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 architecturals 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 resumΘ. 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 incongruency. 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.

Mr. Stuart, if you don't mind, just give me a very brief part of your background that's included in, I'm assuming, the dozen or 15 pages that were submitted with this packet.

MR. STUART: Yes, Mr. Hearing Examiner. Good morning.

HEARING EXAMINER STRAIN: Mr. Strain is fine.

MR. STUART: Good morning, Mr. Strain, counsel, staff. Good to see you again, Ray, fellow members of the audience, and counsel.

Greg Stuart, for the record, of Stuart & Associates Planning and Design Services. My office is in Fort Myers, 7910 Summerlin Lakes Drive in Fort Myers.

As just a quick overview, as for educational qualifications, my bachelors of arts is from the University of Florida in urban studies with high honors; my masters is in urban regional planning, full HUD fellowship. My post-graduate work, I was a fellow at the Danish Academy of Fine Arts in their College of Architecture, and my specialty was urban design.

I've been practicing for a little over 30 years. I've practiced in -- I have had experience in 14 Florida counties, including Collier. I've done a lot of work in Collier over the years, both in permitting, project management, real estate analysis, that type of thing. I've been qualified in a Lee County Circuit of Florida Appellate and Seattle -- actually, King County, Washington, as an expert. I've probably had around 120 to 130 judicial and quasi-judicial cases.

My qualifications are in Growth Management and land-use planning, urban design, real estate development, and analysis and comprehensive planning.

HEARING EXAMINER STRAIN: Okay. And I have just one question.

MR. STUART: Yes, sir.

HEARING EXAMINER STRAIN: In the years that you've been practicing, how many cases have you presented or been part of that have been in the public testimony in front of the boards in front of the unincorporated area of Collier County? Not including the City of Naples; the unincorporated area.

MR. STUART: Sure. Let's say the -- excuse me -- the Vincentian PUD, which now is an overlay mixed-use district; the PRC&M PUD, which is off -- near Radio and Davis; Sierra Meadows PUD, which is off of Rattlesnake Hammock and Collier Boulevard; the Edison Village PUD. Yes, sir.

HEARING EXAMINER STRAIN: Did you work on these, or did you actually provide public testimony in front of the Planning Commission and the Board of County Commissioners?

MR. STUART: Yes, both.

HEARING EXAMINER STRAIN: I don't remember you. I'm sorry.

MR. STUART: I remember you, though.

HEARING EXAMINER STRAIN: Your name --

MR. STUART: Well, I probably had more hair then.

HEARING EXAMINER STRAIN: And I probably always had this much hair, and that's why people tend to recognize me. I'm sorry, I did not recognize your name when you were first introduced, so I appreciate that.

MR. STUART: No, but I have, and then also, just as an anecdote, in the -- a while back I was doing a lot of work with the Collier County Attorney's Office in their County Barn Road improvement project, the Golden Gate flyway project and some other right-of-way combination cases. So I've had working experience in the county, certainly.

HEARING EXAMINER STRAIN: Thank you. That's what was important. I appreciate it.

MR. STUART: Okay. Then my presentation in chief, I'll try not to cover the points that counsel covered.

Again, the underlying zoning is C4 and, again, they're seeking a 5813 drinking place and with an accessory microbrewery to that. According to the files that I've read, they're looking at around 150 customers in terms of seating occupancy and capacity. Total occupancy at 168.

There's a discrepancy in the facility size. I've seen two sets of numbers. One total at 6,000 square feet with 2585 feet, which is equal to 43 percent, that number would be for the manufacturing of the beer, and then another which was from the October 16th alternative architectural submittal. The number came out to 6,047,

of which 48 percent equaled to 2,914.

So either number, my conclusions are the same, but I wanted to point that out because I'm not sure exactly how much.

There are a number of unknowns, as counsel pointed out, in terms of barrel capacity, fermentation capacity. The licensing, no information has been permitted. As one example, I am an owner -- it's coincidental, but I'm an owner and partner of a microbrewery in Orlando, downtown Orlando. It's the Orange County Brewers located on Jefferson and Orange in Downtown Orlando. In addition, I'm part owner in a pub.

When we had to go through the permitting process, staff wanted to see copies of all of our license applications to get a handle on some of the knowns and unknowns that we're dealing here, and I just point that out. That information is not in the file. So here we are.

If I can make just two overriding points: Manufacturing is not permitted in this land use, the urban coastal fringe. It's not. Manufacturing is an industrial use. Manufacturing is not a residential use. It's not a commercial use, retail use. It's not civic or institutional use. It's not a recreational use. The only use that manufacturing fits into is -- manufacturing, that is, is industrial. Whether it's light industrial or heavy industrial, that remains to be seen.

If you look at the Collier County Comp Plan as in Exhibits 1, 2 and 4, again, it's in the urban -- the property's in the urban coastal fringe within the urban mixed-use district, and then there's the Bayshore mixed-use development overlay. If you look at the Comp Plan, it's very clear. It says, industrial manufacturing uses, such as the manufacturing of beer, is only permitted as a permitted accessory conditional use in urban industrial districts, urban commercial districts, and in some interstate interchange activity centers. Those are the three land uses. If, in fact, this was a legal use, then there would be some type of language saying, in the Bayshore overlay element -- well, you know, and we also will allow for some select light industrial uses.

There's a complete absence of language. You have to take the Comp Plan explicitly, you know. Again, there are three land-use categories that allow for this.

