PLANNING COMMISSION
July 26, 2022

Meeting Minutes

The Planning Commission of Monroe County conducted a hybrid virtual and in-person meeting on **Tuesday, July 26, 2022,** beginning at 10:03 a.m.

CALL TO ORDER by Chair Scarpelli

PLEDGE OF ALLEGIANCE

ROLL CALL by Ilze Aguila

PLANNING COMMISSION MEMBERS

Joe Scarpelli, Chair	Present
Ron Demes, Vice Chair	Present
George Neugent	Present
David Ritz	Present
Rosemary Thomas	Present
Douglas Pryor, Ex-Officio Member (MCSD)	Absent
Christina Gardner, Ex-Officio Member (NASKW)	Absent

STAFF
Emily Schemper, Sr. Director of Planning and Environmental Resources
Mike Roberts, Assistant Director of Environmental Resources
Devin Tolpin, Principal Planner
Peter Morris, Assistant County Attorney
Patrick Stevens, Planning Commission Counsel
Ilze Aguila, Planning Commission Supervisor

COUNTY RESOLUTION 131-92 APPELLANT TO PROVIDE RECORD FOR APPEAL
County Resolution 131-92 was read into the record by Mr. Patrick Stevens.

SUBMISSION OF PROPERTY POSTING AFFIDAVITS AND PHOTOGRAPHS
Ms. Ilze Aguila confirmed receipt of all necessary paperwork.

SWEARING OF COUNTY STAFF
County staff was sworn in by Mr. Patrick Stevens.

CHANGES TO THE AGENDA
There were no changes to the agenda

DISCLOSURE OF EX PARTE COMMUNICATIONS
None.

APPROVAL OF MINUTES

Motion: Commissioner Neugent made a motion to approve the May 25, 2022 meeting minutes. Commissioner Demes seconded the motion. There was no opposition. The motion passed unanimously.

MEETING

AGENDA ITEMS

1. LARGO MANAGEMENT COMPANY, INC., 99530 AND 99540 OVERSEAS HIGHWAY, KEY LARGO, MILE MARKER 99, BAYSIDE: A PUBLIC HEARING CONCERNING AN APPEAL, PURSUANT TO SECTION 102-185 OF THE MONROE COUNTY LAND DEVELOPMENT CODE, BY THE PROPERTY OWNER TO THE PLANNING COMMISSION CONCERNING A LETTER OF UNDERSTANDING REGARDING THE PROPOSED EXPANSION OF AN EXISTING RESTAURANT USE ISSUED BY THE SENIOR DIRECTOR OF PLANNING & ENVIRONMENTAL RESOURCES DATED SEPTEMBER 14, 2021. THE PROPERTY IS LEGALLY DESCRIBED TRACTS 13, 14, AND 15 OF THE REVISED PLAT OF SUNSET COVE SUBDIVISION, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 2 AT PAGE 20 OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, LESS THE SOUTHWESTERLY 50 FEET OF SAID TRACT 13, HAVING PARCEL IDENTIFICATION NUMBER 00504080-000000. (FILE 2021-203)

Mr. Peter Morris interjected that staff had conducted its typical briefings with each of the Planning Commissioners on all of the items on today's agenda, just to remove the presumption of prejudice.

(10:03 a.m.) Ms. Devin Tolpin, Principal Planner, presented the staff report. This item is an appeal to the Planning Commission of a letter of understanding that was issued by the Senior Director of Planning and Environmental Resources dated September 14 of 2021. Ms. Tolpin presented a visual of the subject parcel showing two main structures, the back structure being the restaurant known as Bayside Grill, and the front structure known as Café Largo which has an attached office use and two permitted apartments. The property to the north is not the subject of this appeal, though it may be of relevance at some point throughout the presentation as an outside parking agreement had been attempted on this property at some point in time and may be used at some future point, but is under a separate entity. The owner is appealing the decision of the Planning Department to the effect that the Planning Department actually required a decrease in previously legally-approved seating and is denying the owner's right to seating to the state capacity on the restaurant and bar.

Ms. Tolpin presented the application for pre-application conference with the letter of understanding submitted by the appellant. The appellant had inquired about how to increase seating to maintain capacity at the restaurant and bar currently on the property for Café Largo, Bayside Grill and Sunset Bar. An excerpt from the letter of understanding describes how the seating could be increased from what was lawfully permitted, which would require an amendment to the subject property's deemed conditional use and other site requirements needed.

Restaurant seating is regulated by the Land Development Code because it is equal to the intensity of that restaurant use. The more tables and chairs in a restaurant directly relates to how many patrons can be served, and the more patrons that can be served generates more traffic or trips to and from that restaurant. The Land Development Code breaks out low, medium and high-intensity restaurants, with the differing factor being the number of trips.

Ms. Tolpin then explained the history of this property. One of the main building permits was issued in 1992 to renovate the existing Café Largo building, which included 164 restaurant seats. Later in 1995, another permit was issued to construct the rear restaurant called Bayside Grill, being a circular structure with an open deck, a kitchen in the center, with 26 bar seats, which is what was depicted at that time. In 2011, a Code Compliance case was issued on the property for an unpermitted increase in restaurant seating on the site. The appellant did enter into a stipulation agreement stating they would comply with the County requirements and reduce the seating to what was lawfully permitted on January 26, 2012. Over time, the appellant did not come into compliance and fines started running. A pre-application conference was submitted by the appellant in 2014, inquiring how they could get some of that seating permitted. There was no letter of understanding written afterwards, nor were permits or land use approvals given to have that seating permitted. Ms. Tolpin then presented a copy of an attempted off-site parking agreement that was emailed to Assistant County Attorney Steve Williams in 2016 in an attempt to comply with the additional parking requirements. The code requires an off-site parking agreement to be reviewed and approved by the County and recorded with the Clerk of the Court. At this point in time, there is no off-site parking agreement on the northern parcel. As of 2019 and 2020, the property is still not in compliance. An authorized agent of the appellant reached out via email to the senior director to find out exactly how many seats on the total property were lawfully permitted and what needed to be done in order to bring the property into compliance. Twice, the senior director let the agent know that 190 seats are what are currently permitted; 164 from the floor plan of Café Largo and the 26 from Bayside Grill. There was no appeal filed at that time but the agent did request staff to do an inspection of the property to count the seats. Staff performed the inspection and, at the time of the first inspection, the property did not comply. It appeared restaurant chairs were being hidden under palm fronds or were oddly placed. Shortly after, another inspection was requested and staff determined that they were in compliance.

The initial letter of understanding to increase seating was applied for in February of 2020. It took some time to get that letter drafted due to the shutdown, and was not drafted and issued until September 14 of 2021. However, the message remained clear and the same steps were provided as in 2016, requiring an amendment to the conditional use permit. Once the property was in compliance, in October 2021, the appellant actually requested a reduction in the code fines from the special magistrate as there were fines running for more than ten years, and the applicant was granted a 98 percent reduction from $1.1 million to $22,000 in fines. The Land Development Code does require a building permit for a change of intensity on a property in Section 110-140. In reading the appellant's brief, it appears they may be trying to confuse or utilize the stated maximum capacity on the certificate of occupancy issued by a building permit as the number of restaurant chairs permitted on a property. The maximum capacity of a building is not something that's regulated by the Land Development Code. That is a number figured based on relevant building and fire codes for life safety measures only. A maximum capacity

would include servers, bussers, kitchen staff and anyone else in the building and is not relevant to the actual seating area approved for that restaurant use. It is customary to include the service and seating areas proposed for staff to determine the intensity of the use, and that is also how the nationally accepted ITE manuals determine how many trips are generated to that site. The Land Development Code states the number of parking spaces required are dependent on the number of restaurant seats. The approved floor plans show the number of seats present and that was the number approved, not the maximum capacity. The County is not denying the appellant's ability to increase seats on the property, but there is a process which would be to apply for an amendment to the major conditional use permit. Up to this point, that has never been applied for. Staff is recommending the Commission affirm and uphold the Planning Director's letter of understanding issued September 14, 2021.

Mr. Peter Morris, Assistant County Attorney, then questioned Ms. Tolpin to qualify her as an expert in planning. Ms. Tolpin stated she has a master's degree in public administration, and an undergraduate degree in environmental science and policy. She is currently and has been a Principal Planner for the County for six years, and has AICP and CFM certifications. Ms. Tolpin was recognized as an expert in the discipline of planning by the Commission.

Chair Scarpelli asked if there were any questions from the Commission for Ms. Tolpin. Commissioner Ritz asked how many seats were permitted compared to how many are present. Ms. Tolpin responded that 190 total seats were permitted, and there had been 255 present. Commissioner Ritz then asked how many seats could be allowed based on their parking. Ms. Tolpin stated that there has been no application submitted to do that analysis, but it would be based on parking spaces available with possible shared parking calculations because there are other uses on the site as well, and a trip generation statement to make that determination. There were no further questions by the Commission. Chair Scarpelli asked for the appellant's presentation.

Mr. James Lupino of Hershoff Lupino and Yagel represented the appellants who were also present. Mr. Lupino explained that Largo Management consists of Café Largo and Bayside Café at mile marker 100. This is the appeal of the LOU of September 14, 2021, which determined 190 allowable seats. The appellant disagrees that this is an increase or expansion because for two decades prior to the Code Enforcement case of 2011, the site did operate with 255 seats. Whoever prepared the application for the pre-application meeting may have used the term "increase" after the Code Enforcement matter where it was agreed to reduce the seating to 190 to close the Code Enforcement case, but they immediately came back with the application to go back to the 255 seats that had been used over the course of 20 years, so the applicant does not view this as an expansion, rather what was permitted in 1992 and 1995. Certificates of occupancy were issued in '92 and '95 allowing for 165 seats at Café Largo, and 90 at Bayside Café which is far different than the 26 referenced. The facilities were built in the 1990s and were operated with that understanding of occupancy. The appellant sees the certificates of occupancy as the controlling documents for capacity. The building permits that were issued as a matter of right at the time and those certificates of occupancy for 165 and 90 are what was granted back at that time, and they operated for 20 years in that fashion. The Bayside Café particularly being built out for hundreds of thousands of dollars for 90 or more seats is the minimum necessary for financial sustainability. That's what was designed, approved, built and

CO'd. At that time, the Planning Department's only apparent input was parking, and parking was not an issue as the petitioner was permitted plenty of parking with regard to Café Largo. There are the two parcels that Café Largo and Bayside Grill sit on, and the owner also owns a different parcel that was shown earlier. Searching the 1996 online records of Monroe County for the building permits of these properties it is stated there is a required final Planning inspection for certificate of occupancy. If COs were issued, as they were, then it is fair to state that at the time of the final Planning inspection there was an approval of 90 seats for Bayside Grill and of 165 seats at Café Largo. There is no probative supporting documentation of limited seating different or beyond the COs.

Mr. Lupino then presented the multiple County sketches for Bayside with the seating noting that each one of those drawings had differing occupancy capacities. Those occupancy numbers were put there by someone other than the appellant, but these sketches came directly from the County's files. One says 31, one says 40 and one says 50 for occupancy, yet the sketches only reflect the circles around the bar area. The seating at tables was never reflected on those drawings of the area built out with a large deck. So this is a sketch not submitted by the applicant saying this was to reflect the maximum number of seats, and in the year 1996 it wasn't used for that purpose. At that time, the CO was granted for 90, not 26 which is only 28 percent of what is being allowed now. It is the appellant's position that the County is inappropriately decreasing the seating capacity rather than the appellant actually asking for an increase in seating capacity, which goes into whether or not there is a need for an amendment to the conditional use. So the owner is appealing the decision in the letter of understanding based on the fact that the official documents show far different from what the County is relying on 30 years later to limit the seating, which wasn't limited or enforced at a lower number for over 20 years. Presumably this was based in part on parking, but based upon everything in the file, the building permits were issued as a matter of right and there is nothing in the file limiting the seating. The only official documents that address occupancy are the certificates of occupancy. The owner has complied with all county and state requirements to have the seating in the facility. The owners spent hundreds of thousands of dollars to build a facility with intended table seating that is now being disallowed because of a sketch showing something different. Mr. Lupino presented and reviewed the multiple various sketches and asked how a CO for occupancy gets granted for 90 and then comes back 30 years later with only 26 circles around the bar area. All three drawings in the County files all have stamps on them, one showing occupancy of 31, one showing 40, one showing 50, none showing table seating, and one showing 26 seats around the bar. There is clearly a representation of a material fact to the contrary of a later asserted position, that being the CO granted with 20 years of use being allowed, a reliance on the representation that occupancy was going to be allowed at those levels, and now a change of position with a decrease in the seating to comply with what is being required by Planning to resolve the Code Enforcement issues of 2011.

It is important that the 255 combined is considered in the appellant's view of the staff report as well as the County files being used for purposes of this appeal. Staff does not mention or address the COs nor the 20 years of use that was never challenged. This only arose in 2011. Ms. Tolpin has been employed for six years and cannot testify to the purpose of those drawings submitted 20 years prior. The owner is saying that those were sketches to show the layout, and not intended for seating capacity, which was determined by the COs. It is important to note that

all drawings show a full kitchen which indicates this was not intended to only be a bar. A kitchen is important when you are a restaurant intending to serve food, which is not only important for sustainability but for the liquor license. The standard in the restaurant industry is 12 to 15 square feet per person in a restaurant. The finished square footage of the Bayside Grill is 2,172 square feet which would be large enough to have over 140 people. Deducting square footage for kitchen, restrooms and server stations, the remainder for seating of patrons is well in excess of 90. The property has a 6COP liquor license, meaning it requires 51 percent or more in food sales. In a facility only allowing 26 seats that becomes very difficult to meet. This was designed to have table seating in the patio area and not just bar seats. In the case of Café Largo, there are 164 circles, which is correct.

Commissioner Neugent asked if the DBPR has a formula for seating capacities and liquor licenses. Mr. Lupino responded that his understanding is they do, but it falls under the occupancy limits as determined by the CO, and you also have to have a number of seats suitable for maintaining your liquor and food sales. In a discussion with a planner named John, 126 seats were discussed, but 90 would have been sufficient. Chair Scarpelli asked about the different floor plan scenarios, indicating there were two completely different floor plans. Ms. Schemper also asked if it was saying 41 seats or 41 people. Chair Scarpelli confirmed that it indicated occupancy. Mr. Lupino noted that all of them have date stamps from December of 1996, and are different iterations. The one with no seats drawn on them was the last one submitted, indicating it wasn't submitted for that purpose. Chair Scarpelli noted that that was a completely different floor plan.

Mr. Lupino then addressed parking. Based upon everything seen in the files, originally there were 88 off-street parking spaces approved which on a three-for-one ratio allows for 264 restaurant seats. The appellant is asking for 255, which is above and beyond what is necessary, and Mr. Lupino does not see any challenge to that. In 2011, there was a recognition of 109 off-street parking spaces which takes into consideration the property adjacent which is owned by the same owners, though in a different name. That is why the off-street parking agreement was submitted. It was submitted on a Monroe County form which says, return to the Planning Department when recorded. It was submitted by John Jabro to Steve Williams. There is not one letter, email or comment ever coming back to the applicant saying it's unacceptable so the owner had the understanding that everything was fine. There is nothing indicating the owner was ever notified there was ever a problem with that parking agreement or that it wasn't accepted, so there was a reliance on the fact that it was requested and submitted. The parking is more than sufficient to satisfy both of the facilities to 255 seats.

