING EXAMINER COLLINS: But in the context of this request, really what I'm comparing is what -- the intensity that's approved today, along with the unused that's allowed today under existing approvals, and comparing that to what this request adds on top of that, and that's what I'm looking at on these roads.

MR. ROARK: Yeah.

HEARING EXAMINER COLLINS: And it's your testimony that, based on these existing conditions, that the addition of traffic generated inside the resort --

MR. ROARK: Yeah.

HEARING EXAMINER COLLINS: -- by this delta --

MR. ROARK: Yeah.

HEARING EXAMINER COLLINS: -- is creating a health, safety, welfare issue?

MR. ROARK: Yes.
HEARING EXAMINER COLLINS: Okay.
MR. ROARK: Yes.
HEARING EXAMINER COLLINS: Is there anything further you want to put on the record?
MR. ROARK: (Shakes head.)
HEARING EXAMINER COLLINS: Okay. I thank you for your time.
MR. ROARK: All right, thank you.
HEARING EXAMINER COLLINS: Charles Gauthier? Okay, listen, you guys are not putting on a case so I'm going by your order. I don't want a lot of handling going on.
MS. MONTGOMERY: Madam Hearing Examiner, I'm thinking Mr. Gauthier is not a short witness, and it's 11:47. I just wanted to --
HEARING EXAMINER COLLINS: You think he's a what?
MS. MONTGOMERY: I don't think he's a short witness.
HEARING EXAMINER COLLINS: Okay. Well...
MS. MONTGOMERY: So I just wanted to let you know.
HEARING EXAMINER COLLINS: How much longer -- well, we can interrupt his testimony if we're going to take a break.
(Sotto voce between Hearing Examiner and reporter)

VOLUME 3

HEARING EXAMINER COLLINS: Okay. So we're going to go 15 or 20 minutes. If your testimony takes longer than that, we're going to take a break for lunch so the court reporter can rest a little before we resume. And he may surprise you, he may be short.

MR. GAUTHIER: Thank you.

HEARING EXAMINER COLLINS: Because I have no experience with dealing with him in the past.

And just for order of witnesses, as I understand it today, Mr. Gauthier will be followed by a Michael Belle, Jeff Alexander, Michael Whitt, James Patterson, and then Lisa Riordan, if time permits. We are also going to try to accommodate, at the end of the day, a Ray and Andrea Titus who have come from the East Coast.

Mr. Gauthier, do you have a hard copy of this PowerPoint presentation to enter into the record?

MR. GAUTHIER: Yes, I do. If I may, I also have my résumé.

(Gauthier Exhibits 1 and 2 submitted.)

HEARING EXAMINER COLLINS: Okay. I will make your résumé Exhibit 1, and then the PowerPoint will be Gauthier Exhibit 2.

MR. GAUTHIER: I gave you two copies of each, but I have additional.

MS. MONTGOMERY: Charlie, do you have an extra

one? Thank you.

HEARING EXAMINER COLLINS: Just give me a moment while I mark...

And I appreciate the extra copy of the PowerPoint. This allows me to make notes.

You may begin. Perhaps a brief summary of your expertise and experience would be helpful.

MR. GAUTHIER: Yes. My name is Charles Gauthier. I am a planner; I'm self-employed. I'm here today because the Captiva Civic Association has asked me to analyze the proposed mixed-use planned development and present my opinion as to consistency with the Lee Plan and the Land Development Code.

I will describe my qualifications. I have over 47 years of experience as a professional planner in Florida. I'll touch on some of the highlights.

Initially I worked for the Department of Environmental Regulation in the Office of the Secretary on State Water Policy and Water Management District affairs. It was about six years.

I moved on to the Department of Community Affairs and worked on regional resource management plans around the state, including for Charlotte Harbor.

From 1985 to '89 I was the chief planner for long-range planning for Collier County. I played a

central role in preparation of the County's Growth Management Plan.

From 1990 to 1994, I served as a principal planner for Lee County. During this time I was responsible for the County's rezoning program in a manner similar, if not identical, to the role played by Adam Mendez here currently.

During this time I oversaw the preparation of zoning reviews, the analysis, the recommendations. I presented testimony before the administrative -- before the Hearing Examiner. I was smart enough to send Staff to that mostly, but I did appear before the Hearing Examiner. I presented over 300 rezoning cases to the Board of County Commissioners. Being in this room brings back a lot of memories.

I went on to serve as a Growth Management administrator at the Department of Community Affairs. Part of my geographic assignment included Southwest Florida and Lee County.

For six years I was a bureau chief at the Department of Community Affairs, responsible for comprehensive planning statewide.

Finally, for four years I was a division director under Secretary Pelham for Florida's Growth Management Program.

All told, I served for 17 years as a senior state official and played a role in the review of 3,000 Comprehensive Plan changes around the state, including amendments to Lee County. My duties also included the area of Critical State Concern program and DRIs.

I'll say that while at DCA, I was involved in many interagency work groups, including with the depart -- the Division of Emergency Management. I have extensive experience at DCA working with coastal development issues, primarily related to guiding development away from coastal high hazard areas. I will tell you there were battles up and down both coastlines of the state that I was involved in.

I participated in the preparation of amendments to Chapter 163 of the statutes regarding coastal high hazard planning requirements, and worked closely with DEM, the Division of Emergency Management, on the preparation and rollout of regional evacuation studies.

I've also worked for two large consultants representing both private and public clients, that is, the Wilson Miller firm in Naples, and worked opening a Tallahassee office for Morris-Depew Associates.

For the last ten years, I've worked on my own. I've represented a series of local government, developmental, and public interest groups. In recent

years I've -- my focus has been more toward public interest representation; and as a certified planner, that is your highest goal, service toward the public interest.

I've been qualified as a planning expert lots of times, 40 final legal proceedings; I have been qualified before the Division of Administrative Hearings or circuit court; I've testified before legislative committees, the governor's cabinet on growth management affairs.

In 1988 I became a certified planner. In 2011 I was honored to be inducted as a fellow in the Institute of Certified Planners, which is the highest honor available based on exceptional contributions to the public interest.

I know it's important to establish my credentials, but it's embarrassing. I don't know how all this happened. I just show up and do the work. But I think short-term memory and, you know, not carrying baggage and the focus on public interest is the important thing.

And those are my qualifications.

HEARING EXAMINER COLLINS: Okay, thank you. You may begin.

MR. GAUTHIER: Yes. First, the materials I

reviewed for my opinions, the application for the mixed-use planned development, the sufficiency questions, sufficiency responses, the Lee Plan, Lee Plan amendments in the past, the Land Development Code, planning information from the County website and elsewhere, historical documents, including the 1973 zoning resolution and 2002 ADD, the comment letter, Staff Report, other general material. So I've taken the time to diligently review what's important.

By way of summary conclusions, I feel a lot of foundation has been laid by previous witnesses; so I think I can probably jump to the bottom line, the key issues.

Based on my analysis, I've concluded the MPD is not consistent with the Lee Plan. It's not compatible with and it does not further the plan as a whole. Additionally, the MPD is inconsistent with the Land Development Code. The key issues that have led to that conclusion:

The proposed intensification of development to include 435 hotel units is inconsistent with the Captiva Community Plan, which is of course a component of the Lee Plan.

The proposed 193 units and 435 hotel units fail to comply with Lee Plan and Land Development Code

provisions to limit development in areas subject to natural hazards.

Thirdly, the high intensity of proposed land uses, particularly hotels, is incompatible with the overall South Seas Island Resort, incompatible with those portions of Captiva outside of South Seas Island Resort, and incompatible with land uses on Sanibel Island.

I'd like to focus now on hotel development and move to my initial slide.

The amendment is within the -- primarily within the outlying suburban designation, 80 acres or so. 40 acres or so is within the wetland designation. So I think the first matter to focus on is the outlying suburban designation and what does it say. It says -- its category is rural in nature or contains existing low-density development. And this is important, the standard density range is from 1 unit to 3 units an acre. What it does not mention is resort destination development, and I think the density bracket is very important.

And -- and the Lee Plan does provide -- there's no guarantee to the maximum residential density in a land use category. It's necessary to take into account the physical circumstances and other goals, objectives, and

policies of the plan.

Goal 6 of the Lee Plan generally allows commercial use based on criteria, performance criteria I'd call it. It allows commercial uses in the range of urban-type land use categories, including outlying suburban. However -- however, that outlying suburban on Captiva is further restricted by the Captiva Community Plan.

In particular, Goal 23 -- Goal 23 -- and I'll skip to the underlined portion -- provides a requirement. The goal is to maintain the historic low-density development pattern. That is the umbrella goal. The MPD is not compatible. It does not further that.

Secondly, there's an objective under that goal, 23.2. It requires -- it seeks, as an objective, to continue the long-term protection and enhancement of community facilities, existing land use patterns. So the exact -- the very objective, you know, complements the goal, steps it forward, and calls for the protection of existing land use patterns.

Let me get to a policy under that goal, Objective 23.2.4, historic development pattern. Limit that -- limit development to that which is in keeping with the historic development pattern on Captiva. The policy goes on to say the historic development pattern is

comprised of low-density residential units, minor commercial, and South Seas Island Resort. There's three components, three identified distinct components. The component we must worry about here or think about here is the third one, South Seas Island Resort. Is this MPD in keeping with the historic development pattern on South Seas Island Resort? That's the central question in this proceeding, in my opinion.

But before I move on, I'd like to mention that these requirements are well integrated into the Comprehensive Plan. These are not fragments or phrases here or there. It's a goal, objective, and a policy that all point toward the sole -- same direction.

Also, the Captiva Plan -- well, there are other community plans. There's a handful of other community plans, and similar to Captiva, they also include restrictions that throttle back what is normally allowed in the future land use category. One example is the Bayshore Community Plan. Another is the Buckingham Community Plan. So it's necessary to look not just at the future land use category, and in this case outlying suburban, but also at any further land use restrictions in those community plans.

So this is not an ordinary outlying suburban area where Goal 6 allows a range of commercial uses. It's

further restricted. Low-density residential pattern, protect existing land use patterns, limits the development in keeping with historic development pattern.

Next, I'd like to talk about the -- characterize the elements of the development pattern. What is a development pattern? Well, it's the type of development. You know, there's a geographic framework, and you look at the type of development. You look at the distribution or location of the development types. Thirdly, the density or intensity of development are a pattern; and, finally, development standards and the physical form of development. Those are the four elements of development pattern: type, location, density/intensity, and the physical form of development. And I say that based on the requirements of state law for a future land use element. That's exactly what 163.3177(6)(a) requires for a future -- future land use map. So those are the -- the aspects of the development pattern that are important. These are the pole -- polestars to understanding development patterns.

Now, the most critical land use pattern consideration in this case, in my opinion, has to do with the intensity of development; and, secondly, the

standards which govern the physical development. So I'm less concerned with type. These development types are there already. I'm less concerned with location. But I am greatly concerned with density/intensity of use, and I don't want to leave off the actual physical form of development on the ground.

But let me turn now to the pattern of historic and existing development within South Seas. And Mr. Mintz and Mr. Murphy laid such an extensive foundation about the '73 zoning, the 2002 ADA -- ADD, I'm not going to spend too much time on it, except to say that the historic and existing pattern has consistently been limited to 3 units an acre for over 50 years now, and no more than 912 units, and there has never been more than 912 units on South Seas Island Resort. The administrative interpretation provides that no more than 912 combined hotel and residential units are allowable, and that's always been the case. There's never been an exceedance of that. So those regulatory devices have like imprinted the development form on the ground, and that form is not inconsistent in terms of density -- overall density/intensity use.

So my conclusion is, you know, the appropriate way to look at the historic and existing development form is through the lens of that zoning resolution in '73

and in the development that has actually occurred since then.

Let me now pull up another slide and talk about what is happening here in terms of density/intensity. Currently under the ADD, which lays out neighborhood by neighborhood, area by area, development allocation, the areas under this MPD allow 272 combined residential and hotel units. That's the land use approval. That's available. That doesn't go away. I see no problem with that.

Now, what happens under the proposed zoning change? Well, 193 residential units, 435 hotel units, so the combined total is 628 units. That's a net increase of 356 units. That's 2.3 times the existing authorization. I think it's just unreasonable to conclude that such a dramatic increase in the number of units is representative of the low-density residential land use pattern, it's not reasonable to conclude it's consistent with the Plan direction, to ensure the long-term protection and enhancement of existing land uses, and it's not in keeping with the historic development pattern.

So that's the rub. I think that is at the crux of this case, outlying suburban as restricted by the Captiva Community Plan, and this zoning change breaches

those restrictions.

To further sort of delve into those Captiva policies, I think it is important to look back at Lee County's data and analysis supporting the 2018 revisions. In 2018 you've got -- a significant update occurred in the Captiva Community Plan. There was a lengthy process that led to that, adopted by Ordinance 18-04. The statement analysis confirmed, it confirmed the Plan's intent to maintain a low-density residential pattern and limit development, specifically, in recognition of the island's storm vulnerability. So that was a foundational basis for the goal, objective, and policy I've discussed.

The data also acknowledges the unique development known as South Seas Island Resort, as they planned a hotel, commercial, and residential uses delineated in the 2002 Administrative Interpretation.

I should mention that the Ordinance 18-04 adopts the data and analysis as part of the Lee Plan's data and analysis. So this is the information, the thinking that led to these policies, and it confirms the purpose of these policies, storm vulnerability, unique character.

I do want to mention, too, that the Lee Plan provides a future land use category entitled

Destination Resort. Now, this category is very much oriented or geared to a development area on San Carlos Island; but instead of, in concept, seeking a land use category similar or a variation of that category, the proposed zoning tries to shoehorn itself into outlying suburban with the Captiva land use restrictions, and it just does not fit.

I'll turn now to residential development.

(Sotto voce between Hearing Examiner and reporter)

HEARING EXAMINER COLLINS: Okay. We're going to go five more minutes. If that's not going to be a good breaking point for you to resume after lunch, we can stop now. I have to be sensitive to her because I am going to rely on her heavily after this hearing is over.

MR. GAUTHIER: I think it would be best to stop right at this moment.

HEARING EXAMINER COLLINS: Okay. We're going to break for lunch now.

MS. MONTGOMERY: Thank you.

HEARING EXAMINER COLLINS: Let's try to return and resume at 12:13.

(Sotto voce between Hearing Examiner and reporter)

HEARING EXAMINER COLLINS: 1:30.

(Recess from 12:12 p.m. to 1:32 p.m.)

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HEARING EXAMINER COLLINS: All right. We're back on the record after the lunch break. We are continuing with the testimony of Mr. Gauthier.

MR. GAUTHIER: Thank you. At this point I'd like to turn attention to the residential development component of the MPD. The proposed 193 units, in my opinion, fails to respond appropriately to the Lee Plan policies and code provisions regarding development in areas subject to natural hazards. First, this comes to methodology the Staff used to calculate that density. That's found on page 19 of the Staff Report. Under that methodology, 193 units are identified as the maximum amount available; and I should add that's based on the outlying suburban designation plus a unit or two -- two units, I think, from the saltwater wetland area in the wetland designation.

Now, under the Staff methodologies for those areas identified for residential use, and those areas prorated for and assumed to be affiliated with residential use, all those acres earned 3 residential units per acre. And to be clear, the definition of density in the Lee Plan speaks to the actual residential tracts, plus various other features on a development site which are available, including open space, roadways, you know, amenities. So the

calculation of density involves both the specific residential tract plus those areas affiliated with the residential tract.

A couple things to note. First, the Applicant is seeking to yield the maximum density available, 3 units per acre, on those eligible areas on the site. So that's the top of the density range for outlying suburban, and, again, that's for the 20-acre residential tract, plus the areas affiliated with that tract, all would earn density at 3 units an acre. Since the residential area, the principal residential tract, amounts to about 20 acres, that's about 9.6 units per acre on those principal residential tracts.

Another piece of this, or a reciprocal piece, has to do with the hotel units. The 435 hotel units would be concentrated on 5 acres with off-tract parking. That calculates to a hotel density of 87 hotel units per acre. So what we have here is a development plan, and this is consistent with the master concept plan, which spikes higher density and very high intensity, you know, embedded within and surrounded by other features such as roadways, amenity features, and open space.

But now relating that to Policy 5.1.2 in the Lee Plan, well, that policy says, prohibit residential

development where physical constraints or hazards exist, that's one option; or require that the density and design be adjusted accordingly. Density and design adjusted accordingly. The policy identifies hazards, to include hurricane hazards, flood, storm. So that's the policy that comes into play here.

HEARING EXAMINER COLLINS: But wouldn't you argue that the reclassification of the property within the resort from urban community to outlying suburban accomplished this policy, and that it's not appropriate to keep applying this to property to further erode potential development entitlements? I mean, because it was urban community, right, and then it was classified down to outlying suburban.

MR. GAUTHIER: You're getting beyond my knowledge. I wasn't -- I guess I don't have knowledge of a previous land use change -- future land use change --

HEARING EXAMINER COLLINS: Yeah --

MR. GAUTHIER: -- of the subject property.

HEARING EXAMINER COLLINS: -- of this property. The property was reclassified during its lifespan from the '73 approvals to today. At the time it was originally approved, it was outlying suburban; and then over the years it got reclassified -- I mean it was urban community reclassified to outlying suburban. So

wouldn't you agree that this policy has already been applied to the property, and then is it appropriate to continue to apply it to the property to further erode potential development?

MR. GAUTHIER: In my opinion it's applicable right now. I mean, that's history, that there was a future land use classification change, but here we are reviewing a zoning change. The zoning change must comply or be consistent with the plan as a whole. Strict scrutiny is applied. You've got to look at every policy here today now as it relates to the zoning change. That's my view of it.

HEARING EXAMINER COLLINS: Okay.

MR. GAUTHIER: So that past change doesn't relieve the MPD from this policy, in my opinion.

But, again, so the Applicant is seeking the maximum density, 3 units per acre, on the principal residential tract and those areas associated with the principal residential tract, and my point here is the severity of the natural hazards that Captiva is exposed to: hurricane winds, storm surge, king tide flooding, rainfall flooding. In my opinion, a planning approach which avoids placing people and property -- additional people and property in harm's way is the most compelling thing. Avoidance -- avoidance of putting

people and property in harm's way, it's a -- it's a planning principle. It's something that historically has been in the growth management law through the former coastal high hazard provisions that are related to land use changes.

And there's no question, you know, it's commonly known the hazards Captiva is subject to. I count five hurricanes that significantly impacted Captiva over the past 20 years, Charley and Irma, and in the past two or so years, Ian, Helene, and Milton; and we've seen in the last two years very significant storm surge and widespread destruction. There's no question this is a hazardous area.

There's also studies that further confirm that; for instance, the 2022 Captiva Island Assessment and Adaptation Plan, and the March 2023 Assessment of Sea Level Rise and Vulnerability prepared for the Captiva Erosion Prevention District. And these studies are very interesting, in that they not only look at today's hazards, but look ahead to the prospect of sea level rise and how that exacerbates potential storm surge and flooding in the future. There's no question Captiva is in a very, you know, sensitive posture.

Now, back to the Outlying Suburban Land Use category in effect here for us, 1 to 3 is allowed. In

my opinion, with consideration to the extreme degree of storm hazards, the bottom of the density range is appropriate. That's what should be awarded here or available here. I mean, if the property owner wants to move ahead under the 1973 zoning and ADA, they have their 272 units; but if they want to change it here now, they're exposed to this plan policy; and in my opinion, given the hazards, the bottom of the range is appropriate. So that would be about 64 residential units instead of what's now being requested. So I consider that a compliance problem. I don't see how the proposal fits in and satisfies Policy 5.1.2.

And I'll add there are also related provisions in the Land Development Code which relate to both residential and hotel development. For instance, the general standards for planned developments, under the plan development component of the Land Development Code, require that negative effects on surrounding properties and the public interest are minimized. I don't see how loading this much development, additional development, the delta, in this context is in the public interest. And that would be Section 34-411.

Additionally, the proposed MPD would increase hazards to persons seeking to safely evacuate from both Captiva and Sanibel. So there's a ripple effect. It's

not just the people in Captiva subject to that additional evacuation stress, but also Sanibel Island.

So, again, under the current zoning, 272 units. That's a given. That land use was granted. But to increase the scale of development, as has been proposed, conflicts with not only protecting the existing land use pattern, but also public life, safety, and storm risk.

I've moved ahead, probably prematurely, on compatibility on my slide.

In my opinion, based on the massive increase of development potential -- and it is a massive increase. This isn't a little bump, this is a very big bump -- I see incompatibility.

The policy itself -- and that's not a policy, excuse me, it's a definition in the Land Development Code. The Lee Plan itself doesn't have a compatibility definition. The Code does. Well, this compatibility, I'll note, it's broadly written. Compatibility means, in describing the relation between two land uses, buildings or structures or zoning districts -- so that's three categories, and it talks about whether there's a positive relationship based on fit, similarity, or characteristics, or a neutral relationship based on a relative lack of conflict.

Now, the planning context with compatibility, well, it means everything, and in Captiva we have a very unique planning context. Captiva is a small area. It's geographically small, 800 or so acres, if I remember the number right. I don't have the precise number in my mind, in that order, about four and a half miles long, half a mile wide. That's not very wide. There's only one north-south road, Captiva Drive. Everyone must use that road. There's one commercial center in the Andy Rosse Lane area, and that's the center for restaurants and specialty shopping.

And so impacts from South Seas Resort, well, they very quickly spill over, and it is a tight geographic area that's sensitive to those impacts given its character. So I view land use compatibility, you know, through the lens of this planning context.

And we heard yesterday from Mr. Suarez about a particular deviation related to compatibility. I think that was important testimony. We heard from Mr. Murphy this morning, who also addressed compatibility in terms of the high intensity versus the lower intensity.

I also see additional compatibility concerns, and I'll focus on Captiva Drive. I mean, this is an outdoor community. Captiva Drive is a two-lane constrained roadway. There are not sidewalks; there

are not bike lanes; people are out driving on it, walking along it trying to reach the beach or Andy Rosse Lane; or they're biking. And so we're -- have this sensitive context, we're intensifying development; we're going to generate more traffic -- how much more traffic is in doubt given the testimony earlier from Mr. Roark -- and I see a conflict there. I don't see a positive relationship with the intensification of development as it relates to additional traffic on Captiva Drive and the impacts on the multimodal use of Captiva Drive.

And I would broaden my concerns about compatibility to hurricane evacuation. The land use change that is occurring intensifies land uses. It's not going to make evacuation better. It's already a strained evacuation scenario. And Mr. Alexander, you know, who will follow me later or perhaps next week, will -- will talk, you know, in great detail. He's an expert in that area. But evacuation isn't going to get easier. There's going to be more people to evacuate. It's not going to be neutral. It's going to be worse.

So I think the land use change, as it relates to other land use on Captiva -- and not just on Captiva, on Sanibel Island. All those people are affected and impacted, in that the already strained evacuation

ability or capacity isn't going to get better, it's not going to get neutral -- it won't be neutral. It will get worse. But I'll defer to Mr. Alexander on the particulars in the area of evacuation consequences.

So I see -- my focus has been incompatibility as it relates to usage of Captiva Drive and overall evacuation. I mean, it's not surprising this is a matter of great public controversy, this zoning change. I'm very aware, speaking back now to Sanibel Island, I mean, you will be hearing from various City Council members and public officials about their concerns. And so I think that needs to be weighed, and I put it in the context of not just the policies that Mr. Trescott talked about, but just compatibility of uses, use to use.

This is where I meant to be a few minutes ago, and I'm getting near my conclusion.

Turning now to the Code, Section 34-411, these are general standards or design standards for planned development. The proposed development must minimize negative effects of the resulting land uses on surrounding properties and the public interest. For the reasons I testified to earlier, I don't see that happening. I don't think this is in the public interest. I don't see that it's being minimized. This

isn't a small increase. This is a big increase. That's (c), sub (c).

Sub (f) says, "shall not create or increase hazards to people or property" -- I believe that is what's happening here, and it says, "by increasing the probability or degree of flood, erosion, or other danger," and I think evacuation fits in under that scenario, there's other danger.

Again, sub (i), minimize any negative effects.

A couple other citations for you to look at and consider in the context of my testimony, 34-413 in the Code. Planned developments are to be determined case by case based on the nature of the density/intensity of existing development surrounding the property, and is that happening here? No. I mean, this is a case -- we need to look case by case, look at the facts and circumstances and reach a conclusion on what is happening. How is this affecting public safety, what is the nature of the impacts on existing development; and when I look at those things, I see a negative relationship.

There are also several Lee Plan policies that I'll quickly mention:

Policy 2.2.1 addresses and requires an evaluation of compatibility with surrounding uses and other facts

affecting public health, safety, and welfare.

Policy 5.1.5 has some pertinent...

Policy 5.2.2, prevent and mitigate adverse impacts.

Policy 6.1.1, ensure that appropriate site development regulations are incorporated, and this relates back to compatibility and, for instance, Mr. Suarez's testimony.

And Policy 6.1.4 has a relationship to this.

So to conclude, I mean, my basic thought is this is just inconsistent with the Lee Plan as it's restricted by the Captiva Community Plan; and, additionally, the allocation of residential density should track the minimum in the outlying bracket; and there are compatibility concerns.

I've given you my focus. You'll hear from many other speakers about compatibility that I'm sure you will weigh and look at.

And with that, I'll conclude my remarks.

HEARING EXAMINER COLLINS: Okay, thank you.

Staff, do you have any questions of Mr. Gauthier?

MR. MENDEZ: No, thank you, Madam Hearing Examiner.

MS. MONTGOMERY: Yes, Madam Hearing Examiner, thank you.

Mr. Gauthier, let's go back and look at Policy 1.1.6 that you started with.

MR. GAUTHIER: (Complies.)

MS. MONTGOMERY: You are not suggesting that Captiva is rural, are you?

MR. GAUTHIER: No, Captiva is not rural.

MS. MONTGOMERY: Okay. And due to your time and experience in Lee County, hotels have been permitted in the Outlying Suburban Land Use category, haven't they?

MR. GAUTHIER: I agree.

MS. MONTGOMERY: And let me ask you a question, because I can't remember, when -- what was the time frame that you were at the County?

MR. GAUTHIER: '90 through toward the end of '94.

MS. MONTGOMERY: Okay.

MR. GAUTHIER: Four and half years.

MS. MONTGOMERY: And resorts are allowed in outlying suburban, aren't they?

HEARING EXAMINER COLLINS: What was the question?

MS. MONTGOMERY: Resorts are allowed in outlying suburban?

MR. GAUTHIER: Provided they comply with the policies not just in outlying suburban, but outlying suburban as restricted by the Captiva policies.

MS. MONTGOMERY: I didn't ask that question. Are

resorts allowed in outlying suburban?

MR. GAUTHIER: They're not disallowed, no.

MS. MONTGOMERY: Resorts are not allowed in outlying suburban? I'm trying to figure out -- are resorts allowed in the Outlying Suburban Future Land Use category?

MR. GAUTHIER: My answer is yes, provided they comply with the Captiva policies.

MS. MONTGOMERY: I didn't -- wasn't identifying a location. I just want to understand regarding this policy.

MR. GAUTHIER: Yes, it's not -- they are not prohibited, I'll put it that way.

MS. MONTGOMERY: And the next one you referenced was Goal 23. And you've underlined the section that says, enforce development standards that maintain the low-density residential development. There aren't any Land Development Code changes before the Hearing Examiner that bring development standards into question, are there?

MR. GAUTHIER: There are not. This is a zoning --

MS. MONTGOMERY: Okay.

MR. GAUTHIER: -- change, not an LDR amendment.

