

TRANSCRIPT OF THE MEETING OF THE  
COLLIER COUNTY HEARING EXAMINER  
Naples, Florida  
June 30, 2016 (Continued from June 23, 2016)

LET IT BE REMEMBERED, that the Collier County Hearing Examiner, in and for the County of Collier, having conducted business herein, met on this date at 5:00 p.m., in SPECIAL SESSION in Building "F" of the Government Complex, East Naples, Florida, with the following people present:

HEARING EXAMINER MARK STRAIN

ALSO PRESENT: Fred Reischl, Principal Planner  
Mike Bosi, Planning and Zoning Director  
Heidi Ashton-Cicko, Managing Assistant County Attorney

PROCEEDINGS

HEARING EXAMINER STRAIN: Ladies and gentlemen, good evening. Welcome to the Thursday, June 30th meeting of the Collier County Hearing Examiner's Office. This is the continuation of the June 23rd meeting.

If everybody will please rise for Pledge of Allegiance.

(The Pledge of Allegiance was recited in unison.)

HEARING EXAMINER STRAIN: Thank you.

Review of the agenda: We have two items that we started last week that are continued tonight. The first one is Petition No. ASW-PL20150002369, also known as the automobile station waiver for the Racetrac Petroleum facility proposed for U.S. 41 between Frederick and Palm.

The second item is Petition No. VAC-PL2015002788 (sic). It's the Racetrac Petroleum, Inc., same location, for a vacation of right-of-ways.

There are no minutes from our last meeting available yet, so there's none of those to be reviewed.

And with that, I need to follow up on some cleanup items from last meeting. At the last meeting I had asked several questions of the applicant and one of a member of the public. Since that time I've received answers. Wayne Arnold, who is the planner for the applicant, provided an answer to a question concerning the number of fuel pumps and their adjacency to the residential product that he showed on his planning -- or on his maps last time.

Ted Treesh is the gentleman who did the traffic study. He provided some additional information based on the questions I asked about the FDOT study.

Mr. Yovanovich, who's the attorney for the applicant, provided some new information that is relevant to the questions I asked concerning things I found on the appraisal that was briefly talked about. I guess it's not an appraisal; it's a comparable analysis.

And then Vern Hammett provided to me his speech in text in response to my question of getting the map that he had put up there.

Now, those four items I've provided to the court reporter for part of the record. And I did check; everything that's been added to the record is on the Clerk of Court's website.

I've given extra copies to Fred Reischl. Fred Reischl also has all of these already in electronic format as they came in. So if anybody needs any of these records, if you contact Fred at any time, he can email them to you. There are a couple hard copies available if someone needs those.

I'm going to bring up some reminders from our last meeting. First of all, this is a case that was remanded back to my office from the Board of County Commissioners for analysis and findings of fact. This is an evidentiary hearing. I'm trying to get information. That information will be used to create a document to go forward to the Board of County Commissioners in which they will make a final decision sometime in the fall when this is done.

We're going to be hearing both the automobile station waiver and the vacation application simultaneously tonight. So if you have issues with either one when you come up for your time to speak, you can talk about both of them or just one of them.

The format of the meeting -- first of all, it's televised and transcribed. So if you want to see this meeting again and you feel like you want entertainment, I guess you could pull it up at home and watch it.

The young lady up front is our court reporter. Every hour and a half or two hours we'll break to give her fingers a rest. But she is transcribing the meeting. And as soon as she finishes moving it into written format, it will be available to the public.

Last time we heard from the applicant, and then we went directly into public speakers. We got two hours of public speakers heard last week. We're going to start with the public speakers tonight. If there is time after the public speakers, I'll ask for some comments from staff, I may have some questions, and then there will be a rebuttal period for the applicant.

If you're a public speaker, you need to register with a speaker slip, and they're on the table out front. Please provide them to the gentleman to my left. There are two staff members. It's Fred and Mike.

Also out front is the agenda for tonight's meeting giving you an indication of the numbers of the cases

being heard, and there's a handout that we had last week that described the process in a little more detail.

All speakers will be under oath. You must fill out the speaker slip to speak. You can only speak once. We need to please avoid redundancy. If you spoke last week, this is a continuation of that meeting, so that was your speaking opportunity.

Please identify yourself when you come to the speaker. Speaker clearly; not too fast so she can type as fast as you talk. And I'm probably the one that is the most violator of that.

If you agree with the speaker and you want to just come up and say you agree with the previous speaker, that's fine, too.

After all the speakers, then we'll get into the other issues of rebuttal and any questions of staff if we have time.

This is a quasi-judicial hearing. A certain amount of decorum is needed. Please do not shout or make comments from the audience. Please do not applaud or otherwise react to specific speakers. And all materials that are used that are put on the screen or brought forward during the meeting and as part of the public speaking must be supplied, a copy, for the record.

And with that, we will move directly into public speakers, and we'll start off where we left off last week. Some of the speakers towards the end of last week had already left. We're going to start by calling them first, and then we'll move through any other speakers that have been registered by the speaker slips that Mike has.

So as you're called, please go up to either one of the mikes. Mike Bosi will call two names so that the second person is ready to come up right after the first person finishes.

Mike?

MR. BOSI: Thank you, Mr. Strain.

The first speaker would be Kathy Volland. Kathy Volland?

(No response.)

MR. BOSI: The speaker after that would be Maarten Heybroek.

HEARING EXAMINER STRAIN: Mr. Heybroek's here.

THE COURT REPORTER: Do you want me to swear them all in at once?

HEARING EXAMINER STRAIN: I'm sorry. That's -- thank you. All those wishing to testify on behalf this item, please rise to be sworn in by the court reporter.

(The speakers were duly sworn and indicated in the affirmative.)

HEARING EXAMINER STRAIN: And disclosures on my part, since last meeting I've provided the documentation I've received as -- to be admitted to the record.

I have talked to the applicant; I have had correspondence, I think a conversation with a member of the public, Vern Hammett; and I've certainly talked to staff and others involved in the county system to get some clarification on issues.

And with that i mind, we'll move right to our speaker. Mr. Heybroek?

MR. HEYBROEK: Okay. I'd like to thank you for allowing me to address this forum. I do not have the gift of the gab, as the opponents have, as I'm constrained by an artificially imposed five-minute limit.

We're here to talk about a variance to a restriction that we have in our law. This is not, for me, a case of whether we want a Walmart or a Saks Fifth Avenue on a commercially-zoned property.

I think these restrictions that we have have been imposed by the county with good cause. And as I understand it, what's being proposed by Racetrac is to be within a 50 feet distance of another station that's across the road on 41. I don't think that this should move forward, and I have certain concerns about it.

The area in question is a natural floodplain. I've seen many times after a storm how that area gets flooded, and I'm wondering what's going to happen if that area's paved over and we have a significant storm that hits the area. Are we going to see that water cascade onto the roads?

Building another gas station, okay, does not to me appear to be consistent with the restoration of the area, the new nine-story building that's supposed to be erected at Davis Boulevard and 41.

Facilities like Racetrac, okay, can become loitering areas for drug and other illegal activities. Our area has enough issues with illegal drugs on Bayshore, which is very, very close to the area where a Racetrac wants to build. I don't want to see it get worse.

Lastly, there's an important aquifer supposedly underneath the property. It used to be a canal, as I understand it. And I'd like to know if an environmental study has taken place to determine if spilled gas is going to make its way into the aquifer and eventually into the Gordon River. Those are my major comments about the Racetrac thing.

I'd just like to talk a little bit about the proponent's presentation, if I'm allowed to. I found last week when I was sitting here that it lacked cohesive and coordinated understanding of the plan. I didn't know if we were looking at Plan A, Plan B, Plan C, Plan D, or whatever it was. It didn't make sense.

The time limit for other than the attorney was scheduled for 45 minutes. It went on for two-and-a-half hours. I think it should have been stopped at 45 minutes.

Architectural renderings that were provided to this forum did not include any signage that I saw other than a Racetrac symbol on top of the structure itself. I notice from Racetrac gas stations in our area that they have what I would call a neon sign -- it might be an LED sign -- that sits prominently out on the street and shows the price of the gas. Where is that on the renderings that were shown last week?

The property appraisal is, in my book, unprofessional. It could have been done on the back of an envelope. River Reach is not the same as Royal Harbor.

Architectural review on plantings were irrelevant to the variance. We should have seen berms, what the height was, and what the foliage would do to block the area.

I think that in some cases the attorney argued with respect to Collier County regulations. I think this is inappropriate; any such argument should take place in a court of law.

And I think that the variance should not be given to Racetrac. Thank you very much.

HEARING EXAMINER STRAIN: Thank you, sir.

Next speaker, Mike?

MR. BOSI: Next speaker is Gloria Katz. Gloria Katz?

(No response.)

MR. BOSI: Followed by Molly Whalen. Molly Whalen?

(No response.)

MR. BOSI: Lee Flandreau? Lee Flandreau?

(No response.)

MR. BOSI: Karen Beatty. Karen Beatty?

MS. BEATTY: Hello. Thank you for this opportunity to speak today. I'm weighing in today -- I'm Karen Beatty. I'm weighing in on this proposed Racetrac on East 41 as a citizen, a realtor, and a 12-year board member of the Bayshore/Gateway Triangle.

As a citizen, I've lived in Naples since 1977 within a mile of this proposed Racetrac, since 1986, off Bayshore. I frequently, throughout the years, have cut through the various roads from Bayshore to Palm Street in a car and bicycle to circumvent the light at Bayshore and U.S. 41. I've seen many others do the same.

I have always loved Palm Drive and the lovely well-maintained villa homes there. I also think the charming Frederick Street is one of a kind in Naples and one of East Naples' cherished scenic views. It is truly a slice of Olde Florida and something we need.

As a citizen, I have purchased my gas and convenience store items on U.S. 41 at Voigt's Texaco at Bayshore or the convenience store there, and the 7-Eleven at Commercial and Palm, both within a mile and the other across the street from this proposed location.

I don't need another gas station, and I'm very concerned about the severe congestion that a proposed Racetrac would cause not only on Palm Drive and Frederick Streets but on all the little streets nearby that are connected. And I have a map here.

Most importantly, it will affect all citizens driving east and west on U.S. 41 South. As you are probably aware, the southwest quarter of Naples is one of the fastest growing areas right now and very hot with development.

Bayshore Drive alone will have multiple developments happening simultaneously in the next few years, creating a tremendous increase in traffic going west into downtown Naples on U.S. 41.

Over the last two years, a steady increase of traffic has been noted, and that congestion heading towards downtown and the Gulf of Mexico starts near Commerce, Palm, and U.S. 41.

My office is two miles from my home, which is on Bayshore in this direction; however, in the season it can take me 20 to 25 minutes to get there.

Racetrac, with its reputation for less expensive gas, will attract many trucks with boat trailers on their way to Bayview Park or the City of Naples boat launch. The congestion in and out of narrow Frederick Street and Palm Drive near the proposed Racetrac will be ridiculously unsafe for bicyclists, pedestrians, and pets.

Neither of these streets have sidewalks. It's a natural that trucks will quickly figure out other options of using some of the nearby side roads to circumvent that congestion.

If traffic is too busy at the intersection of Palm and U.S. 41, or Frederick and U.S. 41, it won't take long for drivers to figure out they can turn from Palm onto Monroe, Monroe or Frederick to Clark, to Curtis, to Sandpiper.

Trust me, the locals already know these routes. These are tiny streets that look a lot larger on the map. I concur 100 percent with the testimony of Vern Hamlet (sic) and Gale Burden (sic) last week with all they said.

I'm also weighing in today as a realtor. I've been a full-time realtor in Naples since 1995 representing buyers, sellers, and investors as well as being an investor of real estate myself.

As a realtor, I see this proposed Racetrac ruining one of the few remaining precious neighborhoods that currently enjoys a great location, lifestyle, ambiance, and a slice of real old-Florida charm.

In my opinion, the area between Bayshore and Royal Harbor has been somewhat suppressed and is now in a perfect position to be discovered, to grow in value, as well as improve in all ways. It's time for those owners to benefit from being in the middle between the hot, booming Bayshore and Royal Harbor. It's time for them to enjoy the benefits of some of the current and upcoming changes in the Gateway Triangle. This area is very unique and close to downtown Naples.

The Villas on Palm Drive are so well kept, beautifully landscaped, and the Frederick Street owners have worked hard to improve their properties and create an amazing one-of-a-kind street. I wish we had more of these types of streets and homes in the Bayshore/Gateway Triangle. They are very desirable and lend the essence of ambiance many buyers desire.

There is even a brand new planned unit development on Curtis Street, a narrow street which runs parallel with Frederick, called Kono (phonetic) Cove.

My opinion is that the proposed Racetrac in this area would ruin much of the lifestyle benefits of living in the area. It will be polluted with 24-hour noise, traffic, foul air, potential crime, and harmful bright LED lighting.

If a -- the view shed from the stilt homes on Mills will be ruined.

If a Racetrac is approved for this area, I would personally not invest there and would not advise my clients to do so.

Today I'm also weighing in as a 12-year board member on the Bayshore/Gateway Triangle Community Redevelopment Board -- Advisory Board. Oh, I forget to add, not about -- as far as being a realtor. Not all realtors are duteous in keeping up with current changes in any given area of Naples, and/or a particular realtor may have been out of town when the news of the Racetrac was announced.

A possible scenario would be a realtor representing a buyer who usually works in another area of town. It has this one buyer requesting to see a property in the area of the proposed Racetrac. If that realtor hasn't focused on this area, they may or may not be aware of the proposed Racetrac.

Many buyers, local or from out of town, may buy directly from an owner without being represented by a buyer's broker. They may not be informed about the proposed Racetrac development and, perhaps, are not inclined to speak to the various neighbors on this street to ask questions during their due diligence period. Not all buyers do this. Without posted signs or -- regarding the proposed Racetrac, it could be overlooked.

Going back to the CRA and my viewpoint there: The CRA overlay was created to remove blights in all areas of the Bayshore/Gateway Triangle and to beautify and create safer areas to live and work in all ways. Much work has been done, and more is in the works.

Blight is defined as a thing that spoils or damages something. First of all, I want to state that I concur with most of the testimony of Chuck Gunther last week, another long-time advisory board member; however, I did check with the project manager who did look up the minutes, and we didn't do an official vote to make a

recommendation to the BCC; however, we all did agree that we didn't want the Racetrac in the Gateway Triangle, and we agreed to write the BCC individually.

Although a presentation was not made to our board, there was no -- really no need for it. Some of us who attended past Racetrac meetings reported back to other board members.

The bottom line is, regardless of any amendments to the proposed plans of Racetrac, I don't want a mega gas station of any kind in this location. There's nothing that could be presented to ever change my mind. And mega gas station in the Gateway Triangle has never been in my vision for the area, period.

I think someone's ceded me --

HEARING EXAMINER STRAIN: That's okay. Just continue here.

MS. BEATTY: A mega gas station would ruin the abutting area of town and some of the very charm and ambiance we love and want for the area. It would bring in a different kind of blight, one that is initially shiny and new, however, one that creates the very things we have worked hard to eliminate: Crime, noise, bright lights, health pollution, and the creation of an unsafe area.

Another definition of blight is excessive and unfair competition, which this proposed Racetrac would create for the 7-Eleven and the convenience store at Voigt's Texaco; long-time businesses within a mile from this location.