Mr. Lupino then stated that the alternative being suggested is not practical and isn't or shouldn't be called for. The County is stating that the proposed increases, which the appellant says are not increases, may only be processed by an amendment to the major conditional use permit. The appellant disagrees because it is not a proposed increase, but is returning the use to the capacity recognized in 1992 for Café Largo and in 1996 for Bayside Grill. The County's permit files show that is what was CO'd. The appellant does not think there is a necessity for an amendment. The simple resolution is for the Commission to recognize the capacity on the COs and to grant back that capacity. If the Commission believes an amended conditional use is required, it is an illusory resolution which cannot practically be approved without great expense when both of

these restaurants were approved, permitted, built and COd in the 1990s. There are changes in the standards that would change the requirements from a level one traffic count to a level three traffic count, and the traffic engineers don't even want to go there. The parking requirements requested would change. The driveway access requested would be to eliminate a driveway that was required as a part of the CO for Bayside Grill when it was permitted in 1996. It doesn't make sense, is not logical, does not comply with what is in the County records from the 1990s, and isn't compatible with what this owner needs for sustainability on two restaurants they've operated for 30 years. Mr. Lupino requested that the Commission return to the occupancy levels represented by the Cos in 1992 and 1996.

Commissioner Demes stated that this item could be likened to two parties on opposite ends of the universe. It has been his experience that just because you get a CO, that is not an umbrella to embedded noncompliance issues and what was given as a CO. He has had experience being involved in buying a property that had a CO and he had to make alterations after the fact because he didn't have the documentation to do what he did. So his first question is based on the COs that were issued and if that is a matter of right for the seating that was approved at that time.

Mr. Peter Morris first qualified Ms. Emily Schemper, Senior Director of Planning and Environmental Resources, as an expert in the field of Planning. Ms. Schemper has a master's in urban planning and a master's in urban design from the University of Michigan. She has worked for the County for just over ten years, is a certified flood plain manager, and certified AICP. Ms. Schemper was approved as an expert in the field of Planning by the Commission.

Ms. Schemper stated that the number put on a CO is for fire and building codes, and does not reflect any planning approvals, numbers of seats, number of bedrooms or beds in a hotel, or anything like that. This is why she pointed out that it's for people, not number of seats. The parking code is based on the number of seats or square footage. A building could accommodate as many people as possible, but the number of seats are limited by the parking. The Land Development Code is not determining the occupancy on the CO, but rather it is for the fire or building code.

Commissioner Demes then asked about there being nothing that limited seating in the County files except those COs, and what the basis was for the number of seats if there's nothing in the file limiting the seating. Ms. Schemper responded that the floor plan indicating the seating layout would indicate the number of seats. Planning needs to know what that is in order to make sure all other requirements are met such as traffic, trip generation and parking requirements. Commissioner Demes then asked about the various sketches with various numbers of seats depicted on them, and wanted to know how staff came up with the number they used considering those three sketches. Ms. Tolpin responded that generally when a building permit is applied for, the applicant is going to submit their proposal. It is very uncommon that what is submitted the first time around is going to be approved. It is not uncommon for corrections to revised plans to be submitted with a building permit application. Ms. Tolpin understands that once a plan is submitted in a building permit file, even if not approved, it stays in that file. So that file from the public records included both approved and unapproved floor plans. Commissioner Demes then asked about parking and the 255 versus 190 seats and the fact there was zero communication back on that issue, and whether not getting an answer on something means it's approved or does

it require a formal approval; and, with or without the agreement is there parking enough for compliance.

Mr. Peter Morris interjected that with respect to expectations, it is legally untenable for Mr. Lupino to represent what the expectations were of Mr. Jabro in submitting the outside parking agreement. As Ms. Tolpin testified, there has never been an application for an amendment to the conditional use, which is critical vis-à-vis the off-site parking agreements that were sent only to one assistant county attorney who has no legal authority to execute a document on behalf of the County with respect to the Land Development Regulations. The code is air clear that only the Planning and Environmental Resources head can do that. The salience of the off-site parking agreement really doesn't come into play as materially relevant until such time as an application for the amendment to the conditional use is submitted. The off-site parking agreement won't legally effectuate everything until that conditional use is amended. Essentially, that is a manufactured controversy for one that doesn't really exist. Commissioner Demes asked whether there was compliance for the 190 seats with the parking on site right now. Mr. Morris responded that based on the testimony presented, the last inspection performed by Ms. Tolpin personally enabled the appellate to argue that they not be liable for any fines, and enabled at a second level of relief for the appellant to solicit for a reduction in fines, which was granted with the munificent non-objection of the attorney for the Code Compliance Department. So Mr. Morris believes it was 190, although the Department has no control over what may or may not have been done since.

Commissioner Demes re-asked the question of Ms. Schemper. Ms. Schemper stated it may be nonconforming, but the code cases are all closed so it's considered to be compliant. The LOU that's being appealed was not about how many seats are present. The LOU stated that they agree there were this many seats, that that's been complied with, that the code cases are closed, and what is the path forward to get more seats if you want them. That was the purpose of the LOU. The pathway forward was laid out. Now we're going back to how many seats were approved on the site. Commissioner Demes stated, this is not simple, Mr. Lupino responded that with regard to the drawings, the one without the seats is dated December of 1995, and the ones with the seats were dated earlier. Point being there was nothing on the drawing stating it was intended for seating capacity. The seating capacity of 26 was determined when Ms. Mayte Santamaria reviewed this in 2015 and came up with the number of 26, and he assumes that's because she counted the number of circles around the bar. Yes, there is enough parking, it is sufficient, and that is not a question. Because of the adjacent parcel and subject to the cross-parking agreement submitted, with the understanding that that it was approved, if that is needed the Commission can make that a requirement. There's more than enough property and more than enough parking.

Commissioner Neugent asked if anybody refutes what Mr. Lupino just said, that the parking is adequate for the 190 or more seats because parking is a big issue. This discussion and issue started before, when not one of staff present were sitting here. Commissioner Neugent stated that he was living here then but was not yet on the County Commission, and he served 20 years on the County Commission. In 1992, the Comp Plan went into place. Commissioner Neugent then asked if this a legal conforming building to the existing code or a legal non-conforming structure. Ms. Tolpin responded that when it comes to parking, with 190 seats, it is lawfully non-conforming with the parking on the property itself. Without having the full analysis

memorized, there are eight spaces located on FDOT property where there was a lease which may have expired, but the property is in compliance with the current code for 190 seats. Ms. Tolpin disagrees with the appellant's assertion regarding the off-site parking agreement and the parking next door. The code in 2016 and currently does not even consider an off-site parking agreement unless it is recorded by the applicant themselves. Regardless of whether it was responded to or approved, it was still required to be sent back to the applicant at that time to record it as an official document, and the County is required to be party to that agreement. Without any sort of response, there is no way the County could be considered to be party to that agreement. Unfortunately, it's not an off-site parking agreement at this time. It can be, and it would need to be evaluated to make sure there's enough parking on that site to account for the other uses on that site such as the multi-family housing unit there, whose parking could not be attributed to the restaurant leaving them with nothing, which would go against the standards of the Land Development Code.

Mr. Lupino interjected that in the staff files there is recognition in 2011 of 109 parking spaces, which would connote to 327 available seats, 75 more than what is being asked for. That is in the files of staff, of 109 recognized parking spaces being taken into consideration.

Commissioner Ritz stated that there were 88 parking spots, and asked whether those were permitted or actual. Mr. Lupino did not know how to answer that, but reiterated that staff's documentation recognized 88 parking spaces. Commissioner Ritz confirmed the 88 spaces did not include the off-site parking. So if it's three to one, you need 85 parking spaces to get to the 255, so there are three extra spaces without even considering the off-site parking. Mr. Lupino confirmed that to be correct. Commissioner Ritz stated that his recollection is there were always tables at Bayside Grill, and asked if there was ever a time when there weren't tables at Bayside Grill. Mr. Lupino responded that it was designed for tables in the original design with the whole patio area. There was no other purpose for it. It was designed as a restaurant and the 6COP license was based upon a restaurant, not bar seating for only bar service. Ms. Schemper added that the 6COP was issued before Bayside Grill was constructed and was issued for Café Largo. Mr. Morris interjected that Mr. Lupino was not authorized to testify, only to make legal arguments. No witnesses have offered any testimony. Mr. Lupino said his client is available to answer questions. Mr. Morris stated he is prepared to present closing argument unless Mr. Lupino wants to reopen his case in chief. Mr. Lupino stated that he hadn't closed it.

Commissioner Ritz added that he has eaten there, he has eaten outside, he does not recall there ever being a problem with parking, and asked if the County had ever had complaints about parking from some third party. Ms. Schemper stated she was not sure, but that she is not contesting the 190 seats or the current parking. Commissioner Ritz stated there have been 255 seats there and parking there for twenty-some years. The County doesn't seem to have anything in its files saying 190 seats were approved. The applicant does have something in the files saying there's been occupancy for 255. So the evidence seems to be 255 with plenty of parking, and he is trying to figure out what is in the County files to show the 190 and not plenty of parking. Ms. Schemper responded that parking isn't the question right now. The question is how many seats were approved. If they say they have plenty of parking plus the possibility of an off-site parking agreement to add even more parking officially designated to that site, then let's proceed with a conditional use amendment and get this all permitted. The outside deck area that

had the seating with the tables was permitted as a screened porch. It is now all glassed in without permits. This has been ongoing for years, and it's not just about the County arguing over how many seats. This has been going on and on for years. There has been constant work without permits, opening of bars, establishment of tiki huts, outdoor entertainment, additional seats, and the owner has repeatedly complied with certain requests and is now arguing about other requests. They have conceded to the fact that, no, the downstairs underneath Bayside Grill was not supposed to have a certain amount of seats, no seating at the picnic tables, that that is only a waiting area, and no seating at the tiki which is only for entertainment purposes.

Mr. Morris added that mouth-to mouth resuscitation is being performed on a corpse. The special magistrate held the property in violation, one of which implicated the illegal expansion of the seats. This was never appealed until nine years later, apparently unimpeded by the fact that they had entered into a stipulation agreement admitting to the violations and admitting that they would be liable for fines if they didn't bring the property into compliance by a date certain in 2011. Nine years later, with the business running unabated, they retained Mr. Horton to determine what had to be done. The Planning Director responded in 2019 in two separate emails that the number was 190, and there was no appeal. Following that, they called an inspection and failed because they were vastly in excess of the 190 which they never appealed at any stage prior in the last eight to nine years. They didn't challenge the failed determination by Ms. Tolpin. They called in another inspection, had brought it down to 190, and were deemed in compliance. They asserted to the special magistrate with unmitigated gall that they're not liable for anything because the person who signed the stipulation agreement wasn't legally authorized. The magistrate rejected that argument in a written order and they never appealed that either. Then they requested to pay $22,000, a haircut of 98 percent on $1.1 million in fines, which functions as an admission. They paid the fines after bringing the number down to 190, and the code case was closed. They then came in for a letter of understanding which, as telegraphed in the beginning of Ms. Tolpin's presentation, the request was in part that they wanted to seek a way to increase the seating, and that seems to presume that the seating that they brought the number down to was the lawfully permitted seating. We're now at the third or fourth stage of attempting to reopen the appeal window after the first final order from the special magistrate, the first email from Ms. Schemper to Mr. Horton, the second email from Ms. Schemper to Mr. Horton, and the final order, the second final order from the special magistrate rejecting their argument that they were not liable for any fines. The special magistrate accepted that with the County's non-objection, that $22,000 would suffice rather than the full $1.1 million, which was then paid. At no stage were any of those appealable determinations by either the special magistrate's two separate final orders or the two separate determinations, nor decisions in writing from the Senior Director, at no stage were any of them appealed. Now, in addition to the fact that there's no pushback or challenge to Ms. Tolpin's rejection or failed inspection when she was called up for the first inspection when they were deeply in excess of the 190 number, they called in another inspection. The County never pushed back on that. So there are two independent orders of the special magistrate, two independent determinations in writing from the director, a payment of the fines that were due, in part, due to exceeding the number determined by the Planning Director, and now an LOU nine, ten, eleven years later, supplicating to reopen the appeal window which is entirely improper. For all of these reasons, they've bit into an apple that spoiled years ago and is not properly cognizable. In addition to the fact that the testimony offered overwhelmingly supports that the director's determination on the merits is substantively correct.

Mr. Lupino stated that Mr. Morris presented a tainted viewpoint and clarification in two sentences. Yes, they did agree to reduce the seating to 190 from what had been there for 20 years because they were in the middle of a code enforcement matter. And in 2016, Ms. Santamaria put a unilateral number of 26 seats on Bayside Grill and one seat less in Café Largo for the very first time after 20 years of operation. And because he needs to stop the fines that are accruing at hundreds of dollars a day, under duress, and then he immediately comes back with the LOU to say, okay, how do we get back to where we were for 28 years.

Chair Scarpelli asked if the LOU was filed for in 2016. Mr. Lupino stated there were two LOUs but the seating that came up for the very first time was based on Mayte Santamaria and coming out of the code case, and that was never raised before that date. Chair Scarpelli confirmed the LOU in 2016 was not appealed. Mr. Morris added that duress is a defense to enforcement of any contract, so it's a bit rich to now, now that appellate relief is being sought, rather than going through the process that every other property owner has to go through, the conditional use permit, that there's now a late-rising duress defense to payment of the fine. Chair Scarpelli stated the panel understands the points of contention.

Commissioner Thomas commented that there are processes and rules. If you choose not to follow them, then there are issues. Society has rules and processes. It appears that in many cases they have not been followed. Chair Scarpelli added that from a purely document perspective the occupancy that's written on the plans that show the barstools says 30, because that occupancy is determined by the interior square footage. As it was just pointed out, this deck is now enclosed. When originally permitted it wasn't enclosed, and that's why it says deck. It was an outdoor observation style deck. He does not see a determination made then as to occupancy and seating during the planning review process. That would be when the major conditional use was filed. Mr. Lupino responded that the only thing they could find was that Planning's only involvement at the time was parking. Ms. Schemper stated that there is a stamp on one of the floor plans that shows the 26 seats that it was approved by Planning. Chair Scarpelli noted there is no conditional use application stating the intent by the applicant for the use of these facilities like we have to do now. Ms. Tolpin responded that the original structure was built prior to the establishment of current codes and standards prior to 1986, so the property is operating under a deemed conditional use permit. The provision and guidance that the applicant, in order to increase the intensity, increase seating, in the letter of understanding it also contemplates that enclosed area. Rather than referring them to code enforcement for the unpermitted expansion and deck area, we note in the LOU that it appears there's a couple of extra thousand square feet of non-residential floor area. In order to have this properly accounted for and in accordance with Section 110-73, development under a conditional use permit, the amendment is required to go through.

Mr. Morris added that in addition to everything the County has already asserted, what is being claimed here is some flavor of sort of camouflaged vested rights determination. The County code provides for a vested rights determination remedy. That's located at Chapter 102, Division 3, at Sections 102-134 through 102-137. That process contemplates an application filed with the Planning Department. It's different from an application for an appeal to the Planning Commission which resolution of a vested rights claim is exclusively reserved as a matter of

jurisdiction and quasi-judicial power to the Florida DOAH Administrative Law Judge sitting as a local hearing officer. Essentially, what's being made here is we had a number of seats a long time ago, we should have them now, and these are the equitable reasons why. Those are arguments for the vesting of rights based on things that did or did not happen in the past, and that determination is by code and would be a fundamentally unlawful decision for the Planning Commission to step into the shoes of an ALJ that the code exclusively reserves that power and jurisdiction to. It's another remedy that the appellant has not only untimely sought to appeal these determinations which were made years ago, but has also gone to the wrong forum.

Chair Scarpell confirmed that in 2016 when Ms. Santamaria made this determination based upon a drawing and no application that would comply to current code, that those decks were enclosed and being used as seating in 2016. Chair Scarpelli then asked if Ms. Santamaria would have had to take that into account because there was an unlawfully enclosed area. Ms. Schemper stated that the Planning Department very deliberately operates independently from Code Compliance so a code case doesn't have to be opened every single time something unlawful is seen. Chair Scarpelli noted that in order to get a CO today, you need to go through final Planning approval. Ms. Schemper stated there may have been a final Planning inspection. If they were counting seats, they may have counted 26 seats and would pass the inspection. Then the Building Department prepares the certificate of occupancy. Ms. Schemper does not know what a CO form looks like. She doesn't review it or sign off on it. If a final Planning inspection is passed and final Biological inspection is passed, the Planning Department is done, and the Building Department takes it from there. Mr. Lupino interjected that the 1996 online records from Monroe County specifically say that for this building permit, required final Planning inspection is necessary for a certificate of occupancy. Chair Scarpelli added that for Planning approval purposes when this was originally reviewed, there was no enclosure, the deck was open and was never intended for seating as originally designed. Chair Scarpelli noted that traffic intensity is determined by square footage, not seats. Ms. Schemper interjected that it's trips per square footage. Chair Scarpelli noted the square footage hadn't changed since 1996. Ms. Schemper agreed that the permitted square footage had not changed, but the now enclosed area on the second floor, originally permitted as an open deck, is now considered square footage. As part of this amendment, you can also get approval for that extra square footage, and they were not opening a code case. That would actually help in terms of trip generation because when you have more enclosed square footage, trips per square footage with the same number of trips and more enclosed square footage, the intensity would go down. That would likely work in the appellant's favor rather than using the old square footage numbers. There is nothing in the Land Development Code specifying how many people can be approved in a building, so those occupancy numbers would have nothing to do with the Planning Department. Chair Scarpelli noted that when it comes to the building code, it doesn't reference seats. There's no documentation from 1996 as to how many seats were allowed at that time. Ms. Schemper corrected that that is except for the floor plan which was approved and stamped by the Planning Department. Chair Scarpelli noted that sometimes the architects don't draw tables and chairs, which they should.

Commissioner Demes added that though Commissioner Thomas was much more eloquent and concise, he agreed there are processes and he hopes anyone contemplating a permit or business expansion is watching this today because it tells them to make sure to do due diligence to close

out actions and clearly define your actions before embarking on them, and do follow up. After listening to the attorneys, this is an example of egregious noncompliance over a very long period, and if this happened more often the Planning staff would need to be increased. This is not the way the regulations were set up and to get off a million-dollar fine in itself was a huge "give-me." There is an avenue, a clear path to get what the business needs as far as seating, and he's coming from the point of expanding. When reducing the fine from 1.1 million and acknowledging that that's the seating, that it's an expansion. And also, credibility as far as this unbelievable historic noncompliance, everything mentioned as far as no permits and agreement to comply and then don't comply, right to the palm fronds on the chairs which is an insult to intelligence, and for Ms. Tolpin to go out and see that and keep her composure, she's a better person than himself. This speaks to why he will move for denial. Commissioner Demes is making a motion to affirm the finding of the County staff.

Mr. Morris advocated for an alternative holding, for dismissal, if a sufficient number of panel members agree, not only that Ms. Schemper is correct on the merits but that the appeal is fatally untimely. Mr. Morris is requesting a motion that if the panel is inclined to rule in the County's favor, a motion first dismissing the appeal based upon its fatal untimeliness for the reasons elucidated earlier and, in addition, that Ms. Schemper was correct on the merits with respect to her determination on behalf of the department. Commissioner Demes modified his motion based on the recommendation.

Mr. Lupino added that the LOU has the language which says if you want to appeal this LOU, you have 30 days to do so, and they did so within the time frame of the LOU. To say that this appeal is untimely is an erroneous statement.

Chair Scarpelli asked if this item should be opened up to public comment. Mr. Morris responded that this dispute is more confined to the litigants, but just as belt and suspenders because there might be enterprising lawyers out there who might want to file a violation, to go ahead. Chair Scarpelli asked if the owner needed to speak. Mr. Morris responded that Mr. Lupino had covered that, and the motion is already on the floor. Chair Scarpelli indicated that he only wanted to be sure everything was tied up correctly. Mr. Morris stated that the County would not object. Mr. Lupino said the owner was available to answer any questions, but otherwise his statement would be reiterating much of what Mr. Lupino had already said.

Chair Scarpelli then asked for public comment. There was none. Public comment was closed.

Motion: Commissioner Demes made a motion to uphold the LOU. Commissioner Thomas seconded the motion.

Roll Call: Commissioner Demes, Yes; Commissioner Thomas, Yes; Commissioner Neugent, Yes; Commissioner Ritz, No; Chair Scarpelli, Yes. The motion passed 4 to 1.

2. WAYHI LLC, 40 E BEACH ROAD, TAVERNIER, FL.: A PUBLIC HEARING CONCERNING AN ADMINISTRATIVE APPEAL PURSUANT TO SECTION 102-185 OF THE MONROE COUNTY LAND DEVELOPMENT CODE, BY THE PROPERTY OWNER TO THE PLANNING COMMISSION CONCERNING THE PLANNING DIRECTOR'S DECISION TO DENY A BUILDING PERMIT APPLICATION TO INSTALL A 16"x12"x141'

CONCRETE GRADE BEAM AND A 8”x26”x141’ CONCRETE RETAINING WALL AND TO IMPORT AND SPREAD 240 CUBIC YARDS OF FILL AT 40 E BEACH ROAD, IN TAVERNIER, HAVING PARCEL IDENTIFICATION NUMBER 00446340-000000. (File No. 2021-254)

Mr. Spencer Crowley, agent for the applicant asked to make some preliminary objections. The first objection is regarding the County’s use of hearsay evidence in this matter, which really is the sole basis for the permit denial. Section 2-202D of the Code clearly states that hearsay evidence is not sufficient in and of itself to support a finding unless it would be admissible in a civil action. The evidence the Commission will see today is clearly not admissible. The second objection is based on the fact that one of the County’s stated bases for denial of the permit application was only raised last week. The first time the appellant heard about it was last week. This is well after the deadline for everyone to submit all arguments and certainly well after the permit was denied eight months ago in November. Mr. Corlwey wanted to make sure those objections were on the record contemporaneous with the County’s use of this information.

(11:40 a.m.) Ms. Emily Schemper, Senior Director of Planning and Environmental Resources presented the staff report. The property in question is at 40 East Beach Road in Tavernier between a residential development to the southwest, and to the northeast is Harry Harris County Park. The owner is WAYHI, LLC which is identified as Lisa Hartman and the agent is Spencer Crowley. The zoning is Improved Subdivision and this is a typical platted lot in a subdivision. The decision being appealed today is from November 23, 2021. A letter was issued denying building permit application 21302121. The scope of that permit was to install a grade beam, a retaining wall, and to bring in some fill on the subject property. The reason for permit denial rests on a Comp Plan Policy and similar Land Development Code regulation. Comp Plan Policy 212.2.4(13), no development other than pile supported docks and walkways designed to minimize adverse impacts on marine turtles shall be allowed within 50 feet of any portion of any beach berm complex which is known to serve as a nesting area for marine turtles. Subsection (a) the 50-foot setback shall be measured from either the landward tow of the most landward beach berm or from 50 feet landward of mean high water, whichever is less. The maximum total setback will be 100 feet from mean high water. Land Development Code Section 118-12(p), requirements for marine turtle nesting areas, notwithstanding the provisions of subsection (o) of this section, no development other than pile supported docks and walkways designed to minimize adverse impacts on marine turtles shall be allowed within 50 feet of any portion of any beach berm complex that is known to be or is a potential nesting area for marine turtles. Beaches known to serve as nesting areas for marine turtles are those areas documented as such on the County’s threatened and endangered species maps and any areas for which nesting or nesting attempts, crawls, have been otherwise documented. Any development shall comply with Sections 12-114 through 12-120. Number one, the 50-foot setback shall be measured from either the landward tow of the most landward beach berm or from 50 feet landward of mean high water, whichever is less. The maximum total setback shall be 100 feet from mean high water.

Ms. Schemper presented slides of excerpts from Florida Fish and Wildlife Conservation Commission’s nesting and crawl documentation. The first was from 2001 depicting the total number of nests counted was one, and the total number of non-nesting emergences or false crawls which did not result in a nest was seven. The documented nest first observed date is

5/22/01. When looking at the associated maps, although they are simple diagrams, it is fairly clear to see that this somewhat triangular parcel is what at that time was a vacant parcel between the park and the residential development and is at the very least the location of the 5/22/01 nest and the location of documented crawls. The highlighted yellow parcels from the 2001 documentation is regarding the full area and marked in the triangular lot, the subject property, are some of those crawls and one of the nests. Similarly, in 2003, the total number of nests was one, and non-nesting emergences were six. The nest was first observed on 5/31/03, and the blue highlights on the map show the nest which crosses through the subject property, and then returns to the sea, and comes through the subject property as well. There are also other crawls related here. This has two examples of nesting crawl documentation but is not all of the documentation, and these were the two included as exhibits to the denial letter. Based on this nesting information, this is considered subject to the marine turtle setback provisions.

Ms. Schemper then presented a clip from the proposed plans for what was being presented in the permit. The thick blue line is the property line. The thin black line waterward of the property line is what is listed as the mean high water line. Just inside and along the property line is a double line with hatching which is the proposed grade beam with a retaining wall on top of it, and then rip rap on the waterward side of it. Fill is proposed behind that retaining wall. Based on the mean high water line as depicted on this plan, the proposed retaining wall does not meet the marine turtle setback requirements. At the very least, it is not 100 feet from mean high water so if there is no beach berm, you would measure 50 feet back from mean high water and then another 50 feet back, and that is your setback. If there is a beach berm, the most landward beach berm, even if it was very close to the shoreline, you would measure 50 feet back from the beach berm, so it does not meet that turtle setback requirement. Ms. Schemper then pointed out on the plan, though this is not the subject of the appeal, that a house permit was issued a couple of years before this retaining wall permit was applied for. The house permit was issued, construction began, and a neighbor or someone in the community submitted a complaint and requested a stop work order because the house being built was very close to the shoreline and they asked how this could meet the open water shoreline setback requirements. So the stop work order was placed due to the physical evidence on the site, and staff reviewed the survey for mean high water that had been submitted with the building permit application for the house. When looking at that survey, staff noticed several items that seemed inaccurate on the mean high water survey. One of those items was that the elevation used to designate where you draw the line for mean high water was in the NAVD 88 data. The line drawn on the plans was drawn according to that elevation number, say one foot above sea level, but it was drawn according to the NGVD 29 data. So it was using two different datums, making it clear to staff that it was an issue. Another issue with that survey was that it used the Key West Tide Station and local surveyors understand that in this area, the Tavernier Tide Station should be used, which is much closer. With the datum change, there is about a 1.56 foot difference in elevation so on a very shallow sloped beach like this, it would put the mean high water line significantly farther waterward than if you put it in the correct datum. Even from a layman's perspective, you can see this is mean high water, but the rap line is up here, so it's definitely something that you would question.

Mr. Spencer Crowley, agent for the appellant, objected to all of this information, stating it is not relevant to the appeal. Mr. Crowley has an email from Ms. Schemper thanking him for the revised survey that addresses our concerns. Mr. Peter Morris asked for the objection to be

briefly stated and let the presentation continue as objections are usually not narrative. Mr. Crowley stated that he is expressing the objection because issues are being raised that are not before this Board on the appeal and which have already been resolved per this email from Ms. Schemper. Chair Scarpelli instructed that typically the Commission likes to let staff finish their report and Mr. Crowley can have his point of argument after that. Mr. Crowley stated that he understands, but this is all not subject to the appeal and was previously resolved, so he does not know why it is being brought up. Chair Scarpelli responded that Ms. Schemper was trying to give the Commission the full picture. Ms. Schemper explained that staff had asked for clarification and received an email with confirmation from the surveyor, who is licensed, that this was an accurate mean high water survey. There was a meeting with Ms. Schemper, Ms. Christine Hurley and the owner or owner's representative and, in the end, staff agreed to accept that survey. The stop work order was lifted and construction continued.

Ms. Schemper then presented a section detail of the proposed retaining wall showing the wall, the fill behind it, the rip rap in front, and some current photos of the structure being built. Ms. Schemper pointed out the location where the owner was requesting something similar to the neighboring property with a retaining wall and rip rap. Ms. Schemper presented another photograph indicating the house was being elevated according to the V-Zone standards where the beach can be seen through the openings. Since the proposed retaining wall, rip rap and fill did not meet the setback requirements for marine turtle nesting or appropriate nesting sites, it could not be approved by staff, and that was the basis for Ms. Schemper's denial letter. Staff is recommending the Commission deny the appeal and uphold the decision of the Planning Director based on the sea turtle nesting and crawl documentation provided. Ms. Schemper also pointed out that at the time of the house permit staff did not have this documentation about the marine turtle nesting observance. The origins of who submitted this documentation is unknown. It was submitted to staff after the issuance of the house permit, but prior to the denial of the retaining wall permit.

Chair Scarpelli asked for questions or comments from the Commissioners. Commissioner Demes asked if a biologist went to the site, and Ms. Schemper believed that to be correct, and stated that there were a number of people involved. Commissioner Demes explained that his surveying class was from college and he learned the difference between accuracy and precision, and he does not believe the survey appears to be precise. It may look obvious where the mean high water line is and it's not in accordance with that survey, and though he understands that is not the issue here, he believes the owner has benefitted by that survey. Ms. Schemper added that staff conceded to their surveyor's expertise as he was a licensed surveyor, and did not choose to challenge the surveyor as the County does not have someone on staff to do that. The basis for denial of this permit was not based on the survey, but rather based on the turtle setback issue. Commissioner Ritz clarified that the basis of the denial was the turtle nesting issue. When he first saw this he thought it was a slam dunk because we want to protect the turtles, the turtles should have the right to nest there, and there's evidence they've been nesting there. But looking at the photo now with a house sitting there, he asked if there was evidence that turtles will continue to nest there, underneath the home, regardless of whether the wall goes up or not. Ms. Schemper responded that the only thing she can use is the presence of the documentation with the code to make her decision on that. Right now, this is considered a marine turtle nesting site.

There is a policy in the Comp Plan that says that mapped turtle areas can be reviewed by DEP and the Planning Director. The first option is to restore it. If it's determined that that's not an option, a point could be reached where the setback is not enforced anymore. However, that was not requested by the application and no one has asked for the suitability to be reviewed at this point.

Mr. Mike Roberts, Assistant Director, Environmental Resources, stated that it is important to recognize the difference between the nesting area setback and the nesting area. While the house is clearly in the setback that does not necessary impact the nesting area as the two are separate. Commissioner Ritz asked if staff had evidence or a belief that the turtles would continue to nest in this general area even with the house there. Ms. Schemper responded that a full review had not been done but the point is, even with a house there, it wouldn't mean the turtles were nesting under the house in that location. They could be waterward of the house. There is a whole process of coordination with DEP to do that review. At this point, it's a turtle beach and the setback is applied.

Commissioner Demes stated that he was a permitted turtle salvager under the turtle permit, and used to do that for the Naval Air Station and respond to turtle salvaging. He commended the person who did the survey of the turtle reporting, and has seen turtles on the Navy property actually nest in rocks and have successful nests. The bad thing is in a neighbourhood like this where they turn on lights, the turtles have been found to go into people's yards and into their landscaping instead of going back to sea. He believes the turtles would nest there because they do nest in more than just nice sand, so it's possible.

Mr. Peter Morris asked that Ms. Schemper be qualified as an expert in the fields of both planning and flood plain management as she is a certified flood plain manager. Mr. Morris asked also that Mr. Mike Roberts, Director of Environmental Resources, be accepted as an expert in the field of biology. Chair Scarpelli indicated that both of them would be accepted as experts. Mr. Morris then asked Mr. Roberts to state his education, title and expertise. Mr. Roberts stated that he is Assistant Director, Environmental Resources in the Planning and Environmental Resources Department, has a bachelor's degree in limnology, is a certified professional wetland scientist, a certified environmental professional with the Academy of Board Certified Environmental Professionals, a certified flood plain manager, and has worked for Monroe County for over twelve years.

Mr. Crowley noted that Mr. Roberts' undergraduate degree was in limnology which is geology, not biology, and asked if he was actually a biologist. Mr. Roberts clarified that limnology is the study of freshwater marshes and the biology, ecology and chemistry of fresh water. The professional wetland scientist designation does not differentiate between maritime or freshwater biology. Mr. Crowley asked if the educational background was in freshwater wetlands. Mr. Roberts stated that his educational background is in limnology which is freshwater ecology. Chair Scarpelli also pointed out that being in the Biology Department in Monroe County for the past 12 years would satisfy anyone as far as the expertise of these particular waterways. For the record, Ms. Schemper stated she is Senior Director of Planning and Environmental Resources, has a master's in urban design and a master's in urban planning from the University of Michigan,

has worked for the County for over 10 years, is a certified flood plain manager, and has a certification from the American Institute of Certified Planners. Mr. Crowley asked if Ms. Schemper was being recognized as an expert in planning and flood plain management, but not biology. Ms. Schemper responded that she would not claim to be an expert in biology, but is an expert in applying the code to permit applications, which is the question for today.

Mr. Spencer Crowley, agent for the applicant, along with Wes Hevia from his office at 98 Southeast 7th Street in Miami, and property rights litigation counsel Nicholas Giesler of Bartlett Loeb Hinds and Thompson were present representing Will and Lisa Hartman, the owners of 40 East Beach Road in Tavernier. He stated he would need 20 minutes for the initial presentation, 10 minutes of qualifying questions for three experts, and then he may need to call Will Hartman as a rebuttal witness depending on how the presentation goes. Finally, he would like to reserve about five minutes for closing statements, legal objections and additional information based on the presentation. Recognizing everyone's time is valuable, the County has put them in a position of presenting evidence in this matter in case it ends up in litigation, and the rules of this Planning Commission actually require this be done or their arguments would be waived.

Mr. Spencer Crowley presented a visual of the house on the property. This rocky shoreline cannot support nesting activities from sea turtles. Anyone familiar with Florida's natural environment knows sea turtles need sandy beaches to nest. This is a rocky limestone shoreline, sometimes called razor rock, and the turtles cannot possibly traverse this shoreline much less nest here. The state and federal government and even the County initially reviewed this single-family home and never raised an issue regarding turtle nesting. As a result, the house is almost finished. At the very end of a process that has taken four years, a neighbour and a rogue County staff member named Gintautas Zavodzkis have been able to manipulate the County in such a way as to deny this permit for a retaining wall which is an essential component to the overall project. The County did not take any steps to verify the information that was presented and denied this permit based on 15 to 20 year-old hand drawings from the next door neighbour, the same neighbour working with Gintautas to stop the project. The County has no expert testimony or reports supporting the position that this is a turtle nesting beach. No turtle nesting expert could possibly conclude that turtles can nest along this rocky limestone shoreline. Mr. Crowley listed three experts all of whom would testify that the shoreline here is not a beach berm complex which can support turtle nesting or that is subject to the County regulations. Many of the neighbors have submitted letters of support indicating they have never seen turtles nesting here, and support the application for the proposed retaining wall. These letters are in the record. This property cannot be used for sea turtle nesting because it's solid rock with unconsolidated gravel and flotsam overburden. The reports the County relied on are outdated and unreliable. The County did nothing to confirm the accuracy of these reports and strategically omitted contradictory reports which did not fit the narrative that Gintautas and Ms. Gold had created. Any sand which may have existed on this property in the distant past has been eroded due to the adjacent shoreline hardening and the property can no longer retain sand due to these factors. The retaining wall and rip rap is consistent with what every other neighbour along this shoreline has done to protect their own properties. The County's position is totally incorrect, completely

indefensible and should be overturned so the house can be completed as approved by the County, the state and the federal government.

Mr. Crowley stated that this property had been purchased in 2017. A building permit application was submitted in 2018. In 2019, the County approved the building permit. The County visited and assessed the property for endangered species during this permitting process, all of which is in the record, on their own and via third-party biologist assessment. The building permit approved construction of the house and the site features such as the location of the home relative to the mean high waterline, with the shoreline setback and stormwater retention areas in the back yard. If there was a turtle nesting beach on this site, the County couldn't have approved the plans in their current configuration. The County's approval was provided after reviewing the existing conditions report submitted and summarizes an on-site biological assessment completed prior to construction activity. This was reviewed and approved by County staff. There were findings of large, invasive exotics and no threatened, endangered or otherwise protected animals. The photos show the shoreline consists of limestone covered by gravel, flotsam and seaweed. Mr. Crowley presented photographs of how the property exists today with the rocky shoreline which is solid limestone, sometimes referred to as razor rock because of the sharp edges created by the chemical and physical erosion of the limestone. The building permit for the house did not include the retaining wall and rip rap so separate applications were submitted to the County, the DEP and the Army Corps of Engineers.

Mr. Crowly then presented the plan for the retaining wall reflecting a 142-foot retaining wall, 135 feet of rip rap and 240 cubic yards of backfill. The retaining wall is landward of the mean high water line. Both DEP and Army Corps reviewed the application and provided authorizations in the form of exemptions or programmatic authorizations indicating the wall was landward of the mean high water line. As part of the state process, the Florida Fish and Wildlife Conservation Commission coordinates with DEP on permit applications to determine if there are any negative impacts on listed species such as sea turtles. The FWC has veto power over these permits but did not raise any issues regarding turtles, nor does FWC list this property as a nesting site on its state wide atlas of sea turtle nesting occurrence and density. Similarly, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service coordinates with the Army Corps in reviewing applications, also having veto power over the permits, but did not raise any issues related to sea turtles as part of their retaining wall authorization. The U.S. Fish and Wildlife maintains a list of critical habitat for loggerhead turtles and this is not designated as such. The Monroe County Back Bay Study which Army Corp recently completed indicates there are no critical sea turtle nesting habitat in this area of the Florida Keys. None of the state and federal agencies charged with reviewing impacts to wildlife and the environment have raised any objection to this retaining wall based on turtle nesting nor have any regulatory designations indicated this is protected sea turtle nesting habitat.

Mr. Crowley presented a series of slides showing adjacent properties indicating nothing that is being proposed is different from the neighbors. Even the neighboring County Park has altered its shoreline significantly, including the rip rap jetties which enclosed a shoreline to create a swimming lagoon at Harry Harris Park. The adjacent shorelines have created a gap in the

shoreline of this property with rip rap on one side, seawalls on the other, and the result is scoured and intensification of wave energy at this property which has eroded the shoreline down to the limestone base. The rip rap was recently fortified at Harry Harris Park and the County, state and federal government all approved that work without any objections related to turtle nesting. Literally, the County did the exact thing this property owner is trying to do and it was okay for them to do it but not the Hartmans, which makes no sense. Notwithstanding the County's work at the park, they denied the building permit for the retaining wall because they determined this property was a turtle nesting beach. Staff did not reach out to Mr. Hartman, the contractor, or the consultant to discuss this issue, but simply denied the permit. The sole stated basis for the denial was that the shoreline of the parcel had been identified to be a turtle nesting beach, citing to LDC Section 118-12(p) which states that the beach berm complexes which serve as sea turtle nesting beaches must adhere to enhanced setback requirements. If the County's position is upheld, neither the retaining wall nor the home meets those enhanced setback requirements. Mr. Crowley presented pictures showing the existing condition of the beach being solid limestone covered with gravel. The County's only supporting materials for their position are hand drawings dated between 15 and 20 years ago, and prepared by lay persons. Ms. Schemper indicated that she didn't know where these reports came from. They have typos, are decades old, and contain no supporting documentation such as pictures or accurate survey coordinates, are barely legible, are not notarized, and contain no verification regarding origin or where they have been stored. In legal terms, the drawings are hearsay which would fail every test of evidence. The reports on their face state they were derived from the homeowner next door and are certainly not competent, substantial evidence that could be used to strip the Hartmans of their property rights. One report clearly states this area is not an actual nesting beach, and this report was intentionally omitted by County staff as part of their strategy to support their narrative driven by Gintautas and Suzanne Gold.

It is incomprehensible that the County accepted these reports without any critical thinking or verification and used them to deny an essential element of the house causing an eight-month-and-counting delay. Any time the County determines that it is necessary to halt a project it should have independent verification of materials derived from and produced by credible experts, not lay persons. The County did not do that and instead denied the permit allowing Gintautas and Ms. Gold to manipulate the process. Some of the locations included on these drawings as nesting sites were actually located in the ocean. The County biologist indicated the coordinates for several nests indicate 25 degrees 01.2 minutes north and 80 degrees 29.8 minutes west, which is for Ocean Drive at the end of Silver Palm, but those coordinates were not meant to be exact, especially 20 years ago. So the County biologist is indicating the coordinates listed are not exact and if they are not exact, how can they be used as a basis to deny the permit causing eight months of delay and huge financial costs?

After receiving the denial letter, Mr. Crowley performed a public records request to try to understand how and when the County learned of the alleged turtle nesting, and if they had any other evidence in support of their conclusion besides the 15 to 20 year-old, third party hand drawings, and learned the Hartman's neighbour immediately west at 38 East Beach Road, Suzanne Gold, had instigated this. The record shows that she complained for years about all of

her neighbors due to the alleged light pollution. This is also supported by the neighbors' letters of support in the record. More recently, Ms. Gold complained about construction which led to the stop work order on the mean high water line issue that was later resolved. Finally, after so many unsuccessful attempts to prevent the Hartmans from building their home, she complained about the retaining wall permit at 40 East Beach Road. Mr. Crowley presented an email showing that Ms. Gold had enlisted the help of Gintautas later that year, stating that he is someone who seems to be more involved with environmental protection. After enlisting the support of Gintautas, he began contacting other County staff. The records found suggest that the County did not have the nesting reports and so Gintautas provided them as part of Gold's continued efforts to prevent the Hartmans from building the house. Gold and Gintautas were able to manipulate the County into denying the permit with nothing more than these unreliable reports. It is important to understand there are no expert reports in the record, no objections from the various permitting agencies, and no habitat designations by wildlife agencies. There are only unverified hand drawings which fail almost every test of whether material could be considered credible and admissible evidence.

Mr. Crowley then presented an email from Gintautas to the DEP and the Army Corps attempting to influence their process in making an unauthorized turtle nesting determination without due process to the owner. Notably, DEP and the Corps still issued the permits because they exercised common sense and disagreed with the assertion that this is a turtle nesting beach. Thankfully, Gintautas is no longer employed by Monroe County but the Hartmans are still suffering the effects of his work. Additional public records obtained reveal the County's own reservations regarding the quality, accuracy, strength and reliability of the reports. In an email discussing how to strategically omit records from the building permit denial, the County's biologist says, "I don't think we should include any 'documentation' that could be refuted or argued about. Fewer the concrete documents are better than the more questionable documents." This County biologist intentionally excluded expert reports that did not play into their narrative. Specifically, he recommends omitting one of the reports that says, "This is not a turtle nesting beach."

Mr. Stevens interjected that the County Biologist is present and what's being stated is contrary to the human being in the room who has already testified. Mr. Crowley stated he is reading an email which everyone can see on the screen. Mr. Stevens added that Mr. Douma is not the County Biologist, and that Mr. Roberts has testified. Mr. Crowley clarified, "a" County Biologist, not "the" County Biologist. Mr. Stevens responded that there is only one County Biologist. Commissioner Demes asked for the courtesy of one person speaking at a time. Chair Scarpelli instructed Mr. Crowley that he could continue.

Mr. Crowley continued, finally one of the omitted reports indicated that in 2005, hurricanes destroyed any nests and that four hurricanes washed out the shore. In the next email, the County Biologist says, "I would also lean towards not getting into the details of why we considered it a turtle beach at this time. We can see the documents and explanation for when/if they want to appeal it. We just need to 'prove' that it is part of a beach berm complex that is known to be or is a potential nesting area for marine turtles." Note the use of quotes around the word "prove."

Why is this necessary if County staff is dealing with us in good faith? Mr. Crowley stated that his experts who are present today will explain why the County's determination is wrong. This shoreline is rocky, solid limestone rock with gravel and flotsam overburden and exotic vegetation which cannot support sea turtle nesting. The reports the County used are outdated and inconsistent and would fail almost every test of credibility and admissibility as evidence. It is certainly not competent substantial evidence for the purpose of this quasi-judicial hearing. Any sand which may have existed on the property has been eroded due to the adjacent developed shorelines and the property can no longer retain sand due to these factors. This was actually acknowledged by a County Biologist in an email. Mr. Crowley has actual evidence to prove all of these points. A retaining wall and rip rap is consistent with what every other neighbour has along this shoreline, including what the County has done to protect their own property from storm surge and promote on-site stormwater retention. Mr. Crowley respectfully asks that the Commission overturn the decision of the director to deny this building permit, and issue this permit for a retaining wall and rip rap.

Mr. Patrick Stevens then swore in all of the expert witnesses.

Mr. Wesley Hevia of Ackerman LLP questioned the appellant's witnesses. The first witness was Mr. Jim Goldasich of 7040 West Palmetto Park Road in Boca Raton, who stated he has a bachelor of science in biology with a concentration in aquatic biology, a minor in conservation, a master of science from the University of Michigan in environmental health science which is a compendium of biology, toxicology and marine engineering, and has worked in both freshwater and marine systems for over 50 years, with the last 40 years as a biologist in Florida. He has worked for the FDOT as a permit processor and environmental scientist, and also Broward County as the Biological Resources Director responsible for management of not only marine turtles but all of the endangered species that live and work in Broward County. He then started his own firm in 1993 and has continued that same process. Mr. Goldasich was recognized accepted as an expert in marine biology with a specialization in listed species and critical habitat including sea turtles.

Mr. Goldasich explained that he was asked to look at this site and make a determination on whether or not it was a marine turtle nesting site after reviewing the reports available from Monroe County and doing research on what was available in the FWC office. In review of those documents he targeted certain areas on the site and adjacent properties for the field assessment. Mr. Goldasich presented photos to document the conditions on the site. This is very course gravel over limestone, coral rock, bedrock essentially, and both sides of the site are circumvented by vertical seawalls and/or limestone rip rap. Where there is soil on the site it is a mixture of cobble and marl material forming a very cohesive, almost concrete-like block. Mr. Goldasich presented a photo of an escarpment that had been eroded by the wave energy, which gives a good idea of the cross section of soil existing on the site. He did some soil pit excavations and found where there was soil over the rock its maximum depth was in the range of a foot, which eliminates the ability for a marine turtle to nest on the site successfully. She may come up and make the decision that this is not sufficient to lay her eggs and will then return to sea. If eggs were ever laid there, there's not enough separation between the water table and the bottom of the

nest, and the eggs would rot because of the water intrusion into the nest. There is no way that a turtle could walk from an adjacent site onto this site because they can't get to an adjacent site as they are totally bounded by vertical seawalls and/or rip rap. The green dot in the middle of the ocean documents one of the nests or false crawls which is well out into the sea. The subject property is the yellow parallelogram next to the park. The park's vertical seawall and concrete rip rap, and the concrete vertical seawall to the south of this property eliminate any transmission of marine turtles across either property. Mr. Hevia asked Mr. Goldasich if he had reviewed the reports provided by the third party that the County supplied and if so, for his impression of those reports. Mr. Goldasich stated they were rudimentary at best, with his biggest concern being that they were 15 to 20 years old. If there is recent documented evidence of marine turtle use at this site, those should be made available, but apparently there are none. He does not agree that this property is currently a turtle nesting beach. The preferred nesting habitat is unconsolidated sand at least 30 inches deep above the mean high water line. This site has no unconsolidated sand. It has unconsolidated gravel and marl over bedrock. In no place is it 30 inches deep. The flotsam and debris and large limestone boulders on the site make it a fairly unsuccessful location for a marine turtle to crawl into and try and make a nest. This property cannot be classified as a beach berm complex as there is no beach berm on the site, nor any native hammock existing on the site. All vegetation is exotic trees and shrubs, Brazilian pepper and Australian pine, both having very spreading root masses which also makes it very difficult if a turtle were to climb up there to effectively dig a nest through those roots. Mr. Hevia asked Mr. Goldsasich to clarify whether a successful nest needs to be 30 inches above the water table, not the mean high water line. Mr. Goldasich confirmed it was the water table.

Mr. Hevia asked to question all three of his experts prior to Mr. Peter Morris performing cross-examination, and Mr. Morris agreed.

Mr. Hevia then called Mr. Jordan Cheifet who was attending via Zoom. Mr. Jordan Cheifet of 140 Intracoastal Point Road, Jupiter, Florida, is a senior engineer with Cammins Cederberg, is a registered professional engineer in the State of Florida, and a certified floodplain manager. He has a master's degree in ocean engineering with a concentration in coastal engineering, and a bachelor's degree in civil engineering. He has been a practicing engineer for 20 years, the last 10 of which have been in the State of Florida concentrating on waterfront inspection and design. Mr. Cheifet was recognized accepted as an expert in coastal engineering. Mr. Cheifet explained that he was hired to perform a qualitative evaluation of the subject property and the proposed retaining wall and rip rap treatment relative to the potential effects on the subject property's development and adjacent properties. As part of the analysis he reviewed all of the provided background information including the site plan, the structure, the retaining wall and the survey for the property, a series of historical aerial photographs of not only the property but also the surrounding area to get an understanding of its evolution of the shoreline, environmental permits issued for the property, and the flood insurance grade map and flood insurance study published by FEMA for the area. He looked at whether the proposed structures would have an impact on the subject and adjacent properties or on coastal engineering design criteria including waves, currents, storm surge corrosion and localized scour. The key takeaway findings of the study was that the proposed structures would provide a reduction in wave energy and general protection to

the upland structures by reducing incident wave energy by protecting the shoreline. The shoreline, as currently oriented, allows for impacts because it is unstabalized. Not only does it allow for continued erosion and wave energy to reach the upland areas but it exacerbates this phenomenon by focusing the wave energy around the jetties and abutment on adjacent properties. This indicates that any sand that may leak onto the property from the adjacent upland areas would be eroded due to normal coastal processes and storm events. Chair Scarpelli asked if that was a result of adjacent coastal armouring and wanted that explained. Mr. Cheifet responded that the adjacent properties are hardened shorelines so when waves reach those areas, if it was unstabilized that energy would serve to erode the sandy shoreline, but because the adjacent areas are rocks and seawalls and are designed to remain in place, the energy cannot erode those structures, so it's forced to bend around them and go to areas where there's an unstabilized shoreline which causes erosion and scour. Mr. Hevia asked if it was Mr. Cheifet's opinion that due to those characteristics, whatever sand may have once been there has eroded and is unlikely to return. Mr. Cheifet stated that that was correct. The structures are put in place to address a problem which is in this case erosion, and those structures don't create sand, they merely retain it. The fact that the large structures at the park to the north extend pretty substantially into the water, they are obstructing the natural flow of sand, which in Florida is from north to south or in this case northeast to southwest. So any sand that would reach this property is going to be kicked out into the ocean by that structure, and will actually bypass this property. It is too close from the down drift side for the waves to push that sand back onto the property, which is evidenced by there not being sandy beach in front of any of these down drift properties, they're all hardened shorelines. Mr. Hevia presented a satellite image from 2012, and asked if over a period of time this illustrates the erosion at the site. Mr. Cheifet indicated that was correct. There is no beach berm here because it's not a hardened shoreline to retain that fill, so any fill that is there is being eroded and moved down drift to the southwest.

Mr. Hevia then called Mr. Robert Smith as his final witness. Mr. Robert Smith of Terranostra Ranch, 300 meters south of Cemetery, Costa Rica, has a bachelor's degree in mathematics, an additional bachelor's degree in general biology, a master's degree organismal ecology and another master's degree in biochemistry. From there he went to medical school to become a baro-geneticist. Mr. Smith has worked for the National Science Foundation, the Department of Fisheries for the National Marine Fisheries Service, the North Carolina Division of Marine Fisheries, and then worked for a private company that did land use planning for the Outer Banks of North Carolina. He was then hired to come to Monroe County to work on writing environmental portions of the County's Comprehensive Plan that was approved in 1986. Mr. Smith wrote the original draft of the turtle nesting ordinance for Monroe County in conjunction with the county biologist from Palm Beach County. Mr. Smith has testified as an expert witness in either a proceeding like this or in court approximately 125 times, including before the Planning Commission. Mr. Smith was recognized and accepted as an expert in biology with a specialization with listed species and critical habitat, and an expert in the Monroe County Code sea turtle protection and shoreline setback standards.

Mr. Hevia asked if the setback standards cited in the County's denial letter would apply where there is no viable beach berm complex, and whether there is a beach berm complex here. Mr.

Smith stated he would not consider the property to be a beach berm complex at this time. Many years past it would have been considered a beach berm complex in that turtles could use the area there, but currently all the sand has been eroded away and it's basically cap rock. Even the little bit of sand that's there more than likely came from the County beach next door where he did the permits to create that. Mr. Hevia asked for Mr. Smith's opinion from a policy perspective looking at this section of the code whether the intent of the code was to forever restrict the property's development simply due to a reported crawl from 20 years ago or if there was more to the analysis. Mr. Smith responded that there was more to the analysis than that. The original idea was that maybe things might change in the future. When you have an ordinance you might interpret it a little bit differently and go into conditions changing. Conditions did change and that was envisioned within the original writing of the turtle nesting ordinance by saying that if in fact when someone comes to apply for a building permit for something, the county biologist is supposed to ascertain at that point in time if the existing condition is what it was at the time when the ordinance was passed or not. And if it was or wasn't at that time, they should make a decision as to whether it is viable currently or not. And if it isn't viable permanently or at this point in time, they should consult with the state and/or federal government to see whether or not there was some way to fix that situation. So there is actually a code that allows the county biologist to overrule that if he felt he couldn't fix it, but you would have to ask the county biologist how they view that situation.

Mr. Hevia stated that this property had gone through a full building review process during the permitting of the single-family home, presented some documents, and then asked Mr. Smith to explain what the County did to review this property during the single-family home permitting process specifically as it pertains to endangered species and turtles. Mr. Smith reviewed WAYHI 651 titled an Existing Conditions Report which is codified in the County's Comp Plan as being a report with certain specifications as to what currently exists at the point in time that the biologist went out and looked at it. This report came from a biologist that was certified by Monroe County to perform such services and they did. They made mention of the type of vegetation that was there, to some extent the surface area of the property, what surrounded it, and basically that was it. They did not make any mention of anything related to turtles. Mr. Hevia then asked about the Species Focus Assessment Form from the Monroe County Growth Management Division. Mr. Smith stated those are forms used by Monroe County staff to review environmental characteristics of a piece of property and to ascertain whether or not there were further studies needed or further proof needed to determine whether there was any impact upon endangered species owing to whatever particular species may or may not have been there, and whether or not they are mapped as being there or not being there. Mr. Smith had reviewed the file and found no such presence of different species or turtles and there had been no issues raised during the permitting process for the home, and indicated that there weren't any. That was also the case for the building permit review worksheet which says that when you're going for a building permit, you're supposed to look at certain properties of the property and how they relate to the codes and ordinances that Monroe County has adopted, and this particular one went through the checklist that deals with what is the County going to submit to the DEO to see whether or not they agree with implementation and the granting of a permit, and does the implementation of that comply with the comp plan. The DEO usually agrees with that or objects

to it and appeals it. Based on his review, the staff went out to look at the site, did desktop review, and consulted a third-party biologist when reviewing this property for endangered species. The third-party biologist is usually the first person to go out because they're preparing information for the County to look at. Then the County goes out and is supposed to verify every existing conditions report, and there's a form that the owner has to sign that says that an existing conditions report has to be reviewed by the County and you're granting them the permission to come onto your property to verify all facts. Mr. Smith also went to the site to look at the shoreline and was there probably a hundred times when he worked for the County as he did all the parks projects. Mr. Smith's findings and observations on the current condition were that the County had recently gone in and enhanced their growing for the beach next door, and when they did do that, it appears that it exacerbated the amount of scouring or removing of sand from one area to another area. The amount of sand that was there was between nine and 13 inches deep, depending where you were on the property, and approximately one-half to one inch of it was sand that was not indigenous to the Florida Keys, but rather for the beach nourishment on the County Park.

Mr. Hevia then asked if this had been a turtle nesting beach in the past or if it ever would be again. Mr. Smith responded that the evidence he reviewed from the County's files indicated that a very long time ago, 15 years or so ago, there were some false crawls that went to the property, but there was also one that did actually hatch. Now, there's nowhere near enough sand for a turtle to make a clutch hole. Mr. Hevia mentioned correspondence from a County Code Officer Gintautas where he had reached out to FDEP and the Corps unilaterally and basically unilaterally determined that this was a turtle nesting beach, and Mr. Hevia asked if that was a usual way for these issues to be discussed interagency. Mr. Smith stated that he personally had never heard of it. The code enforcement biologist is supposed to deal with code enforcement, not new permit issuances. That's what the permitting biologist does and the County Biologist himself does. A code enforcement biologist is usually looking at whatever the complaint is and to see whether or not the complaint is viable or not. Mr. Smith thought it was unusual and generally speaking, the County doesn't want all of the staff going and making comments. They have a delegated person that does such and that would probably be the Assistant Director or the head of Environmental Resources, Mike Roberts, unless he delegates it to somebody else to go and contact other agencies as relate to a permit situation. Generally speaking, code enforcement cases of an environmental agency more often than not are started by the state or the federal government, and they may ask the County Biologist for his opinion. Mr. Hevia then asked how the County's turtle determination would impact the viability of the approved site plan for the overall project; i.e., the house. Mr. Smith responded that the County approved a building permit without mentioning in the conditions anything at all about setbacks for turtle nesting beaches. They indicated that it was an open shoreline with a 50-foot setback from there. If it had been indicated as being a turtle nesting beach it would have been a 100-foot setback from there which effectively would have rendered the property close to unbuildable. They submitted a stormwater management plan which had reverse swale berm excavations behind the house, and for them to get their certificate of occupancy according to what was approved, they would have to put in whatever the County agreed to, and they had pits that were dug behind the back of the house. For them to do that, they would have to put some kind of sand there because it's solid rock and

you can't make a berm out of a piece of rock, so a certificate of occupancy would not be able to be granted if they were basing it off of that exact same plan. Mr. Hevia asked if this would create a conundrum for the viability of the house if this decision stands. Mr. Smith responded that the substrate there is rock, the house itself is not going to move anywhere, but the back yard is going to continue to erode away from there, and it makes it either more difficult or they will have to change something with the County to allow them to direct the drainage the way that they were approved to do.

Commissioner Neugent asked if the seawall was included in the original building application or in a separate application. Mr. Crowley stated that it was a separate application, but the approval of the house was based on assumptions that this wall would be in place and would not be a sea turtle nesting beach. If it was classified as a sea turtle nesting beach, all of these site characteristics couldn't be located where they are located.

Mr. Peter Morris first stated that appellant has a single manager, Ms. Lisa Hartman, so when he refers to WAYHI he is referring to either Ms. Hartman or the corporate entities. Mr. Morris first cross-examined Mr. Robert Smith, asking how he had become acquainted with the appellant, WAYHI, LLC. Mr. Smith stated that a neighboring contractor had asked him to go over and look at their property, Steve Soto. Mr. Smith had not previously advised WAYHI prior to this litigation, and was hired after the December 21, 2021 date that this appeal was filed. Mr. Smith has testified approximately 125 times either in Monroe County, representing Monroe County, or in the State of Florida, federal state or whatever court system. Mr. Smith has been retained by private property owners to testify in appeals against Monroe County less than half of those times. More than half he has represented the government. Mr. Smith thought it would be about 50/50, so about 60 times. Mr. Smith will be paid for speaking here, but he doesn't know how much it will be until the appeal is finished. He has a written agreement which includes a confidentiality agreement where he is not allowed to disclose that. Mr. Morris stated that Mr. Smith is required to disclose what he is being paid. Mr. Hevia stated that a confidential engagement was prepared for possible litigation and certain terms of that cannot be disclosed. The exact rule on this legal issue he is not sure of. Mr. Crowley stated that he is getting paid by the hour. Mr. Morris stated that he is asking for the dollar rate for testifying today. Mr. Hevia stated that Mr. Smith could give the rate. Mr. Smith responded that he charges $1,000 to do a public hearing irrespective whether it's for an appeal or for an LOU or some kind of conditional use. On occasion, he has an hourly rate but not always. It depends on the circumstances. Where he already knows a situation, it wouldn't be right to charge somebody for that. He does not have an hourly rate for today, so it's $1,000 for testifying today.

Mr. Peter Morris then cross-examined Mr. Goldasich who stated he had become acquainted with WAYHI through the attorneys contacting him, and it was prior to December 21, 2021, probably in the fall. Mr. Goldasich has testified in litigation before, and had not ever been retained by a private property owner in the past to testify on their behalf, it was usually a corporation or government, and probably 20 times for a corporation. Mr. Goldasich is paid hourly at $225 per hour, and for testimony in deposition it is four times that. Mr. Goldasich is not professionally based in the Florida Keys but he works throughout Florida and the Caribbean. Past Florida Keys

clients have been Fury, Jeff Norman, Bonefish, and South Florida Regional Planning Counsel. Mr. Goldasich entered into the compensation agreement prior to the appeal filing and advised WAYHI on the permit application prior to the litigation. After conducting a site assessment, the professional advice was in the form of a report. Mr. Goldasich has testified regarding the Monroe County Development Code for every permit review, and every project in Monroe County takes into account the Monroe County Development Code. Since 2016, he has testified five times, but not in Monroe County.

Mr. Peter Morris then cross-examined Mr. Cheifet via Zoom. Mr. Cheifet was contacted by WAYHI's counsel last month in June of 2022. His firm receives $400 an hour. He has not testified in litigation regarding Monroe County in the past, and has not been retained by a private homeowner in the past, but by a developer just once. Mr. Cheifet's firm has hundreds of clients and he doesn't know them off the top of his head, but he has current contracts with the Cities of Marathon and Key West which are continuing service contracts, so when task orders are issued, the project managers assign them. He has worked for the City of Marathon and was the engineer of record on their beach re-nourishment project at Coco Plum a couple of years ago. He has never filed or assisted someone in filing a development application in Monroe County. He has not testified in litigation regarding the Land Development Code or Comp Plan since 2016.

Mr. Crowley summarized that his personal background is in marine environmental issues. He majored in environmental science and policy, completed the requirements for a bachelor of science in geology, focused on carbon and sedimentology from the Duke University Nicholas School of the Environment. He has a master's degree from Rosensteil School at the University of Miami. He has studied at marine field labs in Bimini, Nicaragua, the Florida Keys, is a certified free diver, scuba diver, and fishes every chance he can get. He appreciates the need for environmental protection and certainly the need to protect sea turtles, but environmental laws should not be administered in this manner. Everything that's going on has not been fair or appropriate to his client. The evidence that's been used is not evidence, it's hand drawings that are inadmissible hearsay that really cannot be used as a basis to deny this permit. The facts from experts show that the shoreline at this house is rock, and turtles cannot nest in rock. Everyone from the federal and state governments understood this and approved the permit. The only true evidence supports their position. Nevertheless, the County was led down this path by Gintautas and that resulted in the County denying an essential component of this home. It's now taken eight months to get to this hearing. The material the County relied on is hearsay, it's not admissible, violates the code, and the experts have demonstrated this today. Mr. Crowley respectfully requests the Commission reverse the denial so the building permit can be issued. He would like his co-counsel to enter the legal objections into the record so those are not waived per the Planning Commission Rules.

Mr. Nicholas Giesler, attorney with Bartlett Loeb Hinds and Thompson, PLLC, had prepared a list of written objections, the bulk of which deal with public records requests that have gone unanswered and also preserving rights for potential lawsuits for inverse condemnation and a Bert Harris claim. To save time, he can distribute the written objections if they will be entered into the record, otherwise he will read it into the record. Mr. Morris asked if they were disclosed

prior. Mr. Giesler stated this is a new document. Chair Scarpelli stated that it's not allowed into the record. Mr. Morris stated there are rules for timeliness requirements of five days. This is litigation by ambush. Mr. Giesler stated that he was happy to read the objections into the record. Chair Scarpelli responded that he could do that. Mr. Giesler asked if Mr. Morris was counsel to the Planning Director or to the Planning Commission. Mr. Morris explained that Mr. Stevens is general counsel to the Planning Commission, and that he is counsel to the Department. Mr. Giesler stated that it appears Mr. Morris is advising on the procedures of the meeting and not as an advocate of the Planning Director, and that is one of the objections. This firm represents WAYHI, LLC in connection with the referenced appeal. In addition to the materials and presentations submitted by our co-counsel, Ackerman, LLP, he wishes to submit for the Planning Commission's consideration the following concerns and objections.

Number one: It has taken WAYHI seven months to be given an opportunity to have its appeal heard during which time the County has violated not just its own code but Florida Sunshine Law by ignoring repeated public records requests. These failures to comply with governing law have deprived WAYHI of a meaningful opportunity to prepare for the appeal hearing. On their own, these issues should, in the interest of due process and fairness, compel the granting of WAYHI's appeal. WAYHI's participation in the appeal hearing is not intended as a waiver of its objections to the County's conduct.

Number two: It appears that the County Attorney's Office is acting as purported independent counsel to the Commission while at the same time zealously defending the County's denial of WAYHI's permit. There have been no disclosures of meetings between the County Attorney's Office and members of the Planning Commission, though the Commission's rules explicitly prohibit applicants from such ex parte communications. This one-sided conflict of interest raises significant due process concerns. There was also a disclosure at the beginning of this meeting that there was some sort of communication between Mr. Morris and the Commission prior to today's meeting, and he objects to that as an ex parte communication and violation of the code.

Number three: Similarly, the County improperly concealed records and made its determination on sea turtle nesting without proper notice and disclosure to WAYHI. The County has, however, allowed owners of neighboring similarly situated properties to conduct work similar to that governed by this permit. Moreover, the County has permitted work on its own shoreline armouring at Harry Harris Park that cite actual reports of nesting on that property. The County's scapegoating of WAYHI violates WAYHI's right to due process and equal unbiased treatment.

Number four: The County's denial of WAYHI's permit relies in its entirety on unreliable evidence provided by self-interested, biased and unreliable third parties, and an overzealous code enforcement officer. None of these materials are backed by objective science, but still were employed by the County to deprive WAYHI at the eleventh hour of the right to finish a project that had been under construction for nearly two years. As with the procedural failures to the timely disclosed record evidence, this evidence has substantive deficiencies that deprive WAYHI of basic due process protections.

Number five: In denying WAYHI's permit, the County is improperly seeking to undo its own prior determinations concerning permitting on the property. Because the final permitting and occupancy of the house are dependent on the shoreline stabilization permit, denial of the latter is functionally tantamount to reversal of the County's prior permitting approvals. Principles of estoppels and waiver should preclude such a belated contradictory decision. These post hoc decisions are an inordinate burden on and substantively deprive WAYHI of its vested right to make reasonable use of its property as well as its reasonable investment-backed expectations of such use. As such, the County's denial implicates causes of action permitted under Florida Statutes, as well as by the Florida and Federal Constitutions.

Mr. Giesler then asked for a ruling on the standing objection on the hearsay evidence that was presented by the County in the way of the unsubstantiated reports. The County Code provision was cited, Section 2-202D, which says hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible in civil actions. Chair Scarpelli asked why it was hearsay as it was actually done by a man that works for the DEP. Mr. Giesler responded that it's hearsay because he's not here today and in the procedures that were passed out today, section three, sworn statements and written comments, it says the presence and ability to cross-examine the author of an affidavit or similar sworn or attested statement is required for its admissibility into the record of the Planning Commission. So the point is he has no ability to cross-examine these witnesses, though the County had the ability to cross-examine his witnesses. He has no idea how these surveys were done, what these surveyors actually witnessed, or if they were even on the property. Substantial information was given on why that's not competent evidence that should be weighed by the Commission, but it also cannot be considered by the Commission, and he would like to get a ruling as to whether or not the Commission will be considering that evidence in its decision making.

Commissioner Ritz confirmed that the Save-A-Turtle survey was being referenced. Commissioner Demes stated that his overall assumption of this particular item is wow, but the statement was made that these turtle records are not admissible, they're hearsay and cannot be used to deny this permit, and he asked Mr. Morris to speak to that. Mr. Morris stated that he is prepared to respond with comments from the staff. Mr. Morris asked Mr. Mike Roberts to speak to the determination furnished by the documentation in the record that Mr. Giesler referred to. Mr. Roberts stated that he observed photos and maps of the area and in his expert opinion, based on the data submitted and reviewed, as to whether or not the area could potentially be a suitable nesting area, he would say yes, given the fact that turtles routinely nest in sub-prime nesting areas in the Keys. There are very few areas that actually have the 30-inch depth of sand referenced in earlier testimony. Mr. Morris asked if FWC delegates work done by Save A Turtle to look for habitat or potential habitat for turtle nesting. Mr. Roberts responded that FWC issues permits for the oversight of sea turtles here in the Keys. One of those permit holders is the Save-A-Turtle Foundation, and they routinely do the surveys for the nesting beaches throughout the County. Mr. Morris asked Mr. Roberts to comment on the species focus area assessment forms that Mr. Smith testified about. Mr. Roberts stated that those forms were a by-product of a lawsuit between FEMA, U.S. Fish and Wildlife Service, and he believes Last Stand, relative to

the management and oversight of the National Flood Insurance Program in the Keys. Those forms specifically referenced species that were in the Fish and Wildlife Service's biological opinion for that program, and specifically excluded marine mammals including sea turtles. Mr. Morris asked Mr. Roberts to comment on the building permit review process or PRP worksheet that Mr. Smith testified about. Mr. Roberts stated that those worksheets are specific to that lawsuit referenced earlier, and only to the endangered species that are included in that biological opinion and in that order. Mr. Morris stated that he hoped that furnished an adequate response with respect to corroborating what's present in those documents from the FWC Save-A-Turtle documentation.

Commissioner Demes asked, yes or no, is it hearsay or is it not hearsay. Mr. Morris stated that in his view it is not hearsay because it's been corroborated by the direct testimony of the live witness, but that Mr. Stevens could give the Commission advice on this issue. Mr. Giesler argued that it's actually the exact opposite. The idea is that not the witness can corroborate the hearsay evidence. Hearsay evidence is admissible in an administrative proceeding, a quasi-judicial proceeding, if it corroborates direct evidence. There was nothing heard from Mr. Roberts indicating that he was personally on the site or that he is basing his opinion on evidence that would be admissible in a court proceeding, and that is the standard. The standard is hearsay evidence is allowed into the record for the Board to consider if it is corroborating evidence that would otherwise be admissible in a court of law, and there has been no evidence that they permitted that laid the groundwork for the hearsay evidence to be admitted. Mr. Stevens stated that if the Commission believes the County provided testimony which would show that this was a turtle nesting zone, they can use that evidence to corroborate what the testimony is. If they do not believe the County provided any evidence that this is a turtle nesting zone, then they cannot use that statement.

Commissioner Ritz stated that what he heard Mr. Roberts say is even though it's not ideal it could be used for turtles to nest there, so he's asking if that makes it a turtle nesting zone. Commissioner Neugent stated it was a potential nesting zone. Commissioner Ritz asked if someone just walked in today and said here's this piece of property and you went out and reviewed this piece of property, would you say, yes, this is a turtle nesting zone. Ms. Schemper responded that there are several definitions in the code. Nesting area for sea turtles means both identified nesting areas and potential nesting areas. Nesting area identified means any area where sea turtles have been or are currently nesting, and the adjacent beach or other intertidal areas are used or accessed by the turtles. Nesting area potential for sea turtles means any area where sea turtle crawls have been observed and documented. Mr. Geisler asked if a decision had been made on the standing objection. Chair Scarpelli stated that they are trying to determine if the County has other evidence that they can offer in so that the Commission can allow this evidence. Commissioner Demes stated that Mr. Stevens' answer had been based upon the Commission's interpretation of what Mr. Roberts said as materially factual, whether you would think this is hearsay or not. Mr. Stevens clarified that if the County had presented any evidence here today as to this being a potential sea turtle nesting zone or in a sea turtle nesting zone, independent of that document, then you can consider that document as collaborating evidence. If that document is what the Commission solely believes shows potential or current nesting zone,

then you cannot use that document on its face by itself. Commissioner Ritz stated that he had asked Mr. Roberts a question, Ms. Schemper read something, and he's still trying to figure out what the answer to the question was, and that is looking at that property today, is it a turtle nest area. Chair Scarpelli interrupted that Mr. Roberts' testimony was this is a potential sea turtle nesting area, that that was his testimony, that's their evidence. Commissioner Ritz stated that Mr. Roberts hadn't said that yet. Mr. Roberts stated that his response was based on the definitions in the code, and he would consider it a suitable nesting area. Chair Scarpelli stated that with that being said, if his testimony is enough evidence to say that's a sea turtle nesting area, then you can then utilize the Save-A-Turtle FWC forms as evidence. But without recognizing Mr. Roberts' testimony as it being a sea turtle nesting area, the documents can't be looked at. Commissioner Ritz reiterated that he has never heard Mr. Roberts say the words, this site is a sea turtle nesting zone. Commissioner Demes stated that Mr. Roberts had stated potential, which is what kicks in what Ms. Schemper read. Chair Scarpelli added that Ms. Schemper had read that if there is potential under 118-12(p). Commissioner Ritz added that it talks about potential and ever seeing it there, but it doesn't say in 20 years. Chair Scarpelli stated that it doesn't matter, it could have been a hundred years ago and it doesn't matter according to that.

Mr. Giesler asked to cross-examine the witness for purposes of this hearsay determination. Mr. Morris asked to first add a few questions for Ms. Schemper. Mr. Morris asked Ms. Schemper if she is the custodian of the FWC documentation that's forming the subject of this query. Ms. Schemper responded that it's officially documentation of Florida Fish and Wildlife Conservation Commission, clarifying that she received those nesting documents from FWC when staff contacted them to verify what had been given to the County. Then they gave the County what they had in their records and they did have all of those same records in their own records. So these are on file with the state. This is not something that was just handed over by a neighbour and staff took it to be true. Steps were taken to verify that this was considered legitimate documentation. But, yes, once those records are given to the County, then they are kept in the County files as records. Mr. Morris asked if she regularly maintained custody of these records now. Ms. Schemper stated that yes, once given to the County, and these are the types of records she regularly has custody of. They set forth matters relating to activities of the Planning Department. The Department's employees in the course of their job duties are legally required to create reports or record such documents in the Department's files. FWC confirmed that these records are held and maintained by that state agency. Mr. Morris stated that for these reasons, in addition to the direct evidence provided by Mr. Roberts, these are also subject to the public records and business records exceptions to the hearsay rule. Mr. Stevens pulled up the exact exceptions and looked at the hearsay public exception rule to make sure the interagency still keeps within the definition of that. Mr. Morris reiterated that these were supplemental to Mr. Roberts' direct testimony. Chair Scarpelli interjected that as long as Mr. Stevens can say that the information can be kept in the record, then they would keep it there.

Mr. Giesler cross-examined Mr. Roberts and asked him whether he had been to this subject property. Mr. Roberts stated that he had not since before the house permit was issued, so he had not visited the site in the formulation of his opinion today. Mr. Giesler asked if a sea turtle could

dig in rock. Mr. Roberts responded that they are not equipped to dig in rock. Mr. Giesler asked if his testimony is that this is a potential sea turtle nesting area, and after seeing the pictures today, what property on the shoreline in Monroe County would not be a sea turtle nesting habitat. Mr. Roberts responded that given the flexibility of nesting for sea turtles, they attempt to nest countywide in open shorelines and there are very few that would naturally be excluded. However, this particular shoreline or this particular segment did support beach berm at one point in time, and that is essentially what created the potential suitability for this area. Mr. Giesler asked if Mr. Roberts thought the neighboring property was also a sea turtle nesting habitat. Mr. Roberts responded that barring any exclusionary obstacles, he would say yes. Mr. Giesler asked other than the reports that he contends are hearsay, what other data did Mr. Roberts rely on in formulating his opinion. Mr. Roberts stated that it was mostly the visual data related to mapping products the County has on hand as well as the physical photographs at the site.

Mr. Giesler then cross-examined Ms. Schemper about whether she had received these reports from FWC. Ms. Schemper explained that initially she received them through some other source through Gintautas, but they then contacted FWC and asked if they were legitimate records, and FWC sent what they had on file and it included the same reports. Mr. Giesler asked if she knew who authored the reports. Ms. Schemper responded that the names of the people who conducted the survey are written on the reports. The two attached to the denial were Jerry Wilkinson and Pat Wells. Mr. Giesler asked if they were employees or staff of FWC when they made the reports. Ms. Schemper did not know the relationship, but that certain people are permit holders for these surveys and they submit their documentation to FWC. Mr. Giesler asked if Ms. Schemper had consulted with the authors of the reports prior to today's hearing. Ms. Schemper responded that she considers these government records that came from FWC. She did not track down the staff members or consultants of government agencies to see who filled out their documentation.

Mr. Crowley stated that the point is they are not authored by FWC, they are offered by lay persons on FWC forms submitted to FWC. Ms. Schemper responded that therefore there would never be documentation of a sea turtle nesting site, which makes no sense at all. Mr. Crowley stated that there would be if FWC staff who were competent to make these determinations went out and made those determinations. Ms. Schemper stated that it's her understanding that they have determined that the people filling out these surveys are competent to do it and they have done the training, and she believes that Commissioner Demes has done this himself, so FWC determines whether they're competent. Commissioner Demes stated that the State of Florida does not have the staff to look at Florida's unbelievable miles of beach, so they have a program to train people. In his case, he focused on Navy properties, and those that want to volunteer their time can have different aspects of this support, one of which is salvagers, people who just like to do crawls, and people that would actually pick up an injured or dead turtle and dispose of it properly. There is mandatory training and you are put on a state permit that allows you to touch or deal with an endangered species as you want to be covered legally for your action interfacing with these protected species. So there's more to it than just some guy that picks up a form and writes this thing and sends it in. Commissioner Demes was impressed by the level of these

reports. People do it voluntarily and in this particular case, he applauds the person for the level of effort they did.

Mr. Giesler stated why he believes it is hearsay evidence and why it's problematic today. The slides were shown of all of the neighboring properties which the County has functionally said are not sea turtle nesting habitats. They all contain seawalls that would be within the setback lines. So what the County is saying, if they say this is a sea turtle nesting habitat, is that for some reason this property has special characteristics which the sea turtles are drawn to and they have to nest on this specific sliver of land, not on any of the neighboring properties, and the reason they believe this is because they have these reports from 20 years ago, but they have no idea what is special about the property that allows the sea turtles to nest on this land, and he doesn't have the opportunity to ask the authors of these reports because they're not here today. Mr. Crowley and the appellant's experts have shown that there's no sandy beach on this area that's suitable for turtle nesting, and that's created because of the hardening of the shorelines. The coastal engineer testified that any beach that may have existed there in the past has been scoured out. This shoreline is solid rock. There is no way a turtle can dig into rock. It makes no sense.

Ms. Schemper stated that Mr. Robert Smith testified that there was nine to 13 inches of sand on this beach so this is not purely rock. Ms. Schemper also stated that she had been to the site and had presented photos on the screen this morning. Mr. Stevens interjected that as to the request to look into the hearsay exception, it has already been discussed about the use of it if you believe the County provided other evidence. The other evidence that the County is saying that this is a public record report, to read verbatim from Florida Statutes, records, reports, statements reduced to writing or data calculations in any form of any public offices or agencies setting forth the activities of the office or the agencies or matters observed pursuant to the duty imposed by law as to the matters which there was a duty to report, excluding to criminal case matters observed by a police officer or other law enforcement personnel, unless the source of information or other circumstances show there's a lack of trustworthiness, the criminal case exclusion shall apply to an affidavit otherwise admissible under Chapters 316.1934 or Section 329-354. So if the Commission believes this is a public record report which has been reduced to writing, and you believe it has trustworthiness, you can rely on the public record report. Mr. Crowley interjected that that is why it's key to know who wrote it. If it's written by citizens, it's different than if it's written by agency staff. Commissioner Demes stated that he's familiar with Pat Wells' signature and that person who permit holder, and thank goodness. Commissioner Ritz stated that he believes it's admissible, that test has been met, and he is ready to move on. Chair Scarpelli agreed and stated the Commission would accept the FWC forms.

Commissioner Neugent added that this discussion could very well become moot depending on the motion made and that this is dragging on. Mr. Crowley seems to want to do something ahead of knowing how the Commission will support the appellant. Mr. Giesler stated that he was just trying to get a ruling on the record. Commissioner Neugent stated that the ruling may not be needed. Mr. Geisler responded that there could be a proceeding after this one, but the decision has been made and they accept the ruling. Commissioner Neugent explained that the reason he asked the question about whether these were two separate applications is because he believes

there's been a level of intellectual dishonesty, because he's thinking the applicant for the building permit said, I want to get my house built, and staff didn't know about this because this wasn't in the application to build this seawall. If it had been in the application, we wouldn't be here today because all of this would have been addressed months ago. Commissioner Demes asked, to Commissioner Neugent's point, when the house building permit was submitted versus the seawall permit. Commissioner Neugent stated that if the seawall was within the site plan it would have been addressed by staff back then. He believes that the seawall was left out because they knew there was a potential for what is being gone through right now. Ms. Schemper gave the permit dates. The single family house application was filed on December 12, 2018, issued on July 30, 2019. The retaining wall application was applied for on October 19, 2021. Further, these sea turtle setback rules and regulations were updated in 2016 where definitions and information were added regarding where things have been observed and documented so that is somewhat recent code.

Mr. Crowley asked to address the allegation of being intellectually dishonest. Commissioner Neugent stated he was referring to the original application. Mr. Crowley explained that this transpired with WAYHI submitting the building permit application which approved construction of the home and other site characteristics at the time such as shoreline setbacks and stormwater retention in the back yard. Those are things that could not have been approved if there was a turtle nesting beach present because the setback would be more and the stormwater retention couldn't be in the back yard. The County Biologist reviewed the existing report and made determinations this was not a sea turtle nesting beach, and the DEP and Army Corps applications were submitted well before the building permit was submitted to the County because those are prerequisite regulatory authorizations that must be had before obtaining a building permit. This is all part of development on the coast, which is not a simple process. There was no active manipulation of the process to try to delay this and it is not factually correct to say that. The record shows the beach is solid rock and turtles can't nest there, and he does not know how that is not understood. Chair Scarpelli stated that he doesn't know about that because there are a lot of sea turtle nests in the Florida Keys and not a lot of beach in the Florida Keys. Mr. Crowley reminded him that the County's biologist had testified that turtles cannot dig into rock.

Commissioner Demes added that this is going on and on, but he is right there with Mike Roberts. He would say wow to the presentation and the experts. Anybody that had just come into the Florida Keys would absolutely agree with the expert testimony that the appellant has put forward but he has personal experience to the contrary. At Truman Annex, NASKW, there is an unbelievable outcrop of cap rock and a pretty high velocity shoreline, there is no sand, and there's oolitic limestone that is still breaking down and somehow, these turtles didn't read the book on how they're supposed to behave, and they've nested and had a successful nest. Because there was a documented crawl there, it has to be considered very seriously. Commissioner Demes believes that with the competition for shoreline, some of these turtles will give it their all and they will use places like this because he has seen it in maybe worse places than this being talked about here. Is it outside the norm of the standard statistical bell curve, but he believes the person did an honest report, and he does not see any proof that that person was malicious, and he believes turtle nesting is possible. Under the definition of counsel, this is admissible, and he is

ready to move on with this. Mr. Crowley interjected that he hasn't seen any evidence of any turtle nesting at Truman Annex or anywhere in Key West, and has had no ability to review that and compare it to this situation here.

Mr. Patrick Stevens advised the Commission that the issue is the appeal of the Planning Director that this is sea turtle nesting. If there is testimony where the Commission believes this is potential sea turtle nesting then the Commission should rule on that. If there is not sea turtle nesting based on the testimony today, then that's how the Commission should rule. So it should be based on the evidence presented today in front of the Commission.

Commissioner Ritz stated that he believes the report from Save-The-Turtles is accurate, he doesn't doubt there were turtles nesting there almost exactly 20 years ago, but wishes the authors were here so he could question them. The key word here is potential. Mr. Roberts testified there are lots of areas that are potential. The question was asked, are there areas where there's not potential, and there's not many areas in the Florida Keys that are not potential sea turtle nesting areas. So the question is are we going to protect every single area that's a potential sea turtle nesting area even if it's hard rock and scarified, or are we only going to protect those areas that fit in that bell curve that are more likely sea turtle nesting areas. Chair Scarpelli interjected, or when there's evidence of sea turtles. Commissioner Ritz agreed when there's evidence of sea turtles, but does 20 years ago mean anything. Chair Scarpelli stated that the appellant could have another analysis and determination done now. Commissioner Ritz continued that 20 years seems like a long time to him but maybe not for a turtle. Commissioner Demes stated the answer to the question is going to be an individual decision based on peoples' experience and the case put forward at the time, period. Commissioner Ritz added that looking at this particular case, all the neighbors are lined up and the County, and there's this little sliver of land left that we're trying to protect in case a turtle comes back to this one little sliver. Commissioner Neugent asked are we not doing this because all the other areas have rip rap so the turtle cannot nest in that area. Mr. Roberts had said that Harry Harris Beach is and appears to be a much better potential place for a turtle to try to nest. Commissioner Ritz stated, if he was a turtle, he would go there. Commissioner Neugent agreed, especially if the seawall is allowed on this property, then he would go to Harry Harris maybe or go look for another place. Mr. Crowley interjected that that places the entire burden on this property owner to accommodate sea turtle nesting for this part of the island, which the experts have said doesn't happen. Harry Harris Park just got permits to rebuild this extensive rip rap jetty system, there's a boat ramp at Harry Harris Park, and all the other shorelines are hardened shorelines. This one area where there happens to be rock and no sand now has to be treated differently. It's unfair and not something he agrees with, and unfortunately they will have to continue fighting this.

Ms. Schemper interjected that what is making her uncomfortable right now is with reading the code about applying the turtle setback, it specifically says that beaches known to service nesting for marine turtles are those areas documented as such on the County's threatened and endangered species map and any areas for which nesting or nesting attempts, crawls, have been otherwise documented. When she reads that, it's been documented, and she must apply the turtle setback. Then there's a separate section in the Comp Plan and Code that says that the County, in

cooperation with DEP, can evaluate whether or not the site is still suitable for nesting. If it's determined that it's no longer suitable for nesting, then staff can look into can this beach be restored and become suitable for nesting again. If it can't, then there's a provision where she does not have to apply the setback. So this is not really the correct venue. DEP is not here, so how can it be determined that it's no longer suitable. Commissioner Ritz added that they already have permits from the state and the feds who looked at it and issued the permits. Commissioner Ritz read that over and over again. So that means a hundred years from now, because there was something noted in 2001, in the year 2061 is that still going to be used as evidence. Chair Scarpelli thought it sounded like it needs to be re-evaluated. Commissioner Neugent added there's a letter from the Director of the Sanctuary, and they control up to the mean high water level, and she said that there is no identifiable impact to the resources within the Sanctuary which would include turtles. Mr. Crowley pointed out that talking about the notion of potential turtle nesting, there's an important prerequisite in the County Code language that is it has to be part of a beach berm complex first. And then, if it's part of a beach berm complex, these other issues of potential nesting can come into effect. So you've got to have the beach berm complex first that is known to be a potential nesting area for marine turtles. His experts have all testified this is not a beach berm complex. You don't have a beach berm compex on a rocky shoreline like this. Therefore, these other issues about potential or past nesting are not applicable.

Chair Scarpelli stated that he could see their point. Commissioner Ritz asked for the question to be called. Mr. Crowley added that all of the designations from the state and federal wildlife agencies never deemed this to be sea turtle nesting, they have all reviewed the permits and none of them decided this was turtle nesting habitat, and they issued permits including Army Corps, U.S. Fish and Wildlife, National Marine Fisheries Service, DEP, Florida Fish and Wildlife Conservation Commission. Then at the last minute, somebody submits these reports and now all bets are off. Chair Scarpelli asked if DEP reviewed for a permit like this or even looked into sea turtle stuff. Mr. Roberts stated the permit issued in this case was an exemption so they didn't review it. Mr. Crowley stated that that is absolutely not true. Any time you apply to the agencies for an exemption they review it very carefully to determine if you meet the criteria of the exemption. Any time you're asking an agency for an exemption or a programmatic authorization, the application is reviewed extremely carefully to make sure the parameters of those exemptions or programmatic authorizations are adhered to. Chair Scarpelli added that that's why it takes nine months to get it back. Mr. Crowley agreed, and an additional eight months to get an appeal. Mr. Giesler added that organisms can do funky things and it's not out of the realm of possibility that someday, a sea turtle will find a nook and cranny in every single property that's on the shoreline of this County, but the duty today is to weigh the evidence and determine whether this fit the code, and is the Commission prepared to make a decision today to say because life will find a way, and these are amazing creatures, are we going to deem every single property in the County as a potential nesting habitat, and then if so, why do we even have this process to begin with then. The setback for everybody should be set the same if every property is a potential habitat, and then this entire process is meaningless. Chair Scarpelli added that this kicks in when a property has documentation of sea turtle habitat, not for a property that doesn't have Save-The-Turtle documentation. Commissioner Demes added that on the same

plane that he accepts the documented crawls by a state-permitted entity, and Mr. Roberts has stated the potential nature of that, he also accepts the survey that is quite questionable to him.

Commissioner Neugent stated he is wrestling with the competing opinions. You have letters from the Sanctuary, knowing how difficult they can be on issues, that says there's no impact to the resources, and he completely understands the conundrum of potential. Ms. Schemper pointed out that the sea turtles don't reach maturity for quite a few years, so it may have been 20 years but this may be the time those turtles are coming back, as they come back to the same general area. Mr. Crowley added that it's improper to take away property rights based on something completely speculative that hasn't been enforced anywhere else on this shoreline. The overwhelming evidence here suggests this is not an appropriate application of the regulations. Chair Scarpelli stated that that is where there is the ability to re-review that with the Planning Director and DEP to make a determination upon the viability of that site currently, not based upon 20 years ago. Mr. Roberts interjected that Pat Wells was the former manager of John Pennekamp State Park and has been retired for many, many years. Commissioner Thomas stated she has been relatively quiet through this whole thing but she believes this horse has been beaten way beyond death. If it was her business and meeting, it would have ended hours ago. She would like to call the question.

Motion: Commissioner Thomas made a motion to deny the appeal. Commissioner Demes seconded the motion.

Roll Call: Commissioner Demes, Yes; Commissioner Thomas, Yes; Commissioner Neugent, No; Commissioner Ritz, No; Chair Scarpelli, Yes. The motion passed 3 to 2.

(5-minute recess)

3. COMMUNITY HEALTH OF SOUTH FLORIDA INC., 228 ATLANTIC BLVD., KEY LARGO, MILE MARKER 99: A PUBLIC HEARING CONCERNING A REQUEST FOR VARIANCES TO THE PRIMARY FRONT, SECONDARY FRONT, AND REAR YARD SETBACK REQUIREMENTS, AND THE OFF-STREET PARKING REQUIREMENTS IN ORDER TO ACCOMMODATE THE CHANGE OF SPECIFIC USE OF AN EXISTING NONCONFORMING PROPERTY FROM GENERAL OFFICE TO MEDICAL OFFICE. THE SUBJECT PROPERTY IS LOCATED AT 228 ATLANTIC BOULEVARD, KEY LARGO, AND IS LEGALLY DESCRIBED AS LOTS 228 AND 229, PORT LARGO FIRST ADDITION, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 6, PAGE 48, PUBLIC RECORDS OF MONROE COUNTY, FLORIDA, HAVING PARCEL IDENTIFICATION NUMBER 00453471-002100. (FILE 2022-055).

(2:09 p.m.) Ms. Devin Tolpin, Principal Planner, presented the staff report. This item is a request for a variance to our off-street parking requirements and the setback requirements. The property's zoning district is Urban Commercial and designated as Tier III. The property is currently developed with a lawfully nonconforming office building that the applicant is proposing to convert into a medical office. Because there is a substantial improvement of the structure involved, the compliance requirements are triggered. The change of specific use from office to medical office is requiring compliance with the Land Development Code, and parking

spaces are generally the overarching issue. There are many existing parking spaces but they are located within the required setbacks. Ms. Tolpin presented the site plan showing the setbacks. The secondary front yard setback is adjacent to Atlantic Boulevard, and the primary front yard setback is adjacent to Homestead Avenue. The applicant is proposing to maintain the current configuration in order to convert the property. The variances requested are: Nine feet and four inches to the 15-foot secondary front yard setback which would result in approval of a five foot eight inch setback as measured from the northwestern property line to an existing parking space. They are not putting new parking spaces within the setback. These are existing spaces present today. A variance of eleven feet and four inches to the primary front-yard setback and approval would result in existing parking spaces that are three feet and eight inches from the property line, and eight feet and nine inches from the property line adjacent to Atlantic Boulevard. Also, a variance of five and-a-half feet to the 10-foot rear yard setback which will result in a four feet and six inch setback measured from an existing parking space, and to a new chiller which is one of the new structures that are being proposed. Also, a variance to the number of parking spaces required for this kind of development. The Land Development Code for a medical office of this size would require approximately 33 off-street parking spaces. The applicant has submitted a study prepared by a transportation engineer that is stating that based on their proposed operation and phasing of opening days for different specialties within the medical office, that they do only need 21 parking spaces. Although their transportation study notes they only need 21 parking spaces, they are proposing 23. They are also requesting a reduction in the space between parking spaces so the access aisle for cars to park, one is going to be approximately a reduction from 24 feet to 21 and-a-half feet, and another from 24 feet to 21 feet. On the southern portion of the property closer to the rear line, the code for those two parallel parking spaces would require a 12-foot access drive, and they are requesting a reduction down to approximately nine feet. They are also asking for a reduction in the design and dimensional requirements of the parking spaces. The Land Development Code requires parking spaces to be 18 feet in length. They are requesting that it be reduced down to 16 feet for those spaces on the northern property line adjacent to Homestead Avenue. This is fairly customary in other municipalities. Because of the wheel stop, the front of the car will usually hang over. Based on the information provided, staff is recommending approval of the requested variance. The applicant has met the eight required criteria. However, staff is recommending the condition be added to this approval that it is based on the specific transportation study that was submitted, so if any change of use or operation increases the number of parking spaces that are required is proposed or occurs over time, then an additional review by the Planning Director and potentially the Planning Commission will be required to reevaluate that reduction in off-street parking.

Chair Scarpelli asked for questions or comments from the Commission. Commissioner Demes stated he was familiar with the 18 going to 16, and then asked if the standard width is eight-foot-six for vehicle width. Ms. Tolpin confirmed that to be correct. Commissioner Demes commented that for a medical facility, you would think there would be more than the one ADA spot. Going back to the diagrams, Commissioner Demes has always thought the rear yard was opposite the front yard, so he is asking for the rationale of having the rear yard 90 degrees from the primary front yard. Ms. Tolpin responded that the code allows some flexibility when there are two front yards. The language is along the lines of the rear yard is generally opposite the front yard, not specifying whether it's the secondary front yard or the primary front yard. Ms.

Tolpin also corrected that the rear yard setback is 10 feet, not 25. There were no further questions for Ms. Tolpin. Chair Scarpelli then asked for public comment.

Ms. Dottie Moses of Key Largo stated that this is a complicated nonconforming building with a lot of issues that seemingly cannot be addressed. The question is how it ever got built in the first place. This property attempted to get an off-site parking agreement to add ten more parking spaces, but they couldn't find anyone to accommodate them so they just abandoned that and went to the lesser number of parking spaces and determined they don't need all that parking. There are a lot of parking problems in Key Largo with previously-approved projects, and there is now parking all over the place. People are crossing the highway, parking on right-of-ways, and have been chased out of other business parking lots because they've encroached onto them. She is very concerned what could happen in this neighbourhood. There's a four-way stop there that is already busy and a light that backs up, and there's a park with children. The other thing is the chiller. Because the building is too high, the chiller has to go on the ground. There have been problems on other properties where chillers on the ground have been loud and have impacted next door neighbors with the loudness of the chiller. Additionally, it doesn't seem that they've decided where their dumpster or loading zone is going to go, which may impact the parking area further. One of the things not made clear in this site plan is the throughway in this parking plan. The throughway on one side actually goes under the building, so there's a height limit to that throughway, not only a width limit. Right now, the columns to the building that are elevated have fenders on them because the parking spaces back up right next to the columns. It's a very tight design that makes it very complicated to be used well. She is concerned that people will avoid the parking lot altogether because of the smaller spaces being offered. If you got in there and had to get out, that would be complicated as well. Though she does not know how to solve this problem, it seems like this makes it worse with the nonconforming building and making it even more nonconforming. Ms. Moses supports any conditions the staff would put on the item. The other problem is who will enforce this if they do find themselves parking throughout the neighbourhood.

Mr. Paul Bean attempted to give comment, but had technical difficulties. Chair Scarpelli suggested that he call in, and he was instructed how to do so multiple times. It was determined he would be unable to participate. There was no further public comment. Public comment was closed.

Mr. Nicolae Popescu, the registered architect and owner's authorized agent, stated that he has had the privilege of being the architect for Community Health for almost ten years. Community Health of South Florida, Inc. is the largest federally funded medical clinic in the State of Florida and they have been providing services to those in most need, those with or without insurance, those who can or can't afford it, and those that can pay or can't pay, for the last 50 years in the state. It's been an honor to work with them and to help develop their clinics in areas where it is generally hard to access medical care such as Key Largo. They purchased this building in 2019 with an existing CO as an office building. The presented layout is exactly as it was. The only difference is the chiller on the bottom where there was an existing concrete block wall where it was decided to use that as the platform for the chiller. To come up to the current life safety code and improve the health and safety of the building, an additional egress is being added to the front

of the building because the building only had a scissor stair for egress for the entire building in the past.

Commissioner Demes asked if Mr. Popescu could use a pointer to point things out. Mr. Popescu pointed out the existing block wall where the chiller is being placed, so the setback is the same. He pointed out where there were two parking spaces where the emergency egress for life safety. He pointed out three parking spaces where a handicap accessible spot was added. This building did not have an ADA accessible stall. Per Florida Building Code, only one ADA stall is required for the amount of parking they have. The traffic study was submitted which included the parking study showing that 21 parking spaces would be required. Mr. Popescu pointed out what had been two two-way access aisles with existing dimensions being the way they always worked since this building was approved. The traffic pattern is being changed to one way in, one way around, and one way out to increase the safety and traffic flow of the project. Everything else is exactly the same as the purchased building. The landscape median is being increased, adding additional landscaping to the building. The parking study was submitted at the beginning of the permit application. They were told and were approved at 28, and per today's code they needed 33, which is when they tried to enter into the off-site parking agreement because they weren't trying to ask for all of these variances or waivers. Ms. Maryanne Fanicio (phonetic), representing CHI locally, spent four months scouring the area trying to find something close enough to be able to enter into a parking agreement. A parking agreement was actually entered into with the Lion's Club.

Ms. Fanicio, the Vice President of Human Relations and Business Development in Monroe County, living in Monroe County, has worked with CHI for almost three years which serves the Upper, Middle and Lower Keys. The center in Tavernier will be closed once this center is opened. Ms. Fanicio thanked the Planning Department team for all of their help with this. She explained that she had looked for a parking agreement and found the Civic Club at the end of the street who agreed to sign that parking agreement. However, going back to the Planning Department, it turned out that it was not within the zone needed. It's not that it was abandoned, but when she went back thhey came up with other alternatives, which is why they are here now to look at the variances, given the fact that there is the parking study and are they able to justify the fact that there are enough parking spaces. She is hoping to get the Commission's approval for this. Mr. Popescu added that it was determined that they would not need a loading zone because CHI does all of their own deliveries, with a centralized logistic center which sends small delivery vans to each facility. There are no trucks that ever bring deliveries to any of their medical centers. Lastly, because it is relatively difficult to provide these medical services and the providers within the Keys, CHI has implemented a system of rotational services for their doctors and their specialties for all of their facilities in the Keys, and are very well aware of all of the parking issues in any of the Keys, not just this area. So they schedule their patients in a way where they have never had any parking issues in Marathon or Key West. Ms. Fanicio added that they stagger their providers so there are not multiple providers at one time and an overload on any one center. It's a challenge to staff anyway so they are working to provide those services under those conditions. Mr. Popescu also pointed out two dumpsters and the recycling bins, indicating they had been addressed within the site plan.

Commissioner Thomas asked about the noise with the chiller. She lives not too far from Marathon High School and she feels sorry for the people living across the street with the equipment they run. She asked for some idea about how loud these things are and whether people would hear it in their house with their doors closed. Mr. Popescu stated they would not, and there are no residential properties on that side. Commissioner Thomas asked for confirmation that it would be in the general area near Walgreens and Office Depot. Mr. Popescu stated he is not sure what the noise volume is, but it's in the specifications of the chiller submitted with the mechanical permit, and these new chillers are not very loud. Commissioner Thomas asked if it was like the new dishwashers. Mr. Popescu stated that that was correct, it's a cold water chiller that really doesn't make that much noise, plus there's a whole row of shrubs and landscaping they are planning on keeping and they are adding additional landscaping. So they are trying to mitigate the noise as much as possible but he does not see an issue with it. It does not run all the time, it cycles, and would only be from 9:00 to 5:00.

Commissioner Demes asked if there was an answer on what is adjacent to the back yard, and Ms. Tolpin confirmed it was single-family residences. Commissioner Demes asked the square footage of the building. Mr. Popescu responded that total square footage under AC is nine-thousand-and-change. Commissioner Demes asked if that would equate to a 12-ton AC, and Mr. Popescu believed that to be correct. Commissioner Demes then asked if there was a 12-to-1 ADA ramp to the second level. Mr. Popescu pointed out the ramp, indicating there had been no ADA access prior and that they had created that access, and he then pointed out the elevator. Mr. Popescu stated that on the second and third floor are areas of refuge which were created for people with disabilities within the stairwell, which is protected, in case the elevator loses power. There is an area within the staircase, fire rated and protected, for them to wait out the situation, called an area of refuge. Commissioner Demes stated that he could see all of the parking spaces, but that space ten is a little sporting, easy to get into but difficult to get out of with parallel parking. He would not want to park in nine or ten, but that's very interesting. He understands the one-way versus two-way, and Mr. Popescu stated that it's actually a 24-foot width which accommodates two-way. There are areas within the state that allow 90-degree parking with one way out to be 20-feet in width. Ms. Tolpin interjected that the code still requires the 24 feet and that's why they had to request the variance. Commissioner Demes confirmed that he had heard there would be different specialties coming in at different times indicating they would be aware of what the demand for parking would be and it would not be helter-skelter. Ms. Fanicio responded that there are schedules for each of the providers, so they will know exactly how many patients are scheduled. Mr. Popescu added that CHI has been a federally funded medical operator for over 50 years, and are not in the business of buying buildings and then flipping them. Once they come into an area, they stay there, and they provide medical services for as long as they can.

Commissioner Ritz made a motion to approve the variance based on staff's conditions. Commissioner Demes seconded it.

Mr. Bean then managed to get connected for public comment. Mr. Patrick Stevens stated that there was a motion, a second, all testimony had been heard. Unfortunately, we cannot always accommodate for all equipment failures.

Motion: Commissioner Ritz made a motion to approve. Commissioner Demes seconded the motion. There was no opposition. The motion passed unanimously.

BOARD DISCUSSION

ADJOURNMENT

The Monroe County Planning Commission meeting was adjourned at 2:45 p.m.