

TRANSCRIPT OF THE MEETING OF THE  
COLLIER COUNTY HEARING EXAMINER  
Naples, Florida,  
November 9, 2017

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 9:00 a.m., in REGULAR SESSION at 2800 North Horseshoe Drive, Room 609/610, Naples, Florida, with the following people present:

HEARING EXAMINER MARK STRAIN

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

PROCEEDINGS

HEARING EXAMINER STRAIN: Good morning, everyone. Welcome to the Thursday, November 9th meeting of the Collier County Hearing Examiner's Office.

If everybody will please rise for Pledge of Allegiance.

(The Pledge of Allegiance was recited in unison.)

HEARING EXAMINER STRAIN: Thank you.

We started a few minutes late. We were short on some chairs. For those of you who have not been seated, there are chairs available on the left side of the room as you come through the door.

With that, we'll move to the review of the agenda. We have four items on today's agenda.

Item 3A is a petition for Cameron Partners II, LLC. It's for the Heritage Bay PUD. That particular item is continued until November 30th. So if you're here for the Cameron Partners II, LLC, issue in Heritage Bay, that will not be heard today. It will be heard November 30th.

Likewise, Item 3D is the Bautsch -- David Bautsch petition for a boat dock, and that's up in Hickory Shores. So if you're here for that one today, it's going to be continued; it is continued until November 30th as well. Both of those will not be heard today.

\*\*\*That takes us to the two items that are on today's agenda that will be heard. They will both be discussed concurrently, and then separate decisions will be issued on each.

Those two advertised public hearings are as follows: Item 3B, Petition No. PL20170003285. It's the 3570 Bayshore Drive, LLC, of an appeal to an official interpretation done by county staff, and then Petition No. PL20170001829, again, it's 370 (sic) Bayshore Drive, LLC. It's the petition for appeal of a site improvement plan, an SIP. SIP-20150002675. Both of these are for the Bayshore Drive facilities at, I believe they're 3555 and 3557, possibly, on Bayshore Drive.

First, all those wishing to testify on behalf of these items, please rise to be sworn in by the court reporter. So if you intend to speak today, please stand up to be sworn in.

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

HEARING EXAMINER STRAIN: Disclosures on my part, and my disclosures will be for both: I've talked with county staff. I've met with the property owner way back before all this started. I was introduced to them at Commissioner Taylor's office. I also have provided Commissioner Taylor and Commissioner Fiala with the bases that we're having this hearing today. I also met with the applicant and his attorney and representatives at a meeting yesterday or actually it was -- I think it was Monday, two days ago, and we went over issues that I'll be asking clarification on today.

And I also met with the county staff member who wrote the OI, Mike Bosi. We talked about issues for today's hearing. I've received emails from numerous people in Bayshore, and I assume most of them are in the Bayshore area, probably about 40. Every email I've received has been forwarded to Mike Bosi's office for record. I received an email late yesterday from the appellant, which I believe will be addressed at today's meeting.

So with that, I have no other disclosures, and we'll move right into the process for today. The procedure for today will be three presentations. The first presentation will be by the appellant, which is the 35070 (sic) Bayshore Drive entity; the second appeal -- and that appellant will have one hour for their both expert testimony and discussion of the two issues.

The next presentation will be by county staff in response to the appellant and also their position on the OI and the SIP; and the last and final speaker will be the property owner. And each one of these speakers will be one hour. The property owner will be able to present their position.

And with that, after the presentations by each one of the individuals -- now, they have up to an hour. It doesn't mean they'll take an hour. It depends on what they want to say -- we'll turn to the public for public comment. Public speakers will be limited to five minutes unless otherwise waived. And then after the public comment we'll have rebuttal by the entities that were previously providing presentations. Those rebuttals will be no longer than 10 minutes.

And then that will be the end of today's particular hearing on these particular matters, and a decision on

these matters is generally rendered within 30 days -- it will be rendered within 30 days. It's not just generally. We'll have it completed in 30 days, maybe less if the time affords.

Decisions are final unless appealed to the Board of County Commissioners, and all speakers are limited to five minutes unless otherwise waived. With that, I do not have any procedural issues to discuss.

Ms. Ashton, did you have anything you wanted to bring up?

MS. ASHTON-CICKO: I believe you addressed that the petitions will be heard -- the testimony will be heard jointly and that the issues for today are essentially the same in both cases.

HEARING EXAMINER STRAIN: Yes, thank you.

Okay. With that, the first item up is the appellant's presentation. Do you mind approaching the podium, state your name and who you represent, and we'll go from there.

MR. LEWIS: Hi. Good morning, Hearing Examiner Strain. Doug Lewis, for the record. I'm an attorney with the Thompson & Lewis law firm. We're located at 850 Park Shore Drive, Suite 201A, Naples.

We represent 3750 Bayshore Drive, LLC. They're the owner of an adjacent mixed-use project zoned BMUD-NC, Bayshore Drive mixed-use district neighborhood commercial, C4, that would be -- NC with the overlay. And my client's property is located at 3750 Bayshore Drive.

A couple of housecleaning items. I do have some evidence binders today that I'd like to introduce into the record. I can give a copy to the owner, which I believe today is a party; is that correct --

HEARING EXAMINER STRAIN: That's correct.

MR. LEWIS: -- in the proceeding? Okay. And also to staff as well.

HEARING EXAMINER STRAIN: Do you have one for the court reporter?

MR. LEWIS: Yeah. We have one for the court reporter, absolutely.

HEARING EXAMINER STRAIN: In order to be in the record, she's going to need a copy.

MR. LEWIS: Absolutely. Absolutely, we've got one for her, the court reporter.

MS. ASHTON-CICKO: I need a copy.

HEARING EXAMINER STRAIN: And the County Attorney's Office.

MR. LEWIS: County Attorney.

HEARING EXAMINER STRAIN: Well, which will be myself.

MR. LEWIS: Well, we have one for Commissioner Strain, yeah.

HEARING EXAMINER STRAIN: I'll just provide mine to the county attorney. At this point I'm not going to be able to read it.

MR. LEWIS: Well, it's a helpful guide as you're reviewing today to be able to follow along through the tab.

HEARING EXAMINER STRAIN: Okay. We will do our best.

THE COURT REPORTER: You can use mine and just give it back to me.

MR. LEWIS: Okay. So we'd like to enter this binder into the record. There's Tabs 1 through 24.

HEARING EXAMINER STRAIN: They will be in the record.

MR. LEWIS: Thank you. In addition, we did just want to note, so we don't waive those, I did send an email out addressing -- on Monday I believe I received a procedure for the hearing today. I did note the objections. I don't want to waste my time today or your time today addressing those, but we don't waive those objections. We've raised those objections. We've outlined those objections in writing, and those are also noted under Tab 21 in the binder.

HEARING EXAMINER STRAIN: I did have a discussion with the County Attorney's Office on your email. It came in late yesterday, so we had a brief discussion this morning. Ms. Ashton may want to address some issues on particular email.

Heidi?

MS. ASHTON-CICKO: Well, I'm going to need to review his binder, so I will address those issues after I have a chance to review what he submitted.

HEARING EXAMINER STRAIN: Okay. Thank you.

MR. LEWIS: So, yeah. There were some procedural objections that dealt with issues leading up to today's hearing. There are procedural issues that we raised in relation to your administrative procedures for

how this hearing is supposed to flow as it relates to how you've set it up today. So we've outlined those.

I do have an expert here today, Mr. Greg Stuart, so I'd like to ask the County Attorney how we'd like to qualify him. I'm happy to get him qualified.

MS. ASHTON-CICKO: Excuse me just a second. For the record, I would like to go through and address generally the issues I believe he's raised, and then I will review the package at a break and see if there's anything that I need to supplement.

HEARING EXAMINER STRAIN: Okay. Why don't we move through -- the email that came in yesterday, I assume, is the one that would be the most important to review right now.

MS. ASHTON-CICKO: Okay. The first issue he raised is that the hearing procedures do not comply with Chapter 9 of the county's administrative code. And the procedure is discretionary, at the sole discretion of the HEX, and that's very clear in Chapter 9 of the administrative code. I will provide a copy of that for the record for the clerk.

Combining of time frames for the separately filed appeals: It's appropriate to consolidate the cases similar to how court proceedings are held for efficiency; however, decisions and evidence related to those will be separately provided by the Hearing Examiner.

The time afforded, I think that it's at the discretion of the Chair how he wants to handle the time, and he had distributed a procedural outline to the attorneys in this case for purposes of efficiency.

Cross-examination of witnesses: We haven't gotten to that issue, so it's a premature claim.

And there were some cancellations of the advertisement for the prior scheduled hearing, and the reason that had to be done is that the county's procedure requires the approval of the appellant who's paying for the ad, which we did not receive. And we did receive it late, and it was not legally acceptable so, therefore, we had to continue the hearing.

And, in addition, the appellant doesn't get to pick a hearing date. That's determined by county staff, County Manager agency.

I think I've addressed all the issues. If I missed any -- and as to the identification of the parties, the parties here today are the applicant, which is the property owner, ANK Crafts, LLC; the appellant is --

HEARING EXAMINER STRAIN: 3570 Bayshore Drive, LLC, I believe.

MS. ASHTON-CICKO: Okay. And then the third party is the county staff.

And I'm going to introduce into evidence the Chapter 9 of the Hearing Examiner, the Carillon County (sic) Residential Versus Seminole County case and, in addition, all the procedures that I've identified are consistent with our Code of Laws Section 2-83, the LDC 8.10.00, Chapter 9 of the Administrative Code, and our county special act Chapter 2001-345. So, thank you.

HEARING EXAMINER STRAIN: Okay. Thank you, Ms. Ashton.

Mr. Lewis, go ahead.

MR. LEWIS: So we have addressed those -- we still maintain our objections. I don't want to spend time today delving into the advertisements that we had requested on the Site Improvement Plan approval that was -- the ad that was canceled by the County Attorney's Office without the client's permission or approval, but those are well documented. They are in the record. We just want to state that we respect and understand the County Attorney's position as it relates to due process. We still haven't waived them. We maintain them.

It is difficult, I will tell you, to prepare for the hearing when we don't know, for example, whether or not we're going to have the ability to do direct or cross-examination. So in that regard, I guess we've been told that that will be decided as we move through the process.

I do say -- I will say that we do have some questions. If we're unable to ask the applicant or the owner, the property owner, questions today, I do have some questions that were simply not asked by staff, and I'd like to -- if we can't ask these questions, I think it will be helpful for the interest of the public to understand what's going to happen here, for the owner to address these.

The questions we'd like to ask are, you know, what are the property owner's annual barrel projections, their production projections? How many barrels will be sold to distributed wholesale for off-site consumption? I have reviewed the CRA minutes. I'm not sure if many -- they might, but I haven't seen any public records that indicate disclosure by the property owner that many of these barrels will be sold and

distributed off site for non-retail consumption. I'd like to know how many barrels they're going to do.

Will the beer be bottled and canned on site? I think these are questions that, frankly, I'm surprised that staff didn't address in their due diligence that I'm aware of. I have asked staff for that information.

We'd like to know what type of brew system the property owners are installing and also the capacity. Is it a seven brew, a 10, or 30 or more?

Are they going to be capped? There's nothing currently in anything that -- other than square footage constraints that limits that.

Will there be a fermentation capacity, and what is this fermentation capacity? That will also impact the number of barrels.

How many barrels, bottles, cans of brewed beer will be stored on the site? And what is the barrel storage capacity and the square footage designated for the storage on the property? It's difficult to tell from the Site Improvement Plan and the architectural what they're going to do there. What are the hours of operation for the bar versus the industrial manufacturing on the property, the number of employees that will be there for the beer manufacturing business versus the bar business, copies of any distribution agreements.

Will any of the SIC 5181 distribution occur in connection with the industrial manufacturing of beer? We don't have an answer to that.

Have federal/state applications and licenses been applied for? And, frankly, can we get a copy of those prior to any determination by the Hearing Examiner as to the nature of the business being conducted on the property?

Will other beers be sold, and will the owner sell -- and, again, this goes back to the interpretation question, but is it their intent to sell 51 percent of the beer produced on the property on site retail as an incident to the bar use, and then is their intent to have 49 percent of that being sold wholesale off site? Is that their intent?

So I would respectfully ask, if we're not going to be entitled -- I certainly wasn't advised before hearing. And we've heard today that that will be decided. But I'd like to give these questions, if I can -- I have a copy of the questions that I can circulate and enter those into the record.

HEARING EXAMINER STRAIN: Okay.

Heidi?

MS. ASHTON-CICKO: The appellant doesn't get to ask factual questions of the property owner. That's going to be up to you as Hearing Examiner whether you want to ask those questions or the property owner whether they want to disclose that information.

HEARING EXAMINER STRAIN: The property owner is represented here today, and we will find out how much the representative of the property owner wishes to disclose, and it's at their discretion.

I think staff is comfortable with the issuance of the OI at this point. We'll talk further about the 51 versus 49 percentage issues and see where that goes. Those were questions I had as well, so we'll get into some of that.

Some of your questions may be off, necessarily, the exact issue that we're here to discuss today, whether there is an industrial use or not. I'm trying to focus on that with Mr. Bosi when we get into our discussions later, so hopefully some of the questions you're asking may be answered in that due correspondence.

MR. LEWIS: I appreciate that, and I think your instincts, I would say, are correct. I mean, our position has been and is that the industrial manufacturing of beer as defined by the SIC code that was set out in the zoning verification letter by the staff, that that use on the site as a permitted use, as a conditional use, or as an accessory use is incongruent with the Comp Plan, and we would ask certainly today -- and we'll be discussing it today in our presentation.

Again, I'm hoping that this is not taking my time. We're dealing with these procedural issues, so this is not hopefully going toward my hour that I have to make my case.

HEARING EXAMINER STRAIN: We'll provide some latitude, Mr. Lewis, but right now you've already started working into the hour. We'll see where it goes. We don't need redundancy. We need to stay on topic.

MR. LEWIS: I understand that.

HEARING EXAMINER STRAIN: And as long as you're doing that and we're providing information that's new and useful, we're fine.

MR. LEWIS: Yeah. And I just need to be able to prepare -- present my case and get the evidence into the record, so I appreciate your latitude there.

All right. So we have our experts. Again, we need to qualify those experts. So, Attorney Ashton, what do you recommend?

MS. ASHTON-CICKO: Well, you'll need to pro --

MR. LEWIS: There's a CV that we've attached. I can certainly qualify him at this point. I have a CV attached under Tab No. 24. And I'm happy at this point to qualify Mr. Stuart as an expert unless, to expedite time, the other property owner or the other party would stipulate to his qualifications. If not, I'm happy to come up and we can qualify him as an expert.

HEARING EXAMINER STRAIN: I'll certainly take the information you provided on Mr. Stuart, which came in just now and it's rather lengthy, under consideration and render his expertise position later on. In the meantime, we can -- you can proffer him as an expert, and we can proceed under that premise.

MS. ASHTON-CICKO: That's acceptable.

MR. LEWIS: Okay. My preference would be to get that determination made now.

HEARING EXAMINER STRAIN: I'm not going to sit here and read, what, 15, 20 pages.

MR. LEWIS: If I can ask him some -- if I can ask him some questions, we can lay the foundation.

HEARING EXAMINER STRAIN: I'll need to read what you've provided first since you have provided it. It's going to be part of the record. I'll have to read the whole thing.

MR. LEWIS: Okay. At this point, as related to your determination, does the other party to the case, do they have any objections to qualifying Mr. Stuart as an expert in the case?

HEARING EXAMINER STRAIN: When they come up for their presentation, we can ask them at that time if that's appropriate, unless Ms. Ashton tells me differently.

MS. ASHTON-CICKO: Well, the Hearing Examiner's already told you to proceed as if he's an expert, so I think you can proceed at this point.

MR. LEWIS: The concern I have is that under the procedures, the rule procedure -- and I raised that in my procedural objections, is that we give an hour presentation, then we have the staff that's going to take another hour in opposition to our position, and then we have the applicant or the property owner that's going to make their hour presentation. We have the public here. We have a large number of members of the public. So that's multiple hours. And I am unable in my rebuttal -- I have a 10-minute rebuttal -- to introduce new facts into the record and, frankly, 10 minutes isn't enough time to address two-and-a-half hours of new information that I have to try to anticipate.

So I think, from a due process point of view, my client would be impaired if we can't qualify him as an expert. I'd like to just note if they have any objections.

MS. ASHTON-CICKO: Well, I think that the issue is whether or not -- excuse me. But I think the issue is whether or not the Hearing Examiner will accept opinion evidence from this person that he's proffered. So to the extent you'll accept opinion evidence and you'll weigh the evidence as part of your review, I think we can proceed.

HEARING EXAMINER STRAIN: He has -- he's going to be offering his opinions here today. I have no problem with that. Now, whether or not they're going to be considered expert -- you've dropped on this office today a one-and-a-half inches or two inches of information that has not had the ability to be read prior to the meeting.

MR. LEWIS: Mr. Stuart's well known -- he's well known in the community. I can certainly qualify him.

HEARING EXAMINER STRAIN: Well, if he's well known, I don't know him. I've seen -- his name's Greg Stuart. I don't know if we've ever met before. I've been working in the planning issues for over 16 years on public boards, so I honestly will have to take a look at the information.

(Multiple speakers speaking.)

HEARING EXAMINER STRAIN: Mr. Lewis, wait till I finish talking.

MS. ASHTON-CICKO: Mr. Chair, I'd recommend that you go ahead, accept the opinion testimony, and you can -- as with any expert, you can weigh their credibility as -- you know, as to whether you think that you should give it great weight or not great weight, so...

HEARING EXAMINER STRAIN: I have no idea what he's going to be testifying to as well, so his expertise is going to have to relate to whatever he is testifying to. He may be a brewmaster; I don't know. But those are issues that I'm certainly going to be trying to find out.

MR. LEWIS: Sure. And in answer to that question -- it is a fair question -- he will be testifying as to land-use matters, and he's an expert in the area of land use, and we will proffer him as such, and I certainly respect however you decide to do that without waiving our position.

Okay. So we will present his testimony. We do have, just in the binder as well, under Tab No. 22, behind the case law, we have an attorney affidavit from Stephen E. Thompson. I have his resum©. He's a board certified real estate lawyer, and he's opining, essentially, that an accessory use is one that's incident and -- to a use permitted -- to a permitted use and does not permit the creation of an independent commercial enterprise such as the Site Improvement Plan contemplates as the applicant -- or the property owner contemplates, and that the creation of an independent commercial enterprise transforms an accessory use into a principal use, and he cites a Florida Supreme Court case, which I will get into as well. And I'd like to proffer that as expert testimony as it relates to the limits of an accessory use under Florida law. So with that, I will --

MS. ASHTON-CICKO: I did want to comment on that. I do know that Mr. Thompson is a real estate lawyer, but I am not aware that he's ever appeared before the Board of County Commissioners, the Planning Commission, or the Hearing Examiner in the capacity of land-use attorney.

MR. LEWIS: I can represent as his law partner that he has appeared in the City of Naples, appears regularly. He was just there last week. In the early days -- he's been practicing in town for 30 years. My understanding is that he has, and I'm happy to supplement that after you can consider the evidence today. But my understanding is he has, certainly in the city.

MS. ASHTON-CICKO: Because the City of Naples has a different code.

MR. LEWIS: Certainly I can opine today --

MS. ASHTON-CICKO: They don't use our code.

MR. LEWIS: I understand that. This is not code driven. His testimony is related to Florida law as it relates to accessory uses. He's a very well-known developer of commercial real estate, Publix-anchored centers, and we're very familiar with the limits of what you can and can't do as relates to permitted uses, conditional uses, and accessory uses. It's part of the wheelhouse that we look at on a daily basis. So again we'd like to proffer him as an expert.

MS. ASHTON-CICKO: That would be up to the Chair to make a determination. I mean, that's going to be up to you to make your determination based on the evidence they submit.

Yeah, when we get to that expert, I don't know, you'll have to decide whether you want to accept it once you get the evidence.

HEARING EXAMINER STRAIN: The book that you've provided today is going to be part of the record. I will review it as such, and it will be part of the outcome of the decision that's issued.

MR. LEWIS: Thank you.

MS. ASHTON-CICKO: But it's quite a lengthy package here. You haven't been provided this ahead of time, so...

HEARING EXAMINER STRAIN: I'm not going to review it here today, no. It will be reviewed after -- the only time I can review it is after the meeting.

MR. LEWIS: Certainly. And the procedures do allow, I think, 30 days to render your decision.

HEARING EXAMINER STRAIN: That's right.

MR. LEWIS: Under Tab 1, you can see the site of the industrial manufacturing site, brewery site. You can see on Tab 1, Page 3, you can see my client's properties, two and three, and those were -- those are also noted and located for your review.

On Tab 2 we've included a copy of the Future Land Use Map. The second page is more of a blowup

of the Bayshore mixed-use district for your review. I think we stipulated, I think it's undisputed, that the property is an urban designation. It's in the mixed-use district. It's in the urban coastal fringe subdistrict, and it's in the overlay as well. So we just wanted to set that out. And our expert will discuss that further as it relates to the Comp Plan.

The Future Land Use Map is provided under Tab 3. And you can see the C4 zoning designation. The second page of Tab 3, we actually provided you with a very helpful zoning map blowup depicting the brewery site and showing the overlay as well.

My client's property is a mixed-use project, and it is consistent with the incentivizations and the intent under the Comprehensive Plan in the neighborhood commercial to incentivize pedestrian-friendly residential/commercial uses.

On Tab 4 I wanted to note that the Future Land Use Element under Overview 1A states, quote, most directly, this element controls the location, type, and intensity and timing of new and revised uses of land, and I would say this controls the location of where we do industrial uses.

Policy 5.4, all applications and positions (sic) -- this is Page 2 of Tab 4. All applications and petitions for proposed development shall be consistent with the Growth Management Plan. And under Policy 7.5, the county shall encourage mixed-use development.

What you'll hear today is that although the underlying C4 bar use can occur, the Comprehensive Plan intent is to incentivize redevelopment of pedestrian-friendly mixed-use. So you can either have it in the same building or multiple residential combined with commercial, but that's -- and the overlay -- the neighborhood commercial overlay expressly implements this policy, 7.5.

Turning to Tab 5 under the definitions, I just wanted to make it clear that when we talk today about accessory uses, it must be both incidental and subordinate to the principal use. That's Tab 5, Page 1, and that's consistent with Florida law. There's no real incongruity. It must be both incidental and subordinate.

And I would like to encourage us to think about the significance of incidental, because it has to be both, versus subordinate. And to get into a subordinate relationship where you have a primary use versus a use that is not as prevalent, that does not address the incidental test. And it's a two-part test. And so you could, for example, have a permitted use on the property that does more business than the other multiple permitted uses on the property. It's very common to have multiple uses occurring on a property. They are still permitted uses, and they are not deemed accessory uses, and the fact that you do more volume in one business versus another does not somehow transform a permitted use to an accessory use. So I wanted to make sure that we understand the definition.

Incidental, as defined by the Supreme Court, would mean that the use is one that is directed specifically -- it's not an independent business.

So the example would be if, for example, you have a restaurant in a hotel that only serves the hotel guests, then that restaurant would be incidental to the hotel. But if that hotel began to, for example, advertise to the public or operate independently of the hotel where a commercial restaurant is not permitted in that zoning district in a residential or hotel district, then the courts have determined that that then is not an incident.

And you can have a portion of the food business that is dedicated to, you know, serving guests. But when you begin to advertise, you begin to distribute or -- distribute would be this case. But when you either advertise or bring the public in to the restaurant that are not guests of the hotel, the courts have said that is not an accessory use. That now becomes a permitted use, or you're transforming it into a permitted use and a lawful use.

Tab 6 is the C4 designation. I just wanted to mention that the C4 designation under Tab 1 typically uses the 1987 SIC classification. Staff has opined in the zoning letter that under Item 48, which is the drinking establishments -- and the SIC code for that is 5813. It's disputed in the zoning letter that this is a SIC code -- that the SIP that they're seeking is certainly what they were asking for at the time of the zoning verification letter -- is a 5813 drinking establishment. That's what that is.

Now, I provided definitions of what a SIC code drinking establishment is. That's helpful to find, and you can see that in your tab under Tab 17.

A drinking establishment is for retail consumption on site. It's not for wholesale distribution. It



doesn't allow bottling, packaging, cans, whatnot. It's retail on site.

So I think the challenge they're going to have today, frankly, and I think the legal requirement, is they're going to have to show how wholesale manufacturing -- wholesale, not retail, for off-site consumption is an incident to on-site retail consumption. But the SIC code that they're going to be relying on to do that is under C4. And our expert today is going to testify that you can't get an accessory use -- the only accessory use in the neighborhood commercial -- neighborhood commercial under the overlay -- the only accessory use that's nonresidential that's permitted there is storage outdoor.

And, specifically, in that overlay, they identify -- and you'll see the tab if you look under the overlay for the Bayshore Drive mixed-use district -- and that would be Tab No. 7. Why don't we just go there real quick.

As we talked about, the purpose is to encourage a mix of low-intensity commercial and residential uses including mixed-use projects and single buildings. So the intent is to create a pedestrian-friendly -- and I see members of the Board of County Commissioners here. I think they understand that that's the intent is to create a pedestrian-friendly residential environment. That's not what this is. I mean, it is relying on underlying zoning, but that's not what this is doing.

If you flip over to Page 3, on Page 3 of Tab 7 you'll see Roman Numeral 2A. It says, the table of uses identifies permitted uses, accessory uses, and conditional uses. Now, there is no akin to the C4 where they talk about accessory uses that are subordinate and incidental. There's none of that in here. They just lay out what are the permitted accessory uses.

And, in fact, under 2B it says any use not listed is prohibited -- is prohibited. So there's no misunderstanding. And, by the way, there's been no determination that -- and there's been no request that I'm aware of that the manufacturing of beer for distribution and consumption off site is akin to outdoor storage. I think that would be ludicrous. But outdoor storage is the only -- the only nonresidential accessory use permitted in that overlay so, therefore, they are not able to bring this in through that overlay.

Now, how does that interplay? Well, if you look at Tab 7 -- and this is an important provision under 2.03.07.3.B. Property owners within the Bayshore mixed-use district may establish use, densities, and intensities. So here they're trying to establish a use. So they can do that in accordance -- they have two options. Option A, in accordance with the underlying LDC, which is C4. That's what they did with their zoning verification letter. They tried to get that approved. Now, we disagree with staff on that, but that's what they tried to do. And staff said, you can bring it in C4 as an accessory use is what staff said, or they can bring it in it -- it says, or under the more -- or maybe elect to develop under the provisions of the applicable BMUD subdistrict.

Now, they haven't -- they're not bringing in any sort of multi-use, you know, residential mixed-use project. They're not looking to do that, so -- and they can't bring this as an accessory use under that.

So they're -- they are trying to bring in industrial manufacturing of beer as an incident to what permitted use -- it's also tied to a permitted use. And the permitted use here is a drinking establishment, which is for on-site retail consumption.

So I don't know -- and that's why we're scratching our heads. I have no idea how they're going to be able -- and don't let them divert you from the real issue, but I don't know how you can articulate a reason why wholesale distribution of product, how that is an incident to -- which is all off site, packing, distribution, all that, how that's an incident to on-site consumption.

HEARING EXAMINER STRAIN: Mr. Lewis, when you had sent your email out yesterday, one of the points you made is that you would prefer, if I could, to hold off my questions till the end of your presentation.

MR. LEWIS: Yes.

HEARING EXAMINER STRAIN: So my reluctance to speak out as you've brought issues up is not because I agree with you or disagree. It's simply I'm going to try to hold off until you finish. So I just want you to know that, for the record.

MR. LEWIS: I appreciate that.

All right. So let me just address a couple of things. I did see -- and then I'll have our expert come up.

I did see several emails, and I want to commend the property owner. They've done a great job rallying the community. I'm not sure how many of the members of the community understand the commercial nature of what they're doing. They may be -- some may be supportive; some may not.

But I tried to essentially summarize what the residents were saying as it relates to the project. The first thing that they articulate is that the owners brought -- they bought the property in reliance on the zoning verification letter. So I want you to start -- let's start with that. And the zoning verification letter is under Tab 9.

So in that letter -- this is back in October 2nd, 2015. Now, again, I don't know this to be fact, but what I'm seeing in those letters is the implication that they were potentially under contract or they were considering the purchase, and then they made the decision to buy it in relation on the letter. I don't know that. We'll hear that later perhaps.

But they asked staff if they could do a lounge, really, basically a bar, that they could do an accessory microbrewery, an accessory. They didn't ask for a permitted or anything like that, or conditional, but an accessory. So they knew that. They didn't ask -- for example, when they came in later for the project description, they asked for industrial manufacturing. They were going to redevelop it as basically an industrial manufacturing, which is completely disingenuous from what they said -- that was in 2016 -- from what they said back in October.

Then they said, tours of the brewery, which is fine; neighborhood gathering, fine; live music, fine; food, fine; and then they -- sale of T-shirts, whatnot.

So staff, in their analysis, says, look, this looks to us like -- under the SIC classification, or the C4, this is a bar. What you've described is a bar. It's a 5813 bar. That's what you've got.

And then staff says that we're going to allow the manufacturing of beer on a limited basis, but it needs to be an accessory to the bar. To the bar. Again, the bar is a retail on-site consumption operation. That's the business.

So you're producing beer for retail use on the site. That's where you get into, you know, how much -- what's the volume? Are you doing 3,000 gallons a year? Are you doing -- or barrels? 10,000? What are you doing? Is it enough to just take care of what the people need when they come to the bar, or are you going to become a wholesale business?

The staff further went on to say that the brewery, as they characterize it -- which is a C4 classification. It's not a classification under the neighborhood mixed-use commercial because it can't, as we talked about. A C4 classification, they said that, as a use on the property, as a permitted use -- it's not a permitted use, and it's not a conditional use. So I think we're all in agreement there.

So, really, the sole question for you to look at is under C4. Does C4 allow a microbrewery, a brewery, basically, industrial manufacturing of beer. Do they allow that -- is it permitted to occur on the site under C as an accessory use?

We say first the Comp Plan says absolutely not. You can't do any industrial per the Comp Plan. As an alternative, if you disagree with that or if later the courts disagree with that interpretation, then the analysis would be it certainly has to be both subordinate and incidental, which I don't know how they're going to be able to articulate how -- you know, as we talked about, wholesale distribution off site as incidental or as incident to your retail operation.

So the property owners are saying, look, they got a zoning letter. You know, I understand that. They relied on it. And I understand that. That's part of the talking points. But I don't think they're aware of these facts.

Now, there's also a clear recognition of under Florida law that you can't rely on promissory estoppel to cure ultra vires acts of government officials. So if the courts conclude that the county's Comprehensive Plan does not allow industrial manufacturing of beer as a permitted, conditional, or accessory use, because it is fully incongruent with the Comp Plan, then the estoppel letter does not amend the Comprehensive Plan, and it doesn't make an unlawful use lawful.

In other words, you can't amend your Comprehensive Plan through a zoning verification letter, and that makes sense. That's why the courts have a very long line of Ultra Vires Act. I'm sorry that the mistake

was made, but you can't amend your Comp Plan.

The front door approach would be to do a text amendment or to amend the Comp Plan to allow for industrial uses, which has not occurred.

Now, the second class of arguments is that -- well, let me continue with this as well. Assuming that it's later determined that industrial manufacturing of beer can be an accessory in C4 to a permitted use and the owners were notified in their zoning verification that a brewery is not a permitted use on the property and that any manufacturing of beer must be incidental and subordinate to the retail sale of the premises -- in fact, the letter even goes on to say that it needs to -- let me get the exact wording. It's on Tab 9 -- needs to be accessory on a limited basis. That's the language under -- on Page 2, Tab 9. Staff says, accessory on a limited basis.

So as such, the owners were on notice that they could not engage in the business of wholesale distribution of beer for off-site consumption.

Now, despite this clear disclosure in the zoning verification letter that manufacturing of beer is prohibited, on July 21st -- and this is important -- 2016 -- I don't know if the residents are aware of this, but the owners, they filed a Site Improvement Plan, and they were seeking approval of, quote, industrial manufacturing of beer and related uses with site work.

Now, I want you to turn to -- Tab No. 10. So in 2016, in July, they came in, and they knew that they couldn't do this, and they said, Dear Mr. Paul, the above-referenced projects consist of a 6,000-square-foot building renovation for industrial manufacturing of beer and related uses.

Now, why would you do that? You knew -- and the residents seem to think, well, they relied on the zoning letter that told them that they -- you know, as we went over that testimony.

So why do owners do this? Well, they do this because later they want to estop the government -- and I've seen case law. I mean, I'm very familiar with the law on this -- from enforcing their zoning ordinances by asserting that approvals were given -- I've seen lots of land-use lawyers in town use this -- the prior approvals done way back when were given for that use, and they were approved. And it's all part of the development order approval.

Look over at the next sheet, Page 2. You'll see -- this is on the GMP public portal. I printed it back in March 2017, 6,000-square-foot building for manufacturing of beer and related uses. Industrial manufacturing of beer. That was in March of 2017.

And, by the way, I know in the staff report there's discussion about, well, it's really now a bar, and this is just -- this is just accessory. It's just a small piece of it. But I've looked at the layout. It hasn't really changed from the original submission. There really has been no significant change, and I'll show you -- there's pictures of that as well here in a minute.

Let's turn to the Site Development Plan, which is on Page 3. I did a blowup on Page 4. This is a blowup. This is the approved Site Development Plan, and they're showing only 22,000 -- or 2,245 -- 2,245 square feet of tables and chairs. That's for their bar.

The rest is kitchen. They have storage, which I presume that's -- and if you look at the -- there's some other exhibits here. If you look at the square footage, it looks to me like that's all going to be part of the brewery. They do have some business area. Maybe you divide half of the business for one business, one for the other business, but these are independent businesses.

So it's not fair to attribute all that business area to the bar. And I'm sure they're going to be -- you know, they're going to use that for their -- they have to have some office for their wholesale distribution off-site business.

Storage, and then they have business area, and then they have kitchen. You know, the kitchen, I'm presuming they're using that -- they're not really producing food under their Site Improvement Plan. They're just bringing in packaged peanuts and things. So I don't know what -- so it's really -- my assumption is that's going to be for -- until established, it's for the manufacturing.

If you flip over -- keep flipping -- there's -- several pages into this it's actually a different sequencing of the numbering, but it's going to be 4 and 5 as you flip back.

But I want to look at this 5. This is part of the -- so you have -- the first stack was for the Site Improvement Plan. The second stack is for the architectural. They did an alternative architectural

submission, design submission. And this is part of the approved document that's -- you know, the county's approved it. We're appealing.

It says, this project is an application for additional renovation of an existing metal frame structure. It is located in Collier County, Bayshore Drive Gateway District. The project will consist of renovations to a 6,065-square-foot existing structure into a microbrewery, industrial manufacturing of beer, that conforms to the C4 and BMUD and C zoning district. No, it doesn't.

HEARING EXAMINER STRAIN: Well, just I don't want to -- I'm trying not to interrupt you until you finish, but you just read something that isn't in this document. It says on the third line, project will consist of renovations of 6,065 square feet of the existing structure into a microbrewery that conforms to the CB MUD district.

You said microbrewery that is industrial zoning. Where did you get that information from that's not on this?

MR. LEWIS: Because the staff opined -- that's a fair question.

HEARING EXAMINER STRAIN: But were you reading -- you're trying to tell us what this page says? Because if you did, that's not what the page says.

MR. LEWIS: Okay. So the text says "microbrewery."

HEARING EXAMINER STRAIN: Okay.

MR. LEWIS: The analysis is that -- in the zoning verification letter the staff said what is an accessory microbrewery? They said that the -- that the analysis and the interpretation letter, the staff has concluded in their interpretation letter that that is -- the closest use to that is an industrial manufacturing of beer and that that's not permitted.

HEARING EXAMINER STRAIN: Okay.

MR. LEWIS: It's an industrial use.

HEARING EXAMINER STRAIN: Doug, I'm not going to belabor this any further. I simply wanted to point out, if you're going to read something that's supposed to be text supplied and approved by the county staff, you need to read it accurately and stop inserting editorials.

MR. LEWIS: Hopefully, when we go back and look at the tape, I said structure into a microbrewery that conforms. I am equating, by my own analysis, that when you approve a microbrewery, what is a microbrewery? What's the closest -- because it's under the C4. So we have to look for SIC code. What is the closest SIC code that would align to a microbrewery?

HEARING EXAMINER STRAIN: That's something we're going to get into before the -- go ahead.

MS. ASHTON-CICKO: Mr. Chair, as you know, this is the appeal of the OI. The time frame to appeal the zoning verification letter expired long ago. So we're here on the OI appeal, official interpretation appeal, and the appeal of the Site Improvement Plan.

MR. LEWIS: Just so we're clear on the record, we are not appealing today the zoning verification letter. The courts could decide as to whether or not that is ultra vires or not, but as it relates to the Comp Plan.

But as it relates to the appeal of the Site Improvement Plan, we are saying here that they've -- in the project summary it's describing an existing structure into a microbrewery -- it doesn't say bar -- with an accessory microbrewery.

HEARING EXAMINER STRAIN: That's fine. I'm only asking, if you're going to read something from the text that was approved and reviewed by staff --

MR. LEWIS: The staff says a microbrewery.

HEARING EXAMINER STRAIN: -- the text that's there. That's all I'm asking.

MR. LEWIS: Thank you. Yeah, the text says a microbrewery. I will maintain that the only use that could, under the SIC code, code system that we have, the only use that's the closest proximity to that -- and staff has concluded with that -- is an industrial manufacturing of beer use, so that's what we're -- that's my analysis.

Okay. What I'd like to do is, at this point, introduce -- have Greg come up. He's going to walk you through the Comp Plan and some analysis, and I'll turn the time over to him. Then I have some concluding remarks.

HEARING EXAMINER STRAIN: Thank you.