We want the neighborhoods in this area to flourish and increase in value, not be thwarted by a mega station that is completely out of context for this quiet neighborhood.

And another note, comparing the location of this proposed Racetrac to the one on Airport Road by River Reach is like comparing apples to oranges. The Racetrac -- that Racetrac is 3.5 miles from downtown. It has already created increased traffic congestion with bright lights shining 24 hours a day, it does not share property lines with the residential homes, and it is an established industrial area, unlike the one proposed for Palm Drive and Frederick Street and U.S. 41, which is only one mile from downtown Naples and backs up to charming homes with a cobblestone street.

A well-known fact is how important it is for the human body to have good sleep at night. It is one of the basic keys to good health and antiaging. It may be virtually impossible for some of these residents in neighboring homes of this proposed Racetrac to ever enjoy a full night's sleep from the 24/7 activities that will echo noise into the open, quiet spaces of the night as well as the objectionable LED lighting.

The additional ongoing noise during the day from increased traffic would rob this neighborhood of the peace they currently enjoy.

In addition, the stress created by all the variables created by having a mega station nearby, the intensely increased traffic, the worry, the fear of all the possibilities, increased crime -- of increased crime will add to a less-than-healthy environment for the citizens and neighbors to endure.

Naples is a designated blue zone. With this in mind, why would Collier County allow for a mega gas station to be built next to a residential neighborhood, an area where many bicyclists, walkers, and others travel daily doing the very activities the blue zone advocates promote? It just doesn't make sense to me.

In my opinion, this is ludicrous. Putting a Racetrac in this location would be a travesty in so many ways. We already have a traffic problem, and it's going to increase naturally and rapidly with all the new development in the Bayshore/Gateway Triangle as well as the continued building in Treviso Bay and Isles of Colliers Preserve, Lely, et cetera. All those folks have one way to get downtown.

We don't need to create a reason for more traffic, particularly with delivery trucks and boat trailers. We don't need to create or add to the health issues of the local citizens who are living in that area.

Let's do blue zone proud and align this decision with what is best for the local citizens.

I urge you, Mark, to please take time and drive the little streets of this quaint neighborhood and imagine the impact a mega gas station like this; the harmful impact it will have.

Thank you.

HEARING EXAMINER STRAIN: Thank you. And just so you do know, I have been through your neighborhood. In fact, this whole thing started because I went down and met with your neighbors right on Mills Street.

I do have one question. You said that you checked the records and you did not find where your CRA board had taken a formal position on this, but you said they agreed that it wasn't what they wanted?

MS. BEATTY: We did talk amongst ourselves at the board meeting, and we all said we don't want it.

HEARING EXAMINER STRAIN: Is that on the record somewhere? I mean --

MS. BEATTY: Well, I does have Elly McKuen to look up all the minutes, and she did, and she didn't see that we took a vote. That's what she was looking for.

HEARING EXAMINER STRAIN: Okay.

MS. BEATTY: But I can ask her to look for that, too.

HEARING EXAMINER STRAIN: Did the applicant ever contact you-all to ask you to hear his presentation?

MS. BEATTY: No, not that I'm aware.

HEARING EXAMINER STRAIN: Thank you very much.

Next speaker, Mike.

MR. BOSI: Next speaker is Carter Elbon. Carter Elbon?

(No response.)

MR. BOSI: Blanche Caron? Blanche Caron?

(No response.)

HEARING EXAMINER STRAIN: By the way, these names are left over from last week, so we're going to go through those folks first before we go on to others, so...

MR. BOSI: And we have two left from last week.

HEARING EXAMINER STRAIN: Okay.

MR. BOSI: Max Forgey.

MR. BROOKES: Carter is donating time to you?

MR. FORGEY: Yes. Carter Elbon is donating time to me.

HEARING EXAMINER STRAIN: Okay. Is that -- do you have a slip for that? Thank you. He's here.

MR. FORGEY: Good evening. My name is Max Forgey. I am a member of the American Institute of Certified Planners in good standing for more than 20 years. I will be providing you with a copy of my analysis of this case as well as my resum<sup>o</sup> and other information.

HEARING EXAMINER STRAIN: Could you spell your last name for the record.

MR. FORGEY: F-o-r-g-e-y, doing business as Forgey Planning Services, 4637 Vincennes Boulevard, Cape Coral, Florida, 33904.

I'm here on behalf of the Stop Racetrac Committee; Vern Hammett, president; and respectfully offering my expert opinion as competent and substantial evidence in opposition to this petition for waiver of the minimum 500-foot separation requirement per Section 5.05.05.B of the Collier County Land Development Code.

It is my expert opinion that the proposed development on the south side of U.S. 41 between Frederick Street and Palm Street, 143 feet from an existing facility with fuel pumps or automotive -- automobile service station, as the Collier County Land Development Code previously called them, in unincorporated Collier County is inconsistent with that section and should not be approved by the Board of Zoning Appeals in their capacity -- or Board of County Commissioners.

Over the past two years, I visited the site, consulted with Mr. Hammett and other neighboring property owners, have conferred with their attorney, and have spoken frequently with county staff and have carefully studied the statute and other documents associated with this application.

I've also attended the presentation hosted by the applicant on December 1st, 2014. My conclusions are summarized in the proposed findings of fact below. I'll also be providing you with a -- an electronic version.

I have a master of public affairs degree from the Indiana University School of Public and Environmental Affairs with a concentration in urban and regional planning, have been a member in good standing of the American Institute of Certified Planners since 1993, and that is a professional organization that is maintained by the American Planning Association.

I have more than 25 years of local government planning experience, including experience as planning and community development directors in Charlotte County and planning director in Lee County.

I've presented hundreds of land use cases before planning boards and elected bodies. My articles have appeared in Planning Magazines and other publications.

The waiver of separation, Section 5.05.05.B, establishes site design requirements for facilities with fuel pumps including a separation from adjacent facilities with fuel pumps based on distance between nearest points, 500 feet. That section allows a waiver of the separation requirement based on findings by the Board of the Zoning Appeals that the proposed station is separated by another station, presumably the one within 500 feet by boundaries, structures, or features which offset or limit the necessity for such minimum distance requirements.

The four factors which are stated in that section for approving can be converted to the form of questions. And I'll go straight to those. Factor 1: Are there natural or man-made features located between the existing and proposed facilities, that is the 7-Eleven and the Racetrac, which would lessen the impact of the proposed station?

The response is that there are not. There are no lakes, marshes, non-developable wetlands, designated preserve areas, or canals between the existing and proposed station.

While there is an existing highway situated between the two, it in no way lessens impacts of the proposed development on the adjacent residential neighborhood.

Factor 2: Will the facility with fuel pumps be engaged only in the servicing of automobiles during regular daytime business hours or, if in addition to or in lieu of servicing, the station sells food, gasoline, and other convenience items during daytime, nighttime, or on a 24-hour basis.

Response: The proposed use utterly fails to meet this test for the following reasons: A, there is not a service -- this is not a service station in the classical sense. It will sell motor fuels but does not offer service, lube and oil, tire rotation, et cetera; B, it will be open 24 hours a days, seven days a week, and its impact will be felt by neighbors without relief; C, the station will sell a wide range of products, including prepared foods and beverage/alcoholic beverages from a large walk-in cooler, cigarettes and tobacco products, and gambling paraphernalia at all hours.

Three: Is the proposed facility located within a shopping center primarily accessed by a driveway, or does it front on and is accessible -- accessed directly from a platted road right-of-way?

Response: The proposed use fails to meet this test because it is not located within a shopping center primarily accessed by a driveway. It is accessed directly from a platted road right-of-way.

Factor 4: Will granting of the distance waiver have an adverse impact on adjacent land uses, especially residential land uses?

Response: The proposed use will have a profound adverse impact on adjacent land uses but particularly on the neighboring residential uses which will be directly impacted by automobile and delivery truck traffic, glare, intensity of use, potential antisocial behavior, noise and vibration without remission every hour of the day, every day of the year.

You have had -- you have heard testimony already from neighbors regarding their experience with traffic as it exists now.

I want to skip now to Section 2.03.07, the Gateway Triangle mixed-use overlay district. The purpose and intent -- at 2.03.07.M.1, the purpose and intent of this district is to encourage revitalization of the Gateway Triangle portion of the Bayshore/Gateway Triangle redevelopment area with human-scale, pedestrian-oriented interconnected projects that are urban in nature and include a mix of residential types and commercial uses.

Development in this district should encourage pedestrian activity through the construction of mixed-use buildings and interconnected street system and connections to adjacent neighborhoods. When possible, buildings are located near the street with on-street parking and off-street parking on the side or in the rear of the parcel.

What the applicant is seeking to do is to vacate right-of-way and to make this less the neighborhood residential -- the neighborhood residential development that it already is. This is inconsistent with the section that I've just mentioned.

Regarding the discretion of the Board of County Commissioners, the Board of Zoning Appeals, I want to go back to Section 5.05.05.2.A, which imposes a high burden of proof upon applicants for waiver separation in cases such as this one. It says, the BZA may grant a waiver of part or all of the minimum separation



requirements said herein if it is demonstrated by the applicant and determined by the BZA that the site proposed for development of a facility with fuel pumps is separated from another facility with fuel pumps by natural or manmade boundaries.

HEARING EXAMINER STRAIN: Heidi, would you mind turning that off? Thank you.

MR. FORGEY: The important words here are "may." This is a discretionary decision. "If" it is determined by the applicant and determined by the BZA that the site proposed for development is separated from another facility by natural or manmade boundaries, et cetera. That is not the case here.

I am asking that the Board of Zoning Appeals deny this based upon four findings of fact:

Finding of Fact No. 1: The proposed use does not satisfy the Sections 5.05.05.2.A.i of the Collier County Land Development Code because there are no lakes, marshes, non-developable wetlands, designated preserve areas, or canals between the existing and proposed service stations. While there is an existing highway, that is U.S. 41, situated between the two, it does not lessen the impacts of the proposed development on the adjacent residential neighborhood.

Finding No. 2: The proposed use does not satisfy Section 5.05.05.2.A.ii of the Collier County Land Development Code because, A, the principal use is not that of facilities with fuel pumps or its regulatory processor automobile service stations as these terms have been historically applied. It is a convenience store which dispenses motor fuels from 16 pumps; B, it will be open 24 hours a day, seven days a week, and its impacts will be felt by neighbors without relief; C, the station will sell a wide variety of products including prepared and packaged foods and beverages/alcoholic beverages, cigarettes and tobacco products, and gambling paraphernalia at all hours.

Finding No. 3: The proposed use does not satisfy Section 5.05.05.2.A.iii of the Collier County Land Development Code because it would not be located within a shopping center primarily accessed by a driveway and would not be accessed directly from a platted road right-of-way.

Finding No. 4: The proposed use does not satisfy Section 5.05.05.2.A.iv of the Collier County Land Development Code because proposed use will have a profound adverse effect on adjacent land uses but particularly on the neighboring residential uses which will be directly impacted by automobile and delivery truck traffic, glare, intensity of use, antisocial behavior, noise and vibration without remission throughout the year.

It is my expert opinion that this application is inconsistent with the statute -- with the ordinance as I have cited it. The first rule of planning is the same as the first rule of medicine. It is primum non nocere; first do no harm.

I am asking the BZA to deny this application.

HEARING EXAMINER STRAIN: Sir, I've got a couple questions. First of all, you indicated you had some paperwork that you were going to supply as evidence. I'd like to see that provided to -- at least several copies of it at this time. One for the court reporter, myself, and the applicant.

MR. FORGEY: We can make more, and we will give you an electronic version.

HEARING EXAMINER STRAIN: During the break I'll make a copy for you, if I can find someplace where there's a copier open tonight.

Mr. Forgey, you mentioned the historical application of service stations. What information have you found indicating this is not a typical -- I'm not saying it is or not. I need to know what information you've found to describe what the historical application is.

MR. FORGEY: I know that there have been past hearings of this kind regarding the separation. There was one regarding a 7-Eleven back in 2000. I've looked at the -- at a map of the area. This does not appear to have involved any automobile service stations that were in residential neighborhoods.

HEARING EXAMINER STRAIN: There were four actually previous ASWs. Three of them were brought forward by the applicant. One had never got approved, so it was not mentioned.

One of those, at least, was pretty -- about in the same distance or even closer to residential than this one is. It's the one on Bayshore and 41. That isn't really where my question's coming from.

You said this isn't -- this is not a typical -- I can't remember all your words, but historical application of a service station. On what basis do you believe that to be true? Anything documented?

MR. FORGEY: I'm looking at the history of service stations in general, and I have maybe a 1950s

and 1960s notion of the trusting your car to the man who wears the Texaco Star and the small station with four pumps and the guys in the little bow-ties.

This is -- this is a 16 -- this is a 16-pump operation. The pumps are right out front. There's a lot of light. It's open 24 hours a day. That's very different from our historical understanding of what these facilities are.

HEARING EXAMINER STRAIN: Okay. And you also indicated that this is different because it's a convenience store with the gas pumps. When looking at the code in Collier County, you do realize that convenience store is an allowed stand-alone principal use by right?

MR. FORGEY: Yes, sir.

HEARING EXAMINER STRAIN: Okay. If this was just a convenience store, a Racetrac convenience store without the pumps, would your testimony be the same today, or is it the pumps that drive your testimony?

MR. FORGEY: I think that the pumps are, indeed, driving the testimony, and I don't think we would be having this hearing if the pumps were not involved.

HEARING EXAMINER STRAIN: Okay. The distance -- the separation of the -- and it says the four-lane arterial collector right-of-way. We actually have a six-lane out there.

The 7-Eleven is on the opposite side of that. So you don't believe that that highway offers a boundary from that 7-Eleven that adds -- provides added protection to the neighborhood?

MR. FORGEY: I don't see how it does.

MR. BOSI: Okay. Thank you.

HEARING EXAMINER STRAIN: Do you have any questions?

MR. YOVANOVICH: I have a few, Mr. Strain.

Mr. Forgey?

MR. FORGEY: Sure.

MR. YOVANOVICH: Are you familiar with the concept of Dark Sky's?

MR. FORGEY: I am.

MR. YOVANOVICH: Would you describe for me in your words what Dark Sky's means?

MR. FORGEY: The prevention of light pollution that allows people to enjoy a view of the night sky, to view constellations and heavenly bodies.

MR. YOVANOVICH: Are you aware that this project proposed that it would meet the Dark Sky's standards for the lighting on this project?

MR. FORGEY: I am not aware of that and have not considered it.

MR. YOVANOVICH: Okay. Mr. Forgey, I'd like you to go back and look at 5.05.B.2.A.ii. You know what, I think Mr. Strain asked the questions I was going to ask about.

So are you saying that in order for us to be entitled to a waiver, we need to go back to providing automobile repair services in order to be able to get a waiver from the distance waiver requirements?

MR. FORGEY: I'm saying that you're not doing that, and I've also said that the waiver is not an entitlement. It is discretionary.

MR. YOVANOVICH: That wasn't my question. I'm just asking you, on No. 2, is it your testimony that in order to ask for this waiver request I have to provide automobile repair services that -- you and I grew up probably about the same time -- that used to be at gas stations in the '50s and '60s?

MR. FORGEY: I am not.

MR. YOVANOVICH: You're not saying that.

What does the word "or" mean in that section where it says, "or" in addition if you provide convenience items? Doesn't that allow for the distance waiver or request?

MR. FORGEY: It could.

MR. YOVANOVICH: Doesn't it, in fact -- in Item No. 2, don't we provide convenience items in this Racetrac that we're proposing?

MR. FORGEY: Yes.

MR. YOVANOVICH: Isn't it true that we're proposing to operate for 24 hours?

MR. FORGEY: Yes.

MR. YOVANOVICH: So if you read that provision, it says, if you're providing convenience items and you're operating for 24 hours, you meet the requirements of ii, correct?

MR. FORGEY: Yes.

MR. YOVANOVICH: Okay. Now, let's go to No. iii, if you will and it says, whether the facility with fuel pumps -- I'm sorry -- whether the facility with fuel pumps is located within a shopping center -- I'll grant you we're not within a shopping center -- primarily accessed by a driveway, or -- there's another option there, correct -- or if it fronts on and is accessed directly from a platted road right-of-way. Isn't this property accessed from a platted road right-of-way?

MR. FORGEY: It is accessed from a platted road right-of-way, and it would, in my opinion, be detrimental to the people who reside there.

MR. YOVANOVICH: But that's not the question, because you opened your testimony with it. Each of these four things can be posed in the form of a question, and the question only asks is it accessed from a platted road right-of-way, correct?

MR. FORGEY: Correct.

MR. YOVANOVICH: And do we not have access from a platted road right-of-way?

MR. FORGEY: You do.

MR. YOVANOVICH: So don't we meet iii?

MS. MISENER: No. It screws up the traffic.

MR. FORGEY: Let me take a look at this again.

Under those circumstances, yes.

MR. YOVANOVICH: Okay. Now, have you ever been qualified as an expert to testify in Collier County land use matters?

MR. FORGEY: This is my first time.

MR. YOVANOVICH: Have you -- are you familiar with the Collier County Land Development Code?

MR. FORGEY: Yes.

MR. YOVANOVICH: How much time have you spent studying the Collier County Land Development Code?

MR. FORGEY: Maybe 10 hours.

MR. YOVANOVICH: Have you analyzed the application for consistency with the Collier County Comprehensive Plan.

MR. FORGEY: I have -- no.

MR. YOVANOVICH: So you're not providing any expert opinion as to whether or not --

MR. FORGEY: I'm not providing an expert opinion.

MR. YOVANOVICH: Let me --

MR. FORGEY: I have read the Collier County Comprehensive Plan.

MR. YOVANOVICH: But you're not offering any extra opinion today, as we stand here today, as to whether or not our request is consistent with the Collier County Comprehensive Plan?

MR. FORGEY: Neither consistent nor inconsistent.

MR. YOVANOVICH: No opinion?

MR. FORGEY: No opinion.

MR. YOVANOVICH: Okay. Tell me the definition in the Collier County Land Development Code of "adjacent."

MS. ASHTON-CICKO: That's not relevant to the issues that we're here about tonight.

MR. YOVANOVICH: It is. It is. Item No. I.4 says, adverse impact on adjacent land uses.

HEARING EXAMINER STRAIN: Richard, you had previously indicated that the issue of the bolding of "adjacent" was an issue that you were concerned with because of the change in the code from the previous version to the new version. The bolding is only present in the new version. Your project falls under the old version.

MR. YOVANOVICH: Mr. Strain, I don't believe that's true for I.4 or --

HEARING EXAMINER STRAIN: Well, for -- let me -- hang on a second; I'll check.

Go ahead with your next question, and I'll move back to that.

MR. YOVANOVICH: Well, I can't go to the next one till the first one is resolved.

MR. FORGEY: I can volunteer that I went through the definitions section of the Collier County Land Development Code today, and I did not find "adjacent," but I found the term "abut" or "abutting."

HEARING EXAMINER STRAIN: It's bolded in the 2.A.iv.I like you indicated. It's not bolded in the table.

MR. YOVANOVICH: Correct. But the one I'm talking about right today, it's always been bolded.

HEARING EXAMINER STRAIN: It's bolded there. Yes, you're right.

MR. YOVANOVICH: All right so you don't know what the definition of iv for "adjacent" is?

MR. FORGEY: I do not specifically know, but there's a pretty standard definition.

MR. YOVANOVICH: No. I'm just asking you, do you know whether or not Collier County has its own specific --

MR. FORGEY: I do not know that.

MR. YOVANOVICH: You don't know. So you cannot give an opinion as to whether or not our petition meets the definitions within the Collier County Land Development Code?

MR. FORGEY: Yes.

MR. YOVANOVICH: Yes, you can or yes, you can't?

MR. FORGEY: As I said, I went through it this afternoon and did not find the word "adjacent" in the definitions section of the Collier County Land Development Code. That was only a few hours ago.

MR. YOVANOVICH: Do you have a copy of the petition you actually reviewed in formulating your opinion with you today?

Mr. Strain, do you mind if I walk over there?

HEARING EXAMINER STRAIN: No, go ahead and get it.

Mr. Forgey, just so you do know, we have -- the words "adjacent" and "abutting" are defined in the code, so...

MR. YOVANOVICH: May I see the petition that you looked at?

Sir, is this the entirety of the document that you reviewed in the forming of your opinion?

HEARING EXAMINER STRAIN: Well, Richard, I don't think he's going to be able to supply you with all the documents he reviewed.

MR. YOVANOVICH: I don't know. I'm asking.

HEARING EXAMINER STRAIN: We haven't got time for that.

MR. YOVANOVICH: I don't know. I'm just asking. I asked him, show me what you reviewed, and he showed me a four-page document.

MR. FORGEY: Attachments; attachments; market analysis; maps; Mr. Fitzgerald's narrative. I have a lot of things in here.

MR. YOVANOVICH: All right. I'm just going to ask, Mr. Strain, if I can just have a copy of it, and I'll provide responses to his other comments.

HEARING EXAMINER STRAIN: Do you want a copy, of what, everything he has?

MR. YOVANOVICH: Yes, sir. He made a comment early on that I want to address in my rebuttal that is not consistent with any of the applications I've submitted.

HEARING EXAMINER STRAIN: Okay. How do you expect to obtain a copy here tonight?

MR. YOVANOVICH: I don't need it tonight. I'll just -- I'll provide additional documentation to you at a later point.

HEARING EXAMINER STRAIN: Well, we don't know if we're going to be --

MR. YOVANOVICH: Or I'll deal with it at the Board of County Commissioners level at that point.

HEARING EXAMINER STRAIN: Okay.

MS. ASHTON-CICKO: Mr. Chair, have you established a policy of how long cross-examination will take of each witness?

MR. YOVANOVICH: Where was it?

HEARING EXAMINER STRAIN: Pardon me?

MR. YOVANOVICH: Was there -- is there a policy?

MS. ASHTON-CICKO: No. I'm just asking. It's his discretion.

HEARING EXAMINER STRAIN: No, there's not a policy. I was -- at 10 minutes I was going to ask you to wrap it up. You've got two minutes left of the 10.

MR. YOVANOVICH: Thank you. And you know, I'm going to actually give you two minutes back because I'm done with my questions.

HEARING EXAMINER STRAIN: Thank you.

Before the meeting's over tonight, we will be talking about the possibility of a written rebuttal to any new evidence submitted tonight. Out of that you'll have an opportunity to further explore Mr. Forgey's information.

Mike, next speaker.

MR. BOSI: Next speaker is the last from the previous meeting. It's Ralf Brookes to be followed by Kate Riley, who has ceding her time to Jean (sic) Van Arsdale.

MR. BROOKES: Good afternoon, or evening. My name is Ralf Brookes. I'm board certified in city, county, and local government law. The Florida Bar said that that allows me to hold myself as an expert in city, county, and local government law.

I've served as an assistant county attorney for Sarasota County; I was also a land use litigation attorney for Monroe County, which is the Florida Keys; I've been city attorney of St. Pete Beach within Pinellas County; and city attorney of Bradenton Beach within Manatee County. I'm currently town attorney as outside counsel for the Town of Yankee Town.

Today I represent Vern Hammett and many of the neighbors who have appeared already in front of you.

It's important to note that citizen testimony, even layperson testimony, can be competent, substantial evidence. In the case, Metro Dade versus Blumenthal, the Third District Court of Appeal held that lay testimony that went to the incompatibility of the proposed development with surrounding uses was found to be sufficient based on undisputed facts in the record about the adjacent existing development and the existing zoning, as is followed up by other cases:

Walberg, which found that neighbors' testimony and a site map was competent substantial evidence; Section 11, Property Corporation, the lay testimony about incompatibility and documentary evidence of a proposed site plan, elevation, drawings, aerials, and photographs could establish that the use was incompatible; and that lay testimony in Sportacres Development Group case, that was bolstered by maps and photographs and other zoning records, upheld a finding of incompatibility.

And I'll provide these citations to the Court. And that's important because that's what you've heard here today and what you heard the previous time.

Now, Racetrac gas stations were found to be incompatible with surrounding residential uses in both Cocoa Beach and in Cape Canaveral where the Racetrac was denied and these denials were taken to Circuit Court and the denials were upheld in Circuit Court.

It's also interesting to note that in the Cape Canaveral case, the City of Cape Canaveral has a 1,500-foot separation requirement between gas stations. That was not the basis of the finding in that case because the other gas station was located across the municipal boundary from the City of Cape Canaveral. That finding was that it was incompatible with surrounding residences and platted streets.

Now, you heard some cross-examination about the section of the code, 5.05.05.2. It's important to understand the intent and purpose of this separation requirement, and it's found here in the 5.05.05.2.A where if there's situations that offset or limit the necessity for a minimum distance it can be waived. Okay.

If -- for example, the gas station is located and surrounded by all commercial as in the case of the 7-Eleven, that was referenced last time and was the subject of cross-examination, at U.S. 41 and Collier Boulevard, that was located within a shopping center, the Capri Commercial Center that's at 951 and 41. And, in fact, I have here the executive summary of the petition from the agenda item that has all the maps and the surrounding zoning surrounded by commercial on all sides; C4, C4, C4, C3ST, and it's located within an out-parcel of a shopping center. I'd like to submit this to the record, too.

Well, why it's interesting and why it's important is because there is a 500-foot separation from gas station to gas station in Collier County but the County Commission, when adopting the Land Development