MS. MONTGOMERY: And I don't know if you know or agree that the Applicant is reducing the number of

residential dwelling units that they could have right now.

MR. GAUTHIER: The gross number of units is being reduced.

MS. MONTGOMERY: Yes. So, again, this goal doesn't come into play because we are reducing the number of residential dwelling units.

MR. GAUTHIER: Yes. A goal is a long-term end, and this goal is to maintain the historic low-density development pattern.

MS. MONTGOMERY: Well, and I'm glad you brought that up, because I heard you say about 50 years of development at 3 units an acre, and I heard Mr. Mintz say that; I heard Mr. Murphy say that; I heard Ms. Berkey say that. And then you testified that we should be something less than 3 units an acre even though it's historically been 3 units an acre. So I'm perplexed, if it's 3 units an acre, why all of a sudden now are you suggesting it should be something less?

MR. GAUTHIER: Because this MPD must comply with the Lee Plan policies. You need to look at all the policies. You need to look at them strictly. It needs to fit in under the Captiva goal, objective, and policy; and it also must comply with the residential development policy, which I talked about, 5.1.2.

MS. MONTGOMERY: We'll get to that one.

MR. GAUTHIER: But you need to look at the Plan as a whole, apply both the Captiva policies and 5.2.1.

MS. MONTGOMERY: Okay. You talked about Objective 20 -- well, never mind. I'm going to skip over that one.

Okay. Let's go to Policy 23.2.4. I've had a chance to check on Section 163.3177 that you referenced, and Chapter 163 in general, and did not find the definition with four categories that you say are provided that further defines development patterns. So can you tell me exactly where in 163.3177 those four items under development patterns are located?

MR. GAUTHIER: I'm characterizing the essential requirements that are found in that section. There are specific requirements of the future land use map. You have to have a map. You have to have categories that identify uses. Each of those use areas you have to -- you know, they're -- what uses are allowed, what density or intensity is allowed. And then there are policy requirements that follow that have to do with the form of development for development particulars.

Now, I use that section of the statute as a jumping-off point to characterize the four elements of a pattern. So you don't see that structured in the --

MS. MONTGOMERY: Okay, but --

MR. GAUTHIER: -- statute, per se --

MS. MONTGOMERY: -- but my question is those four things are not set forth in 163.3177; and if I'm not mistaken, 163.3177 tells you the elements you have to have and the requirements you have to meet through your Comprehensive Plan or an amendment thereto, correct?

MR. GAUTHIER: Yes.

MS. MONTGOMERY: Has nothing to do with the criteria for rezoning.

MR. GAUTHIER: That's correct. I'm using it as a basis for, as I said, a jumping-off point to support my opinion that those are the four elements of the development --

MS. MONTGOMERY: Okay. Okay. I -- just when you talked about it earlier, you made it sound like it was something required by statute, and it's not. It's just your jumping-off point.

MR. GAUTHIER: I'm sorry if I was unclear.

MS. MONTGOMERY: Okay. So this policy identifies three buckets, three different areas. Were you here when the Staff carefully visually went through and identified those three different areas?

MR. GAUTHIER: Yes, I was.

MS. MONTGOMERY: So they went through the southern

part of the island, which is the low-density residential; correct?

MR. GAUTHIER: Yes.

MS. MONTGOMERY: And then you get to the Andy Rosse Lane and the commercial area; correct?

MR. GAUTHIER: Agreed.

MS. MONTGOMERY: And then you have South Seas Island Resort.

MR. GAUTHIER: Yes.

MS. MONTGOMERY: So if the resort -- South Seas Island Resort is a resort today; correct?

MR. GAUTHIER: I missed the first part.

MS. MONTGOMERY: South Seas is a resort today.

MR. GAUTHIER: Yes, ma'am.

MS. MONTGOMERY: And it was a resort in 1973 when it was rezoned. There were already hotel units --

MR. GAUTHIER: That's --

MS. MONTGOMERY: -- development out there.

MR. GAUTHIER: That's fair, yes.

MS. MONTGOMERY: And it's still a resort and will be a resort if this zoning is approved.

MR. GAUTHIER: Yes.

MS. MONTGOMERY: So the development pattern of a resort isn't going to change by anything the County may or may not do.

MR. GAUTHIER: Yes, yes, to that. The way you framed that question, I would agree.

MS. MONTGOMERY: Okay. You read some definitions, and you talked about how dwelling units should be determined based on a Comp Plan policy. Let me ask you a question. Is a Comp Plan implemented through its Land Development Code?

MR. GAUTHIER: Yes.

MS. MONTGOMERY: Okay.

MR. GAUTHIER: Comp Plan -- I mean, a requirement of a zoning change is consistency with the Comprehensive Plan policies. So that's not waived, you still have that; but you have the Code, and the Code is carrying forward the policies in greater detail.

MS. MONTGOMERY: Okay.

MR. GAUTHIER: You know --

MS. MONTGOMERY: Section 34-1493 -- or 8, I can't read this now -- says calculations of total permissible housing units, and it's quite extensive and goes through a process that both the Staff and the Applicant have to go through to determine the available or permissible number of dwelling units. So if I was going to try to determine the total number of permissible housing units, would I not refer to the very specific and detailed language in the Land

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Development Code?

MR. GAUTHIER: Yes, yes.

MS. MONTGOMERY: Okay.

MR. GAUTHIER: For that calculation, yes.

MS. MONTGOMERY: And in Section 34-2, there's a definition of dwelling units, and it says, dwelling unit means a room or rooms connected together which could constitute a separate independent housekeeping establishment for a family, for owner occupancy, or for rental or lease on a weekly, monthly, or longer basis, and physically separated from any other rooms or dwellings. It then goes on to say, the term "dwelling unit" does not include rooms in hotels, motels, or institutional facilities.

So by definition in the Land Development Code, a dwelling unit or a residential unit is different from a hotel room. Do you agree with that?

MR. GAUTHIER: Yes.

MS. MONTGOMERY: And the impact of a hotel room is different from the impact of a dwelling unit; correct?

MR. GAUTHIER: I agree.

MS. MONTGOMERY: So let's go to Policy 5.1.2. So this policy says, prohibit residential development -- which is prohibit dwelling units -- where physical constraints exist. It doesn't say anything, does it,

about hotel rooms?

MR. GAUTHIER: It does not, no.

MS. MONTGOMERY: Okay. And let me ask you a question. During the time that -- if you remember -- that you worked for the County, was there a DRI that went through the process called Pelican Landing?

MR. GAUTHIER: I remember that, yes.

MS. MONTGOMERY: And I believe you either wrote the Staff Report or were directing the person who wrote the Staff Report, and that DRI and zoning permitted a resort hotel in outlying suburban. Do you remember --

MR. GAUTHIER: I recall.

MS. MONTGOMERY: -- that?

MR. GAUTHIER: Yes, ma'am.

MS. MONTGOMERY: And the Coconut Point Hyatt exists today in outlying suburban with a water park, with availability of a golf course, and a variety of amenities; correct?

MR. GAUTHIER: As I recall --

MS. MONTGOMERY: And so --

MR. GAUTHIER: -- yes.

MS. MONTGOMERY: -- hotel has historically been found consistent with the Outlying Suburban Future Land Use category; correct?

MR. GAUTHIER: Correct, down in the -- well, I

guess it's now currently in the Village of Estero area, Coconut Road.

MS. MONTGOMERY: It is now. But at the time that you were here, there was no Estero --

MR. GAUTHIER: It was unincorporated --

MS. MONTGOMERY: -- was there?

MR. GAUTHIER: -- county.

MS. MONTGOMERY: Yeah. It's something else now but...

Well, let me ask you another question. I know you -- you've been to Captiva several times through the years; correct?

MR. GAUTHIER: Yes.

MS. MONTGOMERY: And when you were there in the early '90s, were the size and style of single-family houses a little different than what you see now?

MR. GAUTHIER: Well, my most candid answer is I haven't been to Captiva since my employment with the County to -- to know exactly -- of course I viewed data about it, I've looked at it very closely on Google Earth, but I can't characterize how the housing style or type has changed.

MS. MONTGOMERY: Yeah, I guess where I was headed with that, there used to be sort of like cottages, and now they're --

MR. GAUTHIER: Oh.

MS. MONTGOMERY: -- very large, significant houses with many more rooms. Would you agree with that, if you know?

MR. GAUTHIER: I don't know exactly, but I'm not going to disagree.

MS. MONTGOMERY: Okay. Do you have any numbers or information on the percentage of residential units on Captiva that are vacation rentals?

MR. GAUTHIER: No, only the testimony I've heard here at this hearing.

MS. MONTGOMERY: Okay. And I assume, then, you don't have any information on the small number of people who actually have homestead -- or year-round residence on Captiva?

MR. GAUTHIER: I do not.

MS. MONTGOMERY: Okay, thank you. I don't have any other questions.

HEARING EXAMINER COLLINS: Thank you, Mr. Gauthier.

MR. GAUTHIER: Thank you.

HEARING EXAMINER COLLINS: The next witness, Michael Whitt?

MR. WHITT: Not quite yet, Madam Hearing Examiner.

HEARING EXAMINER COLLINS: Not quite yet, okay.

VOLUME 3

Michael Belle?

MR. BELLE: Madam Hearing Officer, let me start by saying thank you for the opportunity to speak here today. I have previously submitted my public participation form the other day; so I think we're good to go on that aspect of it.

I'll introduce myself. My name is Michael Belle. I'm an attorney in Sarasota, Florida. My practice focuses exclusively on real estate and association matters. I represent the eight timeshare associations on -- or at South Seas Resort, located within the South Seas Resort Development, SR -- which is known as SSRD, and established by Lee County Zoning Resolution Z-73-202 and the subsequent County actions, and then obviously memorialized in the Administrative Interpretation ADD2002-00098.

With respect to the South Seas Island Resort MPD, DCI2023-00051 --

THE REPORTER: Slow down, please.

MR. BELLE: That New England part of me, sorry.

The -- and the pending rezoning application, the associations that I represent, the eight associations, represented more than 6,000 individual fee simple property owners. That, coupled with Katie Berkey's clients, I represent all of the associations within

South Seas Resort and all of the owners.

Some of these owners have owned this property for more than 40 years. The eight associations within South Seas -- South Seas Resort are: Harbourview Villas at South Seas Resort Condominium Association; Plantation Beach Club Owners Association; Plantation Beach Club II Owners Association; Plantation Beach Club III Owners Association; Plantation Bay Villas Owners Association; Plantation House Condominium Owners Association; South Seas Club Condominium Association; and South Seas Plantation Condominium Association.

Again, this totals over 6,000 fee simple properties. So unlike many places you see timeshares, out here on South Seas, they're all individually deeded unit weeks.

And, again, with Katie Berkey, this is all of the property owners associated out there at the resort.

I think at this time, Madam Hearing Officer, I do have -- and just for the purposes of presenting them, I do have 63 authorized agent personal statements. I have shown them to Neale, if I could approach?

HEARING EXAMINER COLLINS: Okay. This will be M. Belle's composite exhibit.

(Belle Composite Exhibit 1 submitted.)

MS. MONTGOMERY: Madam Hearing Examiner, he did

show those to me, and I don't have any objection necessarily to him submitting them with the caveat that they obviously are not available for cross-examination, and based on the Administrative Code, it's my understanding you'll give them the --

HEARING EXAMINER COLLINS: Right, he's here speaking as their representative.

MR. BELLE: Correct. And then just to save time, for you to read them later.

And, again, I'm not going to go through all the different names just to save time because we have a lot of other things to accomplish here.

The Associations obviously have a legally and constitutionally protected right in -- you know, it's in jeopardy with regards to the proposed rezoning. In accordance with 163.3177(6)(i), Florida Statute, the proposed rezoning will impose construction and post-construction noise, dust, loss of views, privacy, unreasonably overburden and infringe upon existing easement rights, which obviously are to be considered with local decision-making pursuant to Lee Plan Element XII, and generate traffic and corresponding roadway maintenance costs at a level far in excess of what has been ensured by the Associations historically and currently, and could impact vested rights of other

owners within South Seas that have not been recognized as a party.

Now, I know Your Honor -- excuse me, Your Honor, I apologize.

Madam Hearing Officer, there has been a discussion with regard to aggrieved party status, and I know and respect your ruling. I'm going to go over just a couple points on it just for the purposes of making a record, but I do respect your prior ruling.

You've indicated that the party status for -- aggrieved party status has been denied for anyone but the Applicant and the Staff. With all due respect, obviously, and out of a need to document for the record, my ability to assert the Associations' interest has been compromised by not being able to provide the party status at the start of the HEX proceeding, and being denied the full presentation and to cross-examine County Staff. I did submit a request for aggrieved party status to the County Attorney's Office on February 11th, but do respect your opinion on that.

HEARING EXAMINER COLLINS: You are free to ask questions, and they will be noted and responded to by Staff.

MR. BELLE: I do want to -- Neale, I did submit this.

VOLUME 3

(Discussion at Applicant's table.)

(Belle Exhibit 2 submitted.)

HEARING EXAMINER COLLINS: Okay. This is Belle Exhibit 2, it's a letter to Joseph A. Adams with the County Attorney's Office requesting for his clients to be granted party status in this zoning hearing.

Are you going to read from this or --

MR. BELLE: No --

HEARING EXAMINER COLLINS: Okay.

MR. BELLE: -- just for the purpose of putting it into the record.

The 2002 ADD limits development to 912 total hotel and residential units and up to 5 acres of commercial at the south end. The 2003 settlement agreement -- which everybody talks about as the mediated settlement agreement -- to which Lee County was a signatory and a party also limits current and future developments of dwelling units and hotel room units to the historical limit of 912 --

MS. MONTGOMERY: I'm going to object. It does not -- the order does not limit hotel units. It specifically says dwelling units.

HEARING EXAMINER COLLINS: Okay. Your objection is noted. We will stipulate you disagree with his interpretation, and we're going to allow him to

continue.

MR. BELLE: -- and was recently held in the circuit court to be valid and binding. The conditions and the development standards within the ADD, in conjunction with the 912 unit cap under the ADD, and further memorialized again in the 2003 settlement agreement, which is what everyone refers to, between the County and the Captiva Civic Association, was intended to prevent and mitigate adverse impacts to and incompatibilities with the surrounding area.

The Applicant's claim that certain deviations incorporated in the ADD related to open space, parking, and buffering are vested for a new application seeking to substantially increase building heights --

HEARING EXAMINER COLLINS: Slow down, slow down. She's working furiously to keep up.

MR. BELLE: Thank you.

-- density, and intensity is legally flawed and foreseeably results in adverse impacts and incompatibilities with the ADD -- which the ADD, excuse me, was intended to protect against.

The Applicant cannot have it both ways and ask about vested rights or use the ADD for its benefit, and then say that they don't want to have it applicable to them.

It's important to point out that the Applicant is a minority owner of about 120 acres within the SSRD, which is the subject of the rezone application; but the remainder of the 304 acres is owned by others who are within the SSRD and subject to the ADD which have not consented to or joined in on the application.

The access road for which the Applicant seeks rezoning is not solely owned by the Applicant, and the additional owners have not joined in the application, which prevents approval. That's important to note because this rezoning would make them subject to that.

The ownership and rights of the access road, which others partially own and control and who are not co-applicants outside of the proposed MPD boundary, and the Wetlands Future Land Use designation already are dealing with safety issues, operational performance, and worsening road conditions, maintenance problems, and costs associated with these issues. Therefore, the Associations and their associated members should be seen as indispensable and be required to join in any rezoning application, if we're going to deal with the roadway issues.

The Applicant and the Associations share an access roadway and easements, the entire extent to which is not fully within the proposed MPD boundary, and which

is not fully owned and controlled by the Applicant, particularly at the south end, but which is the subject of the deviation requests, Numbers 3 and 15, as to the internal right-of-way buffers and road standards. Respectfully, Deviations 3 and 15 apply to the entire road and include portions which are owned and operated by others, and those parties have not consented to or joined in this rezoning application.

LDC Section 34-202(a) provides submittal requirements for all applications requiring a public hearing, and includes the Applicant submitting a signed statement under oath that he is the owner or authorized representative of the owner of the property subject to the request, and that he has full authority to secure the approval required and to -- to impose covenants and restrictions on that property as a result of the actions approved by the County.

The Captiva amendments require an Applicant seeking an amendment to specific provisions of what to present for a publicly-noticed meeting and to provide the County with a compendium with specific information before an application for a plan change may be found sufficient. The subject rezoning application violates Policy 1.1.6, Goal 23, Objective 23.2, as the application was not properly publicly noticed and

violates the other policies of the Lee Plan regarding density, height, and intensity. Therefore, it is not sufficient and cannot be legally approved.

The application is discordant for the following reasons:

The application violates the public meeting requirements of Policy 23.4.1 of the Lee Plan and Section 33. -- excuse me, 33-1612 of the Land Development Code and is, to put it simply, deficient. The Applicant has not complied with Policy 23.4.1 of the Captiva provisions in Ordinance 23-22, and therefore the application must be denied.

The Applicant has acknowledged the access to the South Seas Plantation Road is restrictive, at best, in its revised schedule of deviations. I think that's important to point out again. The Applicant itself has said that the South Seas Plantation Road is restrictive, at best, in its revised schedule of deviations.

The application fails to mention that the internal roadway is not solely owned or presided over by the Applicant, and the other owners, who have not joined in the application, and made a part of the roadway is outside the proposed MPD boundary, more particularly, the south end of SSRD. For this reason alone the

application must be denied with regards to the roadway.

The Applicant incorrectly identified the minimum shoulder width. The correct minimum standard width is 8 feet, structurally supported, with 4 feet of the 8 feet as paved shoulder.

The Applicant incorrectly identified the minimum lane width standard. The correct minimum lane width standard is 11 feet.

The Applicant's justification for Deviation 15 refers to right-of-way width, which apparently was meant to refer to lane width. It also indicates the minimum is 12.4 feet, but that would exceed the minimum of 11 feet. But the purported 12.4 feet includes a paved shoulder/bike lane; and when you take away the bike lane, the minimum lane width would be less than 11 feet. Not having a bike lane will result in serious vehicular/bike confrontations.

For anyone who has been out to South Seas, there are cars, there are bikes, there are pedestrians, and golf carts. Not having some form to be able to protect the slower-moving traffic will result in accidents.

The Applicant's description of South Seas Plantation Drive as a privately-preserved local roadway with open drainage is also simply untrue. The section of South Seas Plantation Drive just north of the

intersection with Bayside Villas, to approximately the intersection of Sandrift, is within the Wetlands Future Land Use designation. An increased amount of traffic would inflict grievous harm to the environment by causing higher levels of greenhouse gas emissions, more carbon dioxide due to increased fuel usage, resulting in poor air quality, noise pollution, and much more. The wetlands would also seriously be impacted due to emissions and other air pollution. It's an important point.

It is clear that the application fails to include indispensable parties who own or control the majority of the properties in South Seas Resort. The Applicant is a minor property owner as compared to the remaining property owners within the resort and share roadways and easements with the Applicant. These other parties invested in reliance on the master development plan's density limits and development standards, and whose properties will be significantly disadvantaged by the approval of the application including, but not limited to, making them nonconforming structures under the LDC and the Lee Plan.

The Applicant improperly -- and I'd like to point out illegally -- attempts to use the historically 30-foot-wide ingress and egress and parking easement --

THE REPORTER: Slow down, please, parking easement...

MR. BELLE: It's an ingress and egress and parking easement for a landscape buffer for the rebuilt restaurant located westerly of the only access road within the resort. The County cannot burden the easement holders' rights by requiring the Applicant use the foregoing easement for a landscape buffer. This is one of the oldest documents that is recorded out there in the resort. It's the 1960s, I think it is. If the County requires a landscape buffer, this requirement should be implemented north of the easement area on land owned by the Applicant. Had the restaurant been moved slightly to the north, any sort of buffering could have occurred there.

There's current litigation pending with the Applicant regarding the easement area and its use of the easement as a landscape buffer, or overburdening the easement with -- with utilities and utilities boxes. If the County attempts to use the easement area improperly for a landscape buffer, it would require the plaintiffs in the litigation to amend the complaint to include the County.

The biggest issue here is this is the access easement for everyone in Section 22 to access the

beach. If the landscape buffer is implemented, it's going to reduce the amount of the access easement. This is a parking location for people. One of the biggest issues is parking outside of the resort, or inside the resort, is extremely constrained. This easement provides for parking, vehicular parking. By adding any sort of utilities or any sort of landscape buffer to that area, you're reducing the parking, and you're also reducing the ability of those who have the right to ingress and egress to the beach.

The ADD constitutes a comprehensive planned unit development -- nowadays known as a PUD -- to be developed as a unified whole, the entire 304 acres. The individual property owners within the SSRD relied on the master plan's binding commitments regarding the maximum number of units, the open space, and the quality of life which has existed out there for approximately 50 years.

It should be noted that the Applicant has loosely used the term "guest" to mislead Madam Hearing Officer that the Applicant is a helpful owner of the amenities. It is factual that the Applicant owns a minor land portion of the overall resort land area. The Applicant has made a concerted effort to deny long-standing owners within the resort access to parking,

restaurants, and facilities within the resort. The Applicant's testimony has been misleading to Madam Hearing Officer, as the only people to benefit will be the Applicant.

It's important to note that besides the Applicant, it's going to be a serious issue with regards to the availability of amenities. The owners who are not part of the resort's rental program, or have not paid the resort's $50,000 amenity fee, will not benefit from nor have access to any of the purported resort amenities. It's important to note. In fact --

HEARING EXAMINER COLLINS: Did they have access historically?

MR. BELLE: Historically, yes, they have had access until the current --

HEARING EXAMINER COLLINS: So what's changing now?

MR. BELLE: The current owner. Once the current owner purchased the timeshare units that did not have agreements recorded in the public records, were immediately denied amenities.

HEARING EXAMINER COLLINS: So what do they have, badges where they check who's using the pool and the golf course?

MR. BELLE: They have nothing now. They have no access.

HEARING EXAMINER COLLINS: No, but how do they monitor that? How do they prevent --

MR. BELLE: You have to have bands now to get into places.

So there will be no access for timeshare unit owners to have access to the restaurants; there will be no access to the bars; there will be no access to the pools, no access to the resort amenities. Even some of the timeshare units that have amenity agreements are having difficulty with regards to having access to the amenities, are being denied certain access to amenities.

So at the present time, it's been extremely misleading for the Applicant to say guests or resort guests or owners, when, in fact, the only people that are going to have access are going to be those who participate in the rental program or pay the resort amenity fee or have a resort agreement.

Our office attempted to negotiate with the Applicant for over two years for one association and unfortunately was unable to do so.

HEARING EXAMINER COLLINS: So it's your position that they should have access at no cost?

MR. BELLE: It wasn't a cost issue. It was -- what the issue is going to come down to is this. The

Applicant is developing --

HEARING EXAMINER COLLINS: I'm trying to figure out what they had versus what they're losing by virtue of --

MS. MONTGOMERY: They're losing all of the amenities. They will not -- most of the timeshare resorts out there will have no amenities with the resort. They'll be an island to themselves.

HEARING EXAMINER COLLINS: Unless there's an agreement.

MR. BELLE: Unless there's an agreement. Prior to this -- for example, South Seas Club prior to this --

HEARING EXAMINER COLLINS: So what was the purpose of some having an agreement and some not having an agreement if anybody could use the amenities?

MR. BELLE: For example, The Cottages and -- I think it was The Cottages and Plantation House had an agreement with the resort because they traded off some land -- what's called a pool and landscape agreement. They received amenities, and those were in writing. South Seas Club initially had amenities in their prospectus that stated they were getting a full family membership. Upon taking over, Timbers sent out a letter saying that they didn't feel that that was something they had to honor and immediately denied --

HEARING EXAMINER COLLINS: This feels like a private civil matter to me --

MR. BELLE: Not at all.

HEARING EXAMINER COLLINS: -- and not relevant to my decision-making, which is consistency with the Lee Plan and the Land Development Code.

MR. BELLE: What I am -- what I'm saying is, is that there are parties involved in this situation as it's being developed. The development of this resort is not for the benefit of the area. It's development just for the Applicant. And there are people involved, for example, who have easement rights. The County is now saying that there needs to be a landscape buffer in the easement that is now one of the only remaining benefits that these timeshares have. To have a landscape buffer in that 30-foot easement is going to burden the individuals who have the right to access the beach.

HEARING EXAMINER COLLINS: But does the land -- the landscape buffer preclude a pathway through?

MR. BELLE: The landscape buffer would -- yes, you would not be allowed to put landscaping in that buffer area because it would burden it. That landscape buffer is one of the sole areas that timeshare owners would be able to park to be able to access the beach.

HEARING EXAMINER COLLINS: Okay.

MR. BELLE: The point being on this is that when the Applicant purchased the property, they bought so with full disclosure. They knew of the issues that existed, they knew of the issues in the relationships that existed out there, and they knew of the easements that existed out there.

The Applicant is not entitled to the rezoning being sought, and the requested deviations, in my opinion, are indefensible. The Applicant has and will continue to procure benefits and development prospects within the 272 total vested units pursuant to the mediated settlement of 2003, which would now include dwelling and hotel units and with the 24 unbuilt units pursuant to the ADD.

The eight Associations representing over 6,000 individual fee simple property owners, as well as the 63 individuals that I presented statements from to you, have requested I speak on behalf of the remain -- on behalf of them and remain firmly opposed to the application as submitted, and are in full agreement with my arguments that the rezoning application violates the Lee Plan and the Land Development Code and must be denied for the following reasons:

The rezoning application increases density and

building heights in violation of the Lee Plan, as well as the mediated settlement of 2003.

The rezone application must be deemed -- excuse me -- must be denied as it violates the understandings regarding density, building heights, open space, and property rights that the majority of the owners at South Seas relied upon for many decades when they purchased their properties as legacied.

The rezone application will increase --

THE REPORTER: Start that paragraph again, please.

MR. BELLE: The rezone application will increase evacuation times on the one road in and out of Captiva, in the case of a hurricane or other natural disaster, and threatens public safety on both Captiva and Sanibel. If evacuees cannot get off the island or suffer harm, it could be related to this application, and for that reason alone the application should be denied.

The rezone application will increase development at the expense of the environment, including water quality and wildlife habitat.

Approval of the proposed rezoning will further worsen traffic and overburden the already narrow access road that has no bike lane or sidewalk.

The rezone application will increase traffic on

both Captiva and Sanibel Island for residents, guests, and others to be overly burdensome.

The rezone application will increase density, building heights, will undermine the low density and low building height ambience that makes Captiva a unique worldwide sought-after destination. People come to Captiva for the look that it is now. They don't want high buildings; they don't want the look. They want to be able to see trees and not buildings. The residents of South Seas Island Resort have always flocked to the island due to the quaint family-friendly feel it emits.

Both the general manager of the resort and the Applicant's hurricane evacuation expert have testified that South Seas does not have an airport shuttle service.

The traffic study, as contained in the Staff Report, page 327, says there is a South Seas airport shuttle service and that the service will reduce traffic impact.

In conclusion, the policies of the Lee Plan do not permit approval of the rezoning application. Furthermore, the Applicant was advised in writing, upon purchasing his 120 acres of the 304-acre resort, that the resort was vested for a maximum of 912 dwelling

units, including 140 employee housing and 107 hotel units.

It is based upon the foregoing that I, on behalf of the eight Associations I represent and the 63 individuals, request denial of the application for rezoning. Thank you.

HEARING EXAMINER COLLINS: Thank you.

Neale --

MS. MONTGOMERY: I have a couple questions.

HEARING EXAMINER COLLINS: -- he's mostly argument --

MS. MONTGOMERY: Well, I just -- yes, I agree, most of it is. There's some factual points I want to understand --

HEARING EXAMINER COLLINS: Okay. Because you can make the points where you disagree with him during your --

MS. MONTGOMERY: Well -- okay. Well, one is I don't understand the 6,000 owners for properties since there aren't --

HEARING EXAMINER COLLINS: Okay.

MR. BELLE: I can explain.

HEARING EXAMINER COLLINS: Please do.

MR. BELLE: So, Neale, technically every single person who owns a timeshare week has an individual deed

for their property.

MS. MONTGOMERY: Okay.

MR. BELLE: So there are --

MS. MONTGOMERY: You're really talking about weeks.

MR. BELLE: Correct, but it's still a deed. It's still a fee simple deed. It's a warranty -- there are over 6,000 warranty deeds --

MS. MONTGOMERY: Okay.

MR. BELLE: -- in the timeshare situation.

MS. MONTGOMERY: Okay. Do you know how large the parcel is that the timeshare sits on?

MR. BELLE: Of the eight total?

MS. MONTGOMERY: Yes.

MR. BELLE: The eight -- I do not have a total acreage for all the eight, no.

MS. MONTGOMERY: Okay.

MR. BELLE: I'd have to add it up, and I don't --

MS. MONTGOMERY: Yeah, and you -- you said something I didn't understand, that there wasn't any public notice about Ordinance 23-22. Is that what you said? It was early on.

HEARING EXAMINER COLLINS: I think he said 33-1612 regarding the legality of the public outreach ahead of the hearing.

MR. BELLE: Correct.

HEARING EXAMINER COLLINS: He's saying that that section of the -- his argument is that that section of the Land Development Code was not complied with, and he didn't further elaborate on that.

MR. BELLE: I did not. That was just more of a statement, that the public outreach, in our opinion, was not publicly noticed.

MS. MONTGOMERY: Okay. Do you know how many acres actually exist that are not wetlands that have been conveyed away in the resort that aren't owned by Timbers, by the Applicant?

MR. BELLE: I do not. I have not done an analysis with regard to the survey between the wetland areas and what's remaining.

MS. MONTGOMERY: Okay. So having not done that analysis, you don't --

MR. BELLE: I -- I do know that with regards to the 120 acres purchased by the Applicant as it related to the total overall, I do know that relationship.

MS. MONTGOMERY: If you're going back to 304, that doesn't exist. So when you call them a minority owner, you need to know what the other ownership is, and you don't, so I'll leave it at that.

I don't have any other questions.

HEARING EXAMINER COLLINS: Thank you, Mr. Belle.

MR. BELLE: Thank you.

HEARING EXAMINER COLLINS: Is Michael Whitt going next?

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: And James Patterson at the same time?

MR. WHITT: James will follow me. James Patterson is an expert. He's a land planner.

(Sotto voce between Hearing Examiner and reporter)

HEARING EXAMINER COLLINS: Michael, the court reporter is saying she needs a break so I'm going to take a brief break for ten minutes --

MR. WHITT: That'd be great.

HEARING EXAMINER COLLINS: -- and we'll resume.

MR. WHITT: We can get our PowerPoint plugged in.

HEARING EXAMINER COLLINS: All right.

(Recess from 2:38 p.m. to 2:54 p.m.)

MR. WHITT: I'll sit as I start, Madam Hearing Examiner, if you're ready for me to proceed.

Michael Whitt, I'm here on behalf of Captiva Civic Association, as well as Suraya, LLC. Suraya, LLC, is the owner of the single-family home just south of Tract G upon which the Beach House restaurant has been constructed.

We have a PowerPoint. If I may approach, I'll hand copies to you, as well as a binder of exhibits.

HEARING EXAMINER COLLINS: Okay. I will take them. Do you have a copy of the PowerPoint for the court reporter by any chance?

MR. WHITT: I don't know if I've got an extra copy. I can -- I can have one made and bring it to you --

MR. ARBOIS: (Indicating.)

MR. WHITT: We do have one?

MR. ARBOIS: Yes.

MR. WHITT: Okay. The answer is yes.

MS. MONTGOMERY: Madam Hearing Examiner, can I have a point of clarification? There has been consistently communications from a different attorney, Mr. Grosso, representing CCA. So are we having two attorneys representing the same entity?

MR. WHITT: The answer is yes. I served as counsel to Captiva Civic Association in the underlying litigation against Lee County and the Applicant that resulted in the final judgment. And, really, the -- 99 percent of my comments are going to be on behalf of Suraya, LLC, with respect to Deviation 4D.

HEARING EXAMINER COLLINS: Okay. Because you understand the focus of this hearing is on the zoning

request; right?

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: Okay.

MS. MONTGOMERY: And so I'm going to object to any testimony about any challenges or litigations filed regarding the beach easement, and I'm going to object to any testimony in regards to the settlement agreement, especially since page 40 and 41 of the transcript of those proceedings Mr. Whitt specifically said he was doing that litigation, and it had nothing to do with this zoning. So I would like him to honor his word to the court.

MR. WHITT: Your Honor -- excuse me, trial lawyers, we all say the same thing.

As --

HEARING EXAMINER COLLINS: That has no impact on me. If you're here representing somebody who owns property --

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: -- inside the resort, please begin.

MR. WHITT: I just -- the other day I had to step out. I had a meeting. I understand that the order granting summary judgment was admitted in the record, as well as the final judgment and the mediated

settlement agreement, is that correct, when Mr. Mintz -- when Mr. Mintz was testifying? If those are in, then that's fine. I don't need to rehash that. I was going to offer them by way of a request for judicial notice, but if they're -- if they've been accepted in the record, and we can verify that at some point in the future, then I need not --

MS. MONTGOMERY: Mr. Mintz did --

MR. WHITT: -- do that. I need not --

MS. MONTGOMERY: -- admit --

MR. WHITT: -- waste your time --

MS. MONTGOMERY: -- those documents under protest, yes, sir.

MR. WHITT: And, Madam Hearing Examiner, if I could ask to be able to finish my comments before counsel for the Applicant starts making --

HEARING EXAMINER COLLINS: That would be --

MR. WHITT: -- comments --

HEARING EXAMINER COLLINS: -- helpful for the court reporter, too.

MR. WHITT: Okay. We can -- we can address that issue if we need to. That is my understanding, that they're in. If we verified that with Miss Maria, that they have been submitted into the proceedings, then I won't waste the time this afternoon --

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: -- with the judicial notice.

HEARING EXAMINER COLLINS: Identify what those documents are, and she --

MS. PEREZ: The (unintelligible) public forms?

MR. WHITT: I'm sorry?

MS. PEREZ: The documents you gave me were the members of the public forms that you gave me?

HEARING EXAMINER COLLINS: No.

MR. WHITT: No, no. They -- it is the final judgment, the order granting summary judgment, and the mediated settlement agreement that I believe came in through David Mintz when he testified.

MS. MONTGOMERY: Here's the documents.

(Discussion at Applicant table)

MR. WHITT: Okay. That's my understanding. That's fine. Then I need not waste --

HEARING EXAMINER COLLINS: Understand --

MR. WHITT: -- any more time.

HEARING EXAMINER COLLINS: -- please understand that those documents are of limited value to me. They don't speak to what I must -- my authority under the Land Development Code and the Lee Plan; so I really don't want to spend a lot of time arguing about them.

MR. WHITT: I don't intend to address them at all.

I only wanted to make sure they were in the record.

HEARING EXAMINER COLLINS: And see what you started.

MR. WHITT: Yes, it was a -- it was a pretty simple straightforward question.

So -- okay. I'm going to -- I'm going to move forward then with respect to Deviation 4D, and I would -- I would note I am going to try to move quickly through my presentation. Speaking right after me is James Patterson, who's an AICP land planner, who will address a lot of these issues and provide his expert opinions as to the requested Deviation 4D regarding the buffer between the single-family home and the Beach House restaurant.

So this -- this shows you the -- the -- the conflict between the Suraya residence and the Beach House restaurant. You'll see from this photograph kind of a cleared pathway, if you will. That is actually the access easement that provides for vehicular access and vehicular parking, as well as pedestrian access to the Gulf of Mexico. It is to the north of the Suraya property, and is built upon what is depicted in the master concept plan as Tract G.

HEARING EXAMINER COLLINS: So this pathway provides beach access?

MR. WHITT: I'm sorry?

HEARING EXAMINER COLLINS: You're saying that this tract, this cleared path, provides beach access?

MR. WHITT: Yes, ma'am, for vehicles and pedestrians. And I will -- I will put into evidence -- part of our package is the actual easement recorded back in 1960, and I'll walk through that language with you quickly here in just a few minutes.

I'll buzz through this because I know you know this, but I just want to make sure it's in the record, what the Applicant has to show with respect to this rezoning and why, in our opinion, it fails to show compliance and consistency with the Lee Plan, show compliance with the Land Development Code, and show that it is compatible with the existing uses in the surrounding area. That was rezonings generally, as you know, under LDC 34-145(d)(4)(a)(2).

PD rezonings have additional findings that you must make with respect to (a), that the proposed use is appropriate at the proposed location; and since we're here on the requested Deviation 4D, that that deviation would enhance the objectives of the planned development; but most importantly, that it would protect the public's health, safety, and welfare. Suraya, LLC, is the public that needs to be protected

with respect to the requested deviation.

And when I mention the requested deviation, my comments today, to be clear on the record, go solely to requested Deviation 4D, the required buffer on the southern property line between the Beach House restaurant and Suraya, LLC. All right?

First, with respect to the Lee Plan, let's start with Policy 5.1.5. I'm going to spend just a little bit of time on this because I believe I could almost stop in my presentation here and then let James go because I think this -- this is the end of the requested deviation.

What must the Applicant show to meet Policy 5.1.5 of the Lee Plan? So that policy is there to protect existing residential areas from any encroachment of uses that are potentially destructive to the character and integrity of the residential environment. That is exactly what we have with this conflict of the commercial use of the restaurant and the residential use of this residence owned by Suraya, LLC.

It says further, "Requests for conventional rezonings will be denied in the event that the buffers provided in the LDC, Chapter 10, are not adequate to address potentially incompatible uses." So if it's just a straight conventional zoning, they have to

comply with the LDC buffering or else it will be denied.

If the uses are proposed in the form of a PD, which is what we have here, or special exception and generally applicable development regulations are deemed to be inadequate, conditions will be attached to minimize or eliminate the potential impacts or, where -- this is important -- where no adequate conditions can be devised, the application will be denied altogether.

There's a problem, and the Applicant has put itself in a box and the County has put themselves in a box that they can't get out of, because the LDC requires a Type C/F buffer, 30 feet wide, trees, and a double hedgerow so as to be an opaque buffer. None of that -- you look at the landscape plans that we're going to walk through, and Mr. Patterson will walk through it, no buffer. What they say is the existing buffer will satisfy. Oh, it does not. You're going to see other Land Development Code provisions that make it very, very clear. They cannot plant trees and shrubs and put a landscape buffer in this easement. This access easement is a right-of-way. It is an access easement for ingress and egress to the Gulf -- it says it right on its face -- for pedestrians; it is an

access easement for vehicles to drive and traverse across this 30-foot access easement, and to park on the access easement. It under law -- and I'll show that to you -- is considered a right-of-way. And I'll buzz through the Land Development Code provisions that prohibit plantings in a right-of-way outright, and say no deviations can be granted to that particular section.

So the Applicant is not complying with Chapter 10. Let's start there. The -- the Applicant is requesting a variation. This is weird, and you're going to have to hear, they jumped the gun, and they went running like four hills over with getting the -- the development order to build this restaurant; and, boy, did they build it fast. It's almost done, in record time.

But the County has been telling them with insufficiency letters throughout the whole process, which they now ignore in -- in recommending approval of this deviation, they now ignore what they put in writing to the Applicant about you gotta show this, you gotta do that. You can't plant in this access easement.

There was a gentleman that testified -- I'll hit it -- the landscape architect or whatever for -- for --

for the Applicant, and he says, oh, we're meeting it. It's 10 trees per 100 feet. No, it's not. The Land Development Code regulation requires a 30-foot Type F buffer. That's what they've shown on their plans all along, 30-foot Type F buffer, trees, double hedgerows. He testified falsely to you that it's 10 trees per 100. That's the deviation that they're asking for, is 10 trees per 100. Until you say I'm recommending approval, and until the County Commission says we approve Deviation 4D, they can't plant 10 trees per 100 and say it's all met. They can't. That violates LDC Chapter 10, Section 416. They can't do it. That's what they're asking for, and that's illegal. They can't do it because they can't plant in the easement, and they built right to the edge of the easement. They have no room to put in any buffer, any buffer.

You're going to hear from Mr. Patterson what -- what they show in their plans and that got approved by the County, here's your DO, go ahead and start your building. However, before you get your certificate of compliance, in essence your CO, and you can -- you can operate in that restaurant, we have to go out and make sure that these existing -- the existing vegetation that's there is an adequate buffer. You're going to hear it's not, and it cannot be, because over 50

percent of the trees and the little plants that are there are on my client's property. So everything in the application about that and the landscape and existing vegetation is false. The testimony of that gentleman that he presented to you under oath is false. 50 -- I think it's 56 percent of the existing vegetation, you're going to see photos of all of that. It's on our property. So they can't rely on the existing vegetation.

We have the right to a 30-foot buffer, and that's what we're asking you to do, is you need to deny this request 4D. Let me -- let me -- let me move on.

Under 23.2.6 of the Lee Plan, the Applicant has to show that deviations -- well, it says variances or deviations from the current development standards won't be permitted unless they meet all of the specific requirements for deviations set forth in the LDC. And we'll show you that they don't, and they cannot. They've put themselves in a box. They cannot meet it.

LDC 416, this is the buffering. A buffering area is required along the entire perimeter of the development whenever the proposed development abuts a different use. They say, oh, well, historically it's been the same use because there's food and beverage that's been -- I'm going to show you photos, and you're

going to see that is false. That's been their narrative all along. That's been a narrative that, frankly, they've duped the County into going along. They even call the access easement a buffer easement, a landscape easement. It's not. It's an access easement only. It's not a buffer easement. It never has been a buffer easement. It's not a landscape easement. It's for people and vehicles to traverse to get to the Gulf of Mexico, period. That's what it's been since 1960, and they can't change it. They can't -- they can't put lipstick on a pig and call it something else and then try to get the County to say, thumbs-up, yeah, we're going along with -- with your requested deviations.

416, it goes on further to say, "Buffer areas may not be located on any portion of an existing or dedicated street, right-of-way, or roadway easement." The 1960 easement is for vehicular, as well as pedestrian use. So I would put to you that it is a right-of-way or a street right-of-way or a roadway easement because that's exactly what it is. If you have an easement that allows for vehicles to traverse it, what would you call it? I would call that a roadway easement for ingress and easement to the Gulf of Mexico and for parking.

LDC 416(d)(7), this is interesting because we know

there's going to be all kinds of noise. Madam Hearing Examiner, the first thing you said on day one in the morning when the Applicant was here, and I believe it was Ms. Crespo that was doing her -- her presentation, you had big questions about conditions, noise, hours of operation, and all that because of the outdoor seating. There's almost 4,000 square feet of outdoor seating at this restaurant 30 feet from my client's property, roughly. You raised those issues.

416(d)(7) says uses or activities that generate noise must provide a Type C or Type F buffer. Well, that's exactly what's required under the LDC, exactly what they show on their drawings and submittals with their application.

"If, in the opinion of the Director, the proposed development will have a significantly adverse impact on adjacent property."

Now, there is no opinion -- I've seen nothing from the Development Director one way or the other. Well, I find that there's really no adverse impact to the Suraya, LLC, property just -- just south of the restaurant. No, there's not a finding for it; there's not a finding against it. There's nothing, and we know that there's going to be significant noise impacts, as well as odor, heat, and other similar impacts.

All right. LDC 10-421(a)(5), this again deals with the landscape buffering. I've highlighted the language about three-quarters of the way down, "No Code-required landscaping may be located in any street easement or right-of-way." So let's leave out "street easement" and the conjunction "or." No Code-required landscaping may be located in any right-of-way. And, again, I'll read some legal definitions to you of what a right-of-way is. It is very broad under Florida law.

"Variances or deviations from the requirements of this subsection are prohibited." So you cannot plant any right-of-way, period. I would -- I put to you, Madam Hearing Examiner, you are prohibited under the provisions of 10-421(a)(5) from saying I approve Deviation 4D to reduce any kind of landscape buffer from what is required. It is prohibited by the very clear language of the Land Development Code.

Now let's look at the Staff Report. I'm going to quickly go through some of the stuff, as I mentioned to you, when they were going through the DO, and you're to see what Staff said at the time that the DO was pending. But now as they move through this process for this application for rezoning, now they're good with -- with -- with everything. Oh, no, it's all good, and -- and -- and we're all -- we're all for it.

So Policy 5.1.5 says uses, not principal uses. So we can go back and look at that slide, but it says uses.

Interesting -- and I'm going to point these out to you -- in the Staff Report, as previously discussed, the proposed rezoning does not introduce any new principal uses not already approved or existing on-site. Well, I mean, if that's the standard, there's a number of restaurants within South Seas. It's a big resort. It's not just this Beach House that they're building. So there's no new principal uses. I don't find principal uses anywhere in 5.1.5. I would say make a note of that and go back and look at Policy 5.1.5. See if you see the word "principal" in there when it talks about uses. You will not find it.

The Staff Report goes on, as far as Land Development Code compliance, Staff find that the planned development rezoning will be in compliance with the LDC -- will be in compliance with the LDC. Yes, they will be, if they get the requested Deviation 4D. They will be because now they've got a deviation from the required 30-foot buffer with trees and double hedgerow that they're not going to put anything in. They're just relying on the existing landscaping. Maybe a handful, maybe seven or eight more trees that

they would have to stick in there. And you're going to see, really, just how silly that is when you see the photographs. But they say, oh, yeah, yeah, yeah, it's in compliance with the use, in compliance with Chapter 10 regarding buffering.

So it talks about compatibility, the Staff Report, and the definition of compatibility in describing the relation between two land uses, buildings, or structures or zoning districts -- and this is not part of the zoning district. This is not part of this MPD, Suraya's property. So you're going to have two different zoning districts, you have two different land uses. But look at the next paragraph. Here we go again, here's our good friend "the principal." "No new principal uses are proposed with this request."

Now -- and they say further steps to promote compatibility would include limiting requested external buffer deviations. That's how you comply with the compatibility, is you don't give a lot of deviations from the required LDC Chapter 10-416 30-foot Type F buffer. So that's how you get compatibility between two uses. You buffer it.

All right, Staff Report. It just says that they have to comply with the LDC and all of that, and that's fine. We know that. Now, here's Deviation 4D

initially, initially, before the 48-hour letter, and I'll show you that. Here's -- here's what they ask for in Deviation 4D. They seek relief from LDC 10-416(d), which requires a Type C or Type F buffer between Tract G and a single-family residential to the south, to allow 10 trees per linear foot (sic). That's what the guy falsely testified, oh, no, we meet it, we meet it, because there's 10 -- there's 10 trees per linear foot (sic), you know, going -- going the length of our shared property line. That's not what that is. That's the deviation they're asking for. That's not the LDC.

Christian Andrea, I'm sorry, that was -- that was his name.

Now, he also testified, I'm going to say incorrectly, he -- he testified to you that it's a 30-foot landscape easement and -- I'm sorry, a 30-foot buffer easement. It's not a buffer easement. It's an access easement, period. That's all it is, is an access easement. And they incorrectly call it -- and you'll see here, the south property line of Tract G must provide 10 trees per 100 linear feet within the 30-foot-wide landscape conjunction and access buffer easement. It is not a landscape easement. It is not a buffer easement. It is solely 100 percent an access easement, and a Type F buffer is going to be required,

or Type C -- which I'm going to let James Patterson address this. I understand Type C to be 15 feet but just as dense. You just basically take the 30-foot buffer with the required plantings and cram it into a -- a -- a -- a smaller space of 15 feet, still opaque with the double hedgerows, et cetera.

The problem is they're in the box. They can't get out of the box because the 30 feet goes right to the Suraya property line, and it goes right to the edge of the Beach House restaurant, the way they constructed it. So all you have is a 30-foot access easement, which I pointed out to you under 421(a)(5), they're prohibited from putting plantings in that access easement/right-of-way. They can't do it so they got a problem, a big problem. It can't be buffered.

So their deviations and justifications. This is part of the Staff Report, Attachment F, part of the Applicant's submittals. They go through the deviations they request and the justifications. I just thought I'd point this out to you. I've heard it over and over with -- when the Applicant was presenting about the cohesive footprint and, you know, interaction and connectivity is the word they use between the various areas within the resort. We're not in the resort. We're not a condo building. We're not a timeshare

building. We're not in the resort, the 120 acres. We're outside of that. We don't need connectivity of somebody coming onto Suraya's property. So that's not an issue, connectivity and the development footprint. We're not in the development footprint, and we don't need connectivity, which they -- they use as part of the justification, as they do their overall narrative, including for 4D.

The Lee Plan compliance, I'm going to hit this -- thank you.

They say that the uses have coexisted within South Seas for decades, including restaurants. They get very specific with 4D and -- and my client's property, which again is false, but I'm going to get to that specific language and point that out to you, and you're going to see on historic aerials that I'm going to -- I'm going to go through with you, you're going to see, oh, wait, no way has there been anything close to any kind of compatible use or historical use or that these uses have coexisted, and I'll point out the language that the Applicant uses.

So this talks about compliance with 5.1.5. Let's move on.

Here's the Suraya property. I want you to have an understanding about what we're talking about here.

This is not a beach cottage. It's not a little beach shack. This is a 12-and-a-half-million-dollar beachfront home. The owner is a -- the main principal of Suraya, LLC, is a gentleman named Peter Stevens, who lives abroad, very fine gentleman, and he is just absolutely apoplectic about what they've done and built this Beach House with no buffer between his beautiful home and this new -- this new restaurant that abuts -- you show the drone shot that I started with -- abuts directly to the Beach House restaurant that used to be the golf course.

Here's the map that you've seen over and over. This is, I think, page 2 of the master concept plan that shows Tract G, which is where the restaurant has been constructed, and then I've put a little arrow in the depiction of where Suraya is right next-door just south of Tract G.

Now, let's take a spin through history. This is from 2004. It predates Hurricane Charley. This is a previous home that was constructed on the Suraya property -- excuse me one second. My Marco Rubio take-a-drink-of-water moment.

That was destroyed in -- in Hurricane Charley and demolished, which you'll see in a minute, but look to the left, as you're looking from the Gulf of -- what is

now the Gulf of America, look at the golf course and the lake and the golf hole that comes up right by the homesite. Make note of that. Also, please make note of what is down toward the beach, and you'll see some little shacks down there just beach side of the line of trees, and you'll also see a vehicle parked down there. So that is what they contend would be the, quote, unquote, compatible use and -- and the preexisting food and beverage service. So we're not doing anything other than just redeveloping what was there on Tract G. This was there. You're going to see through the years, you've got these tiny shacks that are about 300 square feet maybe -- I think combined. I think they're about 150, maybe 170 square feet each. One was like a little taco shack, food shack. The one was a little beer and drink shack located on the beach. And you can see how far away it is from the home.

Next, this is right after Hurricane Charley. So the structures beach side remained, and you'll see the golf course, in 2004.

2006, big changes going on. The golf course is being reworked. They've pulled the hole back. You can see now the sand trap and the green, and the lake down to the left, and all the equipment and everything where they've scraped that pad. And you can see on the

Suraya property, the house has been removed. It's been demolished. And the shacks on the beach are gone as of 2006.

2007, ah, that's beautiful. They did a nice job, but directly across from the building site on Suraya is green space. It's an open area, green space, and the little shacks have come back. They're down along the beach down there far removed from the homesite.

Starting in 2008 you can see the new home. This is the existing home that's owned by Suraya under construction in 2008, completed thereafter, next-door to open green area and the shacks down along the beach, separated by pretty thick landscaping there. And Mr. Patterson has a bunch of photos he'll show you about that.

2010, same thing. The house is now complete. That's the way it looks today with the beautiful -- visit it. When you go to your site visit, please visit the Suraya property. We'll make sure that you have access to walk around. Go up on the second floor, look at everything, see the pool area --

HEARING EXAMINER COLLINS: I don't want to be chased by somebody holding a gun.

MR. WHITT: No, that will not -- that will not happen.

HEARING EXAMINER COLLINS: That has happened.

MR. WHITT: Hey, I went there, and they didn't do that to me so, you know, I think -- I think you'll be okay.

Notice the --

HEARING EXAMINER COLLINS: But you don't have that same scrappy look as I do.

MR. WHITT: You've got the open space; the house is there now; the shacks down on the beach.

Now, I skipped a few years, but you can see -- look at the -- look at the area of the right-of-way/access easement, and you see a bunch of golf carts -- I believe those to be golf carts. They could be automobiles, as well. It's shaded because the picture was taken in January, and the -- and the sun doesn't rise too high in the sky.

But you'll see the beach shack area where food and beverage is down by the beach far removed from the residence. Vehicles, I will call them -- whether it's golf carts, automobiles, whatever -- parked on this access easement.

HEARING EXAMINER COLLINS: So these structures that I see between the dunes and this green space, what are they exactly? It's difficult for me to see. They look like roof structures, but are they --

VOLUME 3

MR. WHITT: Mr. Patter -- Mr. Patterson has photographs that he'll show you --

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: -- of those. That's -- I think it was called Latitudes and Attitudes. One was the -- the food -- like the little food shack. The other is a beverage facility. They're small little buildings down there. And then I think they actually had pulled some like steel containers or something in there to -- and Mr. Patterson will -- will address, but I'll just note now, it's important to note that these structures are most likely illegal. They're built seaward of the coastal construction control line so -- but whatever. They're there. It's okay, but, you know, they're -- they're way out. They're -- they're built seaward of the coastal construction control line.

Now, in 2020 they modify this green space, this open space. The square on the left that has like a little black dot in the middle, do you see that? That's a volleyball court. If you look, you'll see the shadow of volleyball nets. And then the -- the space to the east, I believe those to be golf carts that are parked in a sandy area. So like golf cart parking and volleyball there on the open space. No food, no beverage, no restaurant, nothing there on that tract

that is much, much closer to and kind of abuts the Suraya property.

HEARING EXAMINER COLLINS: And what are these structures that are between those areas and the dunes?

MR. WHITT: I'm sorry?

HEARING EXAMINER COLLINS: It looks like there's some kind of structure there. What is that there? Is it more of the same, these small food buildings?

MR. WHITT: Okay. Have me move my mouse where you're looking. Here?

HEARING EXAMINER COLLINS: No.

MR. WHITT: Or up?

HEARING EXAMINER COLLINS: Now over -- there, what's that?

MR. WHITT: Those are the structures I thought you were asking about before. That is where the food and beverage buildings were.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: That Latitudes and Attitudes and all of that, this is it here.

HEARING EXAMINER COLLINS: So this is continued from --

MR. WHITT: They rebuilt it. It was scraped after Charley. Sometime around 2005 --

HEARING EXAMINER COLLINS: Well --

MR. WHITT: -- 2006 got rebuilt.

HEARING EXAMINER COLLINS: -- there in 2020, there in 2019 --

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: -- not there in 2010.

MR. WHITT: Right.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: Right. Scraped and then come back.

HEARING EXAMINER COLLINS: All right. So now --

MR. WHITT: Latitudes and Attitudes 2.0.

Now Ian, this is 2022, October post-Ian. The Suraya property survived, damaged but survived. You can see the -- the -- the damage to a lot of the landscaping and other areas along the Applicant's property on -- on what is Tract G.

And next you'll see -- in -- in February of last year, just about a year ago, the -- the shacks are gone, everything is gone down here, and they're starting to prep this site up here directly across from the Suraya home. And that brings us back to a year later, January of '25, this is the Beach House. What you see here, Madam Hearing Examiner, in this area, this is the outdoor seating, 3,000 -- the whole structure under air and with outdoor seating is a little over 10,300 square feet.

HEARING EXAMINER COLLINS: Where is the Suraya structure in this photo?

MR. WHITT: Right here. Right here.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: And this is -- this is the way up. This is all the outdoor seating area to enjoy the pool and the beach and everything. You can see the stairs. You go up -- because it's built on the beach so there's not -- there's nothing really on the ground floor. You go up to the second story, that's the main living area with -- with a large terrace and deck, which I hope you visit.

HEARING EXAMINER COLLINS: And this area behind, that's Captiva Drive?

MR. WHITT: This is South Seas Plantation Drive.

HEARING EXAMINER COLLINS: Okay. Right, it's the entrance road, the spine road.

MR. WHITT: Yes, ma'am.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: Okay. The easement --

HEARING EXAMINER COLLINS: So -- okay. So February of last year --

MR. WHITT: Uh-huh.

HEARING EXAMINER COLLINS: -- we see the site cleared. Then January of this year, we see the

restaurant under construction with an outdoor seating area, we believe, between the structure and the beach.

MR. WHITT: Yes, yes, yes, ma'am. And that's what the plans show. We have the development order application, and all that was approved.

HEARING EXAMINER COLLINS: And the access drive is the cleared strip between the two structures?

MR. WHITT: Yes. And the main access into the restaurant is here off of the access easement.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: And you'll see in the landscape plans, their plans are to pave with brick pavers all of this in here, going down almost to the restroom that you'll see -- you've seen in some of the aerials, there's a restroom facility down here toward the beach.

This is a drainage structure that was put in. There's an electrical box somewhere either here or maybe down here past the -- the drainage structure, but they've put different site improvements and improvements in the access easement.

Drainage, you know, covered with a metal grate, all that, you can walk over that, and you can drive over that, you know. Frankly, I don't know if that is any kind of issue. Not your issue to deal with but -- you know, as far as overburdening of an easement, but

putting electrical boxes and things like that certainly is going to be a problem, fire hydrants that they now have to have for the structure being put here in the easement. Their plans call for putting bollards in to protect that. You know what a bollard is, the big steel post filled with concrete to keep a car from ramming something.

All right. I don't want to take too much time. Let me -- let me roll through the access easement.

It's a 30-foot-wide access easement for pedestrian and vehicular access to the Gulf. It covers Government Lots 1 and 3 of Section 22, Township 45 South, Range 21 east on Captiva Island.

In the binder that we submitted with exhibits, we've exhibit -- included exhibits of the deeds with respect to lots -- the lots in Lot 1, Government Lot 1, and Government Lot 3.

The dominant estates -- go back to your property classes in law school. The dominant estate of the easement, those dominant estate holders include Suraya, being in Lot 3, and multiple of the owners' associations. That's why you've heard the attorneys and everybody talking about the impacts on this easement, is because they have easement rights, as well, to walk across it, to drive vehicles across it,

and to park vehicles upon it.

Government Lot 3 encompasses mostly all of the development west of South Seas Plantation Road and north of the water treatment plants. We added the highlighting just to make it easy. That's Government Lot 3 -- if you kind of turn your head, it's right under the "C" of Mexico you'll see Lot 3. Do you see that?

HEARING EXAMINER COLLINS: That's shaded in red.

MR. WHITT: It's shaded in red, and if you see right under the "C" in Gulf of Mexico --

HEARING EXAMINER COLLINS: Yeah.

MR. WHITT: -- right under the "C," you'll see L-O-T 3, Lot 3. So that's Lot 3, which would include the Suraya property and most of the other associations.

Now, here's the language. This is --

HEARING EXAMINER COLLINS: Is the restaurant also on Lot 3? No?

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: Yes, okay.

MR. WHITT: Now, the language here -- it's a little tough to read. I included the sheet from which I've pulled the text on the left, and it has --

HEARING EXAMINER COLLINS: Okay. So this is the same document that you show in slide 31? It's just the

next page?

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: Thank you.

MR. WHITT: Yes, yes. The slide 31 you'll see OR Book 22, Page 486; and if you look at slide 34, in the upper right you'll see OR Book 22, 487. It's the next page of the easement.

Said easement is for the use of the second parties for purposes of egress and ingress to the waters of the Gulf of Mexico. The westerly 200 feet, i.e. the 200 feet closest to the Gulf, the westerly 200 feet of said easement area is and shall be limited to pedestrian use only, and the remaining easterly portion of said easement area may be used for vehicular parking, as well as for pedestrian uses.

So there you have it. You've got vehicles that are allowed to come in and go out, traverse over this right-of-way/access easement, and to actually park their vehicles on this easement.

And then paragraph 3 goes on to say that the party of the first part would have no liability for maintenance of the easement, et cetera.

Now, next -- this is in the exhibits that we have submitted. This is a boundary survey that was done -- it's date -- it says dated 1/2/25, but I -- we've

submitted it. That's the seal date, but I think they were actually out, and the survey may bear a date of October of '24, if my memory serves --

HEARING EXAMINER COLLINS: And this boundary survey was based on the legal description in the document that --

MR. WHITT: Yes, this boundary survey is from the legal description from the access easement, OR 22, Page 486, 487. And Mr. Patterson will testify a lot more about this, but it depicts the 30-foot width, and you'll see out here it talks about the westerly 200 feet based on the legal description.

HEARING EXAMINER COLLINS: And that's the pedestrian only?

MR. WHITT: That's pedestrian only, in this area. Everything else is for vehicular access, ingress/egress, to traverse it and park upon it.

At some point there is a restroom building that was built that is partially built in the easement. Who cares? That's -- it's been that way for years. It's never been challenged. It's not a problem. I don't think anybody cares, but I just want to say that --

HEARING EXAMINER COLLINS: Where is it?

MR. WHITT: Right here. I'm sorry --

HEARING EXAMINER COLLINS: Oh, I see --

MR. WHITT: -- I had the cursor --

HEARING EXAMINER COLLINS: -- right in the middle?

MR. WHITT: Yeah, right here.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: Right in the middle.

HEARING EXAMINER COLLINS: Okay, yeah.

MR. WHITT: Yeah. And it has a depiction, it says "restroom building," and then there's like a little lift station that's right beside it, and that's -- and that's fine.

Okay. And then here, the next slide is blown up a little bit more. You can see that depiction off the westerly feet and the -- the Gulf access easement.

All right. Now, this is important. Lee County maintains a GIS service and a GIS website that they update all the time. For years and years and years on Lee County GIS, this comes up. If you click on the layers -- if you click to your left map layers, click on the parcel, click on the stuff, and you check the box and you look at easements, this easement shows up on Lee County GIS, and I say that because I think it's vitally important. The County is charged with knowledge this is not a landscape easement, it's not a buffer easement, and they can't turn a blind eye and say, oh, well, you know, the Applicant, you know, they

say it's a buffer easement. Well, okay. Well, no. The County knows and the County says, and they -- they shade it out right here, and the easement goes across the road. But look up here with the layers, "access easement." Not landscape easement, not buffer easement, or not "and," access and buffer or access and landscape or anything else. It's an access easement, period. That's all it is. That's all the language is on the easement. They may not like it, but that's what it is, and that's what you're stuck with when you look at this, and you review this for your recommendation.

Now, quickly, the development order. I don't want to draw objection. Let me say at the outset, I'm not -- I'm not honing in on a lot of stuff with the DO. It was -- it went through the process; it got approved by the County; you saw the structure being built.

There are a few things that I want to point out, and I mentioned this earlier because I think it's very important for you to see, as we sit here today, the County's position versus what the County's position was, Staff, a year or so ago when they were reviewing the plan --

HEARING EXAMINER COLLINS: Okay. Because you know my jurisdiction is thumbs-up on the deviations --

MR. WHITT: Understand.

HEARING EXAMINER COLLINS: -- thumbs-down on a deviation.

MR. WHITT: No, no, no, I got it.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: I got it. I got it. I just -- I think this helps inform --

HEARING EXAMINER COLLINS: Yeah.

MR. WHITT: -- inform you --

HEARING EXAMINER COLLINS: If it helps frame everything, I'm happy to hear it.

MR. WHITT: Yes.

So to the extent that the Applicant has said about the uses that this is a recreational use, it is a restaurant. And Mr. Patterson, as a planner, will tell you more than I will what that means and about restaurants being commercial uses. Don't always have to be zoned commercial, but a restaurant use is a commercial use, period.

Now, let's look at this issue of commercial. When they filed the DO application, the Applicant -- same Applicant, exact same Applicant as the -- the PD Applicant before you, in -- in -- in question 5 and question 6, they -- they filed the PD, and then this is -- this is where they came back and added the Beach House restaurant. This is Amendment 2. You'll see

A02, okay? So this is an amendment to development order application 2022-00196.

So that started, then they went back and amended, and the amended application was to do a handful of other things but mostly to build this Beach House restaurant, okay? And they said, yes, commercial. It will increase square footage to commercial buildings.

Question 6, does the amendment alter the appearance or features of a commercial building? Yes. So acknowledging the commercial nature of this.

Now, in the DO they have to submit a landscape plan. They submit the landscape plan, and this -- this goes through the process of Staff review. They -- they describe on their plans this access easement as a 30-foot easement and landscape buffer (making a noise) not a landscape buffer, not a landscape easement. Again, something that's just misleading at best.

They assert that the southern property line, the required Type F buffer, that the requirement is met through the existing tree and shrub vegetation. Again, misleading at best, it really is false. That's a false statement.

HEARING EXAMINER COLLINS: So where is this language being pulled from, this --

MR. WHITT: Right here.

HEARING EXAMINER COLLINS: No, I --

MR. WHITT: Next page --

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: -- on their plan.

HEARING EXAMINER COLLINS: Oh, it's on their plan?

MR. WHITT: Yeah, I'm sorry, I should have -- I had my notes on this slide. I should have -- I should have clicked over so you could see it.

Sheet L2.000 of the landscape plan, this is what was submitted --

HEARING EXAMINER COLLINS: So point one is that they describe the easement as an easement and landscape buffer.

MR. WHITT: Right here, yes.

HEARING EXAMINER COLLINS: Okay. And the second point is that the buffer requirement is met through existing trees and shrubs.

MR. WHITT: Correct. They show the 30 feet, but they call it a -- an easement and landscape buffer. That's wrong. They show a Type F buffer 30-foot minimum width. They show it. They showed that that's what's required there, but they say that the Type F buffer requirement is met through existing tree and shrub vegetation. You're going to see that is not accurate at all.

HEARING EXAMINER COLLINS: Okay --

MR. WHITT: Now -- yes.

HEARING EXAMINER COLLINS: -- just for a minute -- they're saying there's a line of vegetation, which I will see when I go out there, that straddles the edge of this easement.

MR. WHITT: The southern edge.

HEARING EXAMINER COLLINS: The southern edge of the easement, and a portion of that vegetation is on your client's property.

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: And there is a portion that maybe it's not on the property. And what their position is -- well, we know it's not 30 feet in width because the easement --

MR. WHITT: Correct.

HEARING EXAMINER COLLINS: -- is 30 feet in width. So what they're saying, if I could just -- my familiarity with this is the content is met within this area, and they're asking for a pass on that or whatever, administrative something.

MR. WHITT: Correct.

HEARING EXAMINER COLLINS: All right.

MR. WHITT: Correct, correct. And -- and -- so they show that a Type F is required, then they say --

HEARING EXAMINER COLLINS: And this is on the plan they submitted with the DO --

MR. WHITT: Yes, yes --

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: -- yes.

And it says the southern -- and understand, the southern property line where the easement ends is the property line between SSIR owner and Suraya. That's it. That's the line of demarcation between their property and Suraya property.

HEARING EXAMINER COLLINS: So there's a little strip, you're saying, there's almost like a little hiatus in this area?

MR. WHITT: Can we go --

HEARING EXAMINER COLLINS: I'm trying to figure out how half of it's on Suraya's property and half of it's --

MR. WHITT: He's got photos. He'll show you all of it.

HEARING EXAMINER COLLINS: Okay. All right.

MR. WHITT: Yeah, it will be abundantly clear to you.

So, now, the County -- and I'll roll through quickly a lot of their notes, but the County had this note added, required them to add this note: "If

sufficient plant material is not present at the time of certificate of compliance, supplemental plantings must be provided and approved as a minor change to the development order." And there, again, they're still in the box. You can't plant in the easement. You can't plant any other plantings, whether this is sufficient or not, and it's woefully inadequate. They show a Type F as being required, they admit it, but they say it's met, 30 feet wide. Where do they show shrubs? There's no shrubs. A double hedgerow? That's required. Type C required; Type F required. James will testify to that. They show it nowhere. They say it's met with this existing vegetation, but the Staff was like, yeah, I'm not sure about this. They're very leery.

Let's look at what they say back then --

HEARING EXAMINER COLLINS: It's a little late now. The place is built, it sounds like.

MR. WHITT: Exactly, that's the problem. That's the problem. They jumped out, they got the DO, and they -- they -- they filed all this stuff with the County; the County has a lot of problems with it; and it goes back and back and back and back and back with insufficient letters and comments; and they go back and they add these notes, but they put --

HEARING EXAMINER COLLINS: So they're -- they're trying to correct it through this zoning action.

MR. WHITT: Exactly.

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: Exactly. So now they're coming back saying, whoa, looks like we're not going to be able to do this --

HEARING EXAMINER COLLINS: If it's allowed, they could it --

MR. WHITT: Exactly.

HEARING EXAMINER COLLINS: -- through this process.

MR. WHITT: Exactly. So now through this process which, frankly -- you know, I -- I question that, and I question whether Staff -- and this has nothing to do with your jurisdiction but --

HEARING EXAMINER COLLINS: No, I admit it's not ideal.

MR. WHITT: It's not ideal, Staff doing this at the time and giving them the DO, but Staff here -- let's just quickly roll through these. The insufficiency letter -- or did I go by it? Yeah, there it is. For LDC 10-421(a)(5), which I cited to you, "No code-required trees or shrubs may be located in any right-of-way, road, or utility or drainage easement.

The south buffer is within an easement." Oh, so, huh, the County knew it. The County got it. The County knew right then, in September of '23, this is a problem.

HEARING EXAMINER COLLINS: So is this in the context of trying to amend the development order?

MR. WHITT: They've not gone back to amend the development order.

HEARING EXAMINER COLLINS: So the A02 referred to their addition of --

MR. WHITT: The Beach House.

HEARING EXAMINER COLLINS: -- the Beach House.

MR. WHITT: Yeah, the Beach House.

HEARING EXAMINER COLLINS: All right.

MR. WHITT: Yeah, yeah. Their -- their -- their DO was for a bunch of other stuff, and then they went back and amended to add --

HEARING EXAMINER COLLINS: All right.

MR. WHITT: -- construction of the Beach House --

HEARING EXAMINER COLLINS: So this is --

MR. WHITT: -- on Tract G.

HEARING EXAMINER COLLINS: -- September 8th, '23.

MR. WHITT: Yes. And then in December -- and then there is a response, and then in December the County writes back, "The calculation for the required buffer

along the south side is stating that existing trees and shrubs will meet the buffer requirements, however Staff has concerns, as aerials depict insufficient plant material existing, especially shrubs."

"Please illustrate the buffer width for the southern buffer on the landscape plans."

Oh, and they show the width.

Then they -- they ultimately approve it April of 2024, April 1st as a matter of fact. And I put the total, as you can see there, from the -- from the approval letter, 6,740 square feet under air, 3,615 square feet of exterior deck. And I stand corrected, I think I said 3,900 before. It's 3,615. For a total of 10,355 square feet for the Beach House restaurant.

One of the comments that was a condition here on this was the language that I -- I -- I pointed out that said, prior to the issuance of the certificate of compliance, if there's not enough plant material, they had to go back and do a minor change.

So the important thing is the south buffer is still an issue, right now today, under this development order that included Amendment 2, because they said you don't get a certificate of compliance until we know that this buffer is going to be sufficient.

HEARING EXAMINER COLLINS: Where do they say that

here?

MR. WHITT: That is -- that's environmental comments, and they added that language -- it may be in the exhibit that I produced. A set of the plans has the County -- they say like approved with comments or whatever was approved because they added that language in --

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: -- on their plans, that they would go back and revisit it as a minor change if they had to. The problem is they can't because the County knew and pointed out under 421(a)(5), you can't plant in a right-of-way, and that's the only place that you can fix it. You can't plant on Suraya's property, and your building comes right down to the edge of the easement. You can't plant on your easement. You can't put anything in there. There's not even 5 feet for you to plant anything out there on the edge of the easement. There's no room, nothing.

So they issued a commercial building permit -- so that's right up here, COM2023-03208 --

HEARING EXAMINER COLLINS: That was later that month they --

MR. WHITT: Yes.

HEARING EXAMINER COLLINS: -- issued the actual

permit to build --

MR. WHITT: Building permit, and then -- and then from April of '24 to January of '25 when you saw the status of construction, they got that -- that restaurant put up in jig time.

Okay. Now let's look at Deviation 4D and their request. So they request a buffer deviation on the southern boundary of Tract G, which is what abuts us. So as part of this process, there was a comment and like insufficiency from Staff. The Applicant responded back. The Applicant submitted a revised schedule of deviations and justifications and a revised Deviation 4, because Deviation 4 initially was not broken down into subparts, and it basically said we don't want to have any -- any buffers, including external buffers. We don't want to have any buffers.

Then they came back, based on County Staff comments, and they broke it down 4A, 4B, 4C, 4D, et cetera, and they -- they showed -- here. Initially, in the first deviation, it was where you see the green lines around stuff. Those are external buffers. They didn't want to have to put in any buffering. That was their initial deviation request. Then they came back with 4D. They modified that -- yeah, that's where they said -- basically, the first one where it was just

Deviation 4 to allow no buffers, but then, like I say, there was the insufficiency letter.

Now here, August 19, insufficiency letter, "Please ensure that no required vegetation is proposed in any easement." Ah, gee.

HEARING EXAMINER COLLINS: Where -- where are we now?

MR. WHITT: That's the first sentence that's highlight -- I'm on slide 55.

HEARING EXAMINER COLLINS: Okay, I see it.

MR. WHITT: Okay?

So the first part there, "Please ensure that no required vegetation is proposed in the easement."

"Master concept plan sheet 5 of 6 includes green lines that coincide with Deviation 4, which the Applicant is requesting no buffer. The 'to allow' statement does not include Tract G, which abuts" -- now, it's wrong. It's just a typo. They say, "which abuts timeshare units." It obviously doesn't. I showed you that master concept plan sheet. Tract G abuts the Suraya property.

..."but the green line is depicted. Revise to remove the green line reference to this area and please be advised that Staff will not support a deviation."

Well, that was August of 20 -- August 19th of '24.

Well, they sure changed their mind.

"In addition, the development order for this area depicts buffering and a 30-foot-wide landscape and access easement."

See, the County is falling for it. It ain't a landscape easement. That's legalese. It is not a landscape access easement. It is solely an access easement.

"Please revise to accurately depict what is being proposed."

Well, they didn't. They keep using the same incorrect deceiving language about a buffer easement, a landscape easement, which is just wrong.

"If the Applicant" -- yeah -- "provide the required buffers per LDC Section 10-416(d.)"

So the request is they split the deviations. We're now 4D, and they request an alternative buffer on 4D of 10 trees per linear 100 feet -- per 100 linear feet, i.e., 1 tree per 10 feet between Tract G and Suraya's property.

Now, as part of this response, they state that the recreational and residential uses have coexisted for decades. I told you I was going to point this up to you --

HEARING EXAMINER COLLINS: Okay. I still gotta go

back to --

MR. WHITT: Yes, ma'am.

HEARING EXAMINER COLLINS: -- is there a hiatus between the Suraya property and this easement?

MR. WHITT: No.

HEARING EXAMINER COLLINS: So where is this going to go?

MR. WHITT: It can't. It can't. That's -- I'm sorry if I wasn't clear when I was making my comment about they've put themselves in a box. There is zero room between the building and the access easement that they are prohibited from planting on, and the southern property line, where it meets the Suraya property, there's no room because the property line -- again, the majority of the, quote, unquote, existing vegetation that's there is on my client's property. There is not an inch for them to plant anything else. It's -- they're in the easement, which they're prohibited from planting --

HEARING EXAMINER COLLINS: Where is the drawing where you show the constructed -- the slide with the constructed building?

(Discussion at table)

MR. WHITT: Oh, the boundary survey, or do you want the photo?

HEARING EXAMINER COLLINS: Oh, I was just looking to see if there's room to put it on their own property.

MR. WHITT: Madam Hearing Examiner, I'm almost done. If I finish, Mr. Patterson has tremendous photographs of the line --

HEARING EXAMINER COLLINS: Okay.

MR. WHITT: -- and everything.

HEARING EXAMINER COLLINS: And he's not going to get to go today.

MR. WHITT: Oh, no, gracious me.

HEARING EXAMINER COLLINS: Okay, but go ahead.

MR. WHITT: I didn't want to break us up. That's the worst. That's the worst. I'm going to have to go again -- can we break now at 4:00, and I can come back?

HEARING EXAMINER COLLINS: You can do like a five-minute summary, and then you've got to go to him.

MR. WHITT: Okay. That would be good, if I could do that as a final setup when we come back on Wednesday.

HEARING EXAMINER COLLINS: Otherwise you can do -- stop here and finish yours on -- finish yours on Wednesday.

MR. WHITT: I'm sorry?

HEARING EXAMINER COLLINS: We could stop here, and you could finish on Wednesday.

MR. WHITT: Why don't we do that? I'm on slide 57 of 68. Based on some of your questions, I may double back to hit just one or two points, but I will be probably no more than 15 minutes.

HEARING EXAMINER COLLINS: Okay. So you're not finished with your presentation. You will be followed by Mr. Patterson.

It is like 5 minutes to 4:00. I understand that there's two members -- and I never allow this, but I understand there's two members of the public that drove over from the East Coast on the belief that they would be able to testify today. I'm going to let them slide in; and if you can take your seat, we'll finish you on Wednesday.

MR. WHITT: Thank you so much.

(Sotto voce between Hearing Examiner and reporter)

HEARING EXAMINER COLLINS: The Whitt PowerPoint is Whitt Exhibit 1, and their binder is Whitt Exhibit 2.

THE REPORTER: And that's just a binder of exhibits?

HEARING EXAMINER COLLINS: Yeah, it appears to be a binder of exhibits, legal documents, and things of that nature, historical photographs.

MS. MONTGOMERY: So is the binder in evidence or --

HEARING EXAMINER COLLINS: I marked it as an exhibit.

MS. MONTGOMERY: Okay.

HEARING EXAMINER COLLINS: Did you get a copy of it?

MS. MONTGOMERY: Yeah, I did.

HEARING EXAMINER COLLINS: Oh, okay. That is Whitt Exhibit 2, and I think it's probably -- we'll hear what he says. It might not be Whitt Exhibit 2. It might be Patterson Exhibit 1.

MS. MONTGOMERY: Okay.

HEARING EXAMINER COLLINS: I temporarily marked it as Whitt Exhibit 2. I may have to revise that.

Okay. Are Ray and Andrea Titus in the room?

MR. TITUS: Yes.

HEARING EXAMINER COLLINS: Please come sit in this first chair here. We'll take you one at a time, unless one is representing the other.

MR. TITUS: Where did you want us?

HEARING EXAMINER COLLINS: Right there.

MR. MENDEZ: And please state your name for the record.

HEARING EXAMINER COLLINS: I will administer the oath -- I don't know what time they arrived. Were you present this morning when I administered the oath?

MS. TITUS: Yes.

MR. TITUS: Yes.

HEARING EXAMINER COLLINS: They've been sworn, Ms. Montgomery.

MS. MONTGOMERY: Thank you.

HEARING EXAMINER COLLINS: Okay. Please state your name for the record.

MS. TITUS: Andrea Titus.

MR. TITUS: Ray Titus.

HEARING EXAMINER COLLINS: Okay, you may begin.

MS. TITUS: So we are the owners of 1102 Tallow Tree --

THE REPORTER: Could you start again?

MS. TITUS: Sure. We're the owners of 1102 Tallow Tree in South Seas Resort. We previously owned another home, and then we purchased 1102. We upgraded. We've been in the resort about ten years. So we've been through Hurricane Ian; we've been through Hurricane Milton; we built -- rebuilt through Ian and then again had to renovate through Milton.

We are very excited of what South Seas is doing. We've always envisioned taking our children and now our grandchildren to the resort for vacations. It's something that we want to do for years to come. So we're very excited of they're doing at South Seas, Club

Captiva, the new restaurants, and we're going to be visiting very often.

HEARING EXAMINER COLLINS: Okay, thank you.

Sir, do you want to state your --

MR. TITUS: Yeah, I just -- I'd just like to share -- because we've been sitting listening all day. The -- the first attorney that spoke that he was representing all the homeowners, he's not representing us. We're homeowners there, and he's not representing us at all.

The resort is not the only one that benefits from them expanding the property and upgrading the property and bringing all the amenities to the resort. We're going to benefit greatly from that. We -- we rent our property. We'll be able to make more money from the rental, but we'll also benefit from all the amenities that are there. And then down the road, we believe very strongly that the value of the properties are going to go up immensely for all the homeowners.

So we see this as a huge win-win for everyone, but there's a lot of people that have, you know, different contrasting scenarios. You have people that are property managers that are trying to protect their livelihood; you have people that are paid, obviously, to stand in the way of any progress of any kind.

And I would just say that I think that if everybody -- if the homeowners took a step back, anybody that's in the program benefits greatly in -- in the way the resort is being run, and what they're going to do in the future. I mean, I -- I personally don't understand why anybody who has a property in there wouldn't go through the program, because with all the amenities and everything involved -- you always had to be a member to be able to get the amenities. That was another misnomer that was said earlier. There wasn't always a difference in that regard.

So there really isn't very -- there's not a lot of differences that have taken place other than progress. We're seeing -- I mean, they bought the property, and they immediately get hit with a hurricane, and all these buildings are destroyed. And they stepped up, and I think that they've done an outstanding job, and I don't know why anybody would be against that.

Now, I do understand they don't want, you know, 20-story hotels and, you know, other -- you know, they want to keep it the way they want to have it, but everything that we've seen we're pleased with, and we -- we are behind the resort and believe in what they're doing and agree with it.

HEARING EXAMINER COLLINS: Okay. Thank you very

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much.

MS. TITUS: Thank you for hearing us.

HEARING EXAMINER COLLINS: All right. We're going to conclude for today.

MS. MONTGOMERY: Thank you.

HEARING EXAMINER COLLINS: We'll resume on Wednesday. What day is that, the 26th? We're going to resume on Wednesday, the 26th, at 9 a.m. in this room. We will continue with public input.

Thank you, everyone, who came today. I appreciate everyone who testified, and those of you who sat through everything today, thank you for that, and I will see you on Wednesday.

(Proceedings concluded at 4:06 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEE)

I, Deborah M. Bruns, Florida Professional Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings, and that the transcript, pages 1 through 230, is a true and correct record of my stenographic notes.

Dated this 25th day of February, 2025.

Deborah M. Bruns, FPR

(This transcript was electronically signed.)

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