And, also, if you look at Subparagraph 7, the mixed-use residential district, counsel point out that the purpose for mixed-use districts is to have more pedestrian-oriented neighborhood type uses. A pub or a restaurant or a bar or neighborhood uses absolutely. Possibly even a microbrewery that serves the customers maybe, a -- may be a neighborhood-type use, a pedestrian-type use.

But when you get into the wholesale of such product, it is no longer a neighborhood use. It's clearly a light industrial use because it's manufacturing a product for the general public, and I'll expand on that in a little bit.

If you look at Paragraph F, the Bayshore/Gateway Triangle Redevelopment Overlay, which is in Exhibit 7, again, it goes into the intent and the purpose of -- you all are very familiar with it more so than I because you live in the neighborhood; you deal with this. So I don't need to read verbatim.

My point on that is when you go through that section, again, it doesn't identify any type of manufacturing or light industrial uses. It just doesn't. There's an absence of language.

In order for this to go forward on a legal basis, there's no doubt in my mind that there's a -- that there needs a text amendment to the overlay language in the Comp Plan to then implement the type of distribution oriented microbreweries that I believe the applicant is seeking.

When you look at, again, Subparagraph 7 of the Bayshore/Gateway Triangle, it gets into the properties are allowed to use the underlying zoning district if they don't choose to go forward with the mixed -- the Bayshore mixed-use development standards, and that's what we have here, it's my understanding, and from the review of the file it is my clear understanding that they're relying on the C4. They're not relying on the Bayshore mixed-use development standards.

And, again, when you read that, it doesn't state that the introduction of new uses under existing zoning are allowed. I mean, you have to go through a standard public-hearing process, you know, with elected officials voting. I mentioned the Comprehensive Plan. I think that's a good case in point.

And, again, as counsel pointed out, the mixed-use development is inherently oriented; the goal is to try for pedestrian-friendly neighborhoods and the like.

So, again, the urban coastal fringe land use is oriented towards -- towards the restaurant -- or the bar, but not towards wholesale distribution of the product that's going to be coming out of the microbrewery.

Basically, the project's requested accessory use, as currently defined, a condition, again, is not attempting to incorporate Bayshore mixed-use development neighborhood community objectives. It's not trying to promote neighborhood interconnection and pedestrian access and mixed uses. And, again, the manufacturing of this product is not consistent with the Comp Plan. Only in the industrial, general commercial, and some select interchange areas can you have that.

So going into the actual code, if you look, I mean -- and, again, it's obvious. You know, the code has to be internally consistent with the Comprehensive Plan. It can't go asunder. It can't be parallel to it. It has to fall under it. The Comp Plan is a lead document. So if you look at the Bayshore -- under a 2.03 -- excuse me, 2.03.07.4.a.i, under the Bayshore Drive Mixed Use Overlay Neighborhood Commercial Subdistrict, the purpose and intent of the subdistrict is to encourage a mix of low intensity commercial and residential uses. And it doesn't say low intensity commercial and residential and industrial and manufacturing uses. It's just commercial and residential uses, and then it goes on to describe those types of uses.

Furthermore, when you get into actually the use category and table, which is 2.03.07.4.b, which -- let's see, I think that's in Exhibit 7. Anyway, under -- it allows for, under retail and restaurant, it allows for this, okay. It allows for the rest -- or, excuse me. I keep saying "the restaurant." It allows for the bar, pub, and, you know, if they want to morph into a restaurant, it allows that. The table of uses are real clear.

And then when you look at 2.03.07.4.b.i.f, it goes on, manufacturing, wholesale, and storage, and it says under this subdistrict: Premises available for the creation, assembly, storage, and repair of items including their wholesale retail use. Staff pointed that out in their staff report. But then it defines those uses, Mr. Hearing Examiner. It defines the uses as six: Labs, laundry/dry cleaning, media production, metal product fabrication, repair shops, and R&D -- excuse me, seven, seven uses.

HEARING EXAMINER STRAIN: Actually, I think there's nine.

MR. STUART: Then I missed --

HEARING EXAMINER STRAIN: Well --

MR. STUART: Then which ones did I miss, Mr. Hearing Examiner?

HEARING EXAMINER STRAIN: The printout that I pulled from MUNI code this morning, just to try to get the most recent, it has 1 through 9. But I'm not sure what you're reading from.

MR. STUART: MUNI code online. I must have missed that then.

HEARING EXAMINER STRAIN: It's probably something.

MR. STUART: Okay.

HEARING EXAMINER STRAIN: It may not be that relevant, but I was just --

MR. STUART: I hope not.

But of those uses, metal product fabrication clearly is a light industrial manufacturing use that's not allowed; possibly even repair shops. It depends on what is being repaired, of course.

So here you have a very unique situation that the code is not consistent with the Comprehensive Plan, because the Comprehensive Plan, again, allows for these types of light industrial manufacturing uses in three categories, yet the Land Development Code allows for one or two.

So certainly I would encourage you to look at that, because I think that needs -- that needs to be stricken, the Land Development Code needs to be amended, or the Comprehensive Plan needs to be amended to allow for that. But right now, you know, strictly speaking, it's not permitted.

So looking at the staff report -- and I will say -- because, you know, on the face value, when I took a look at the case, wow, this is really neat. You know, I mean, I'm an owner of a microbrewery. It's a neat use. You know, neighborhood pub. You have -- we have 10 different types of beers. I mean, what's not to like? I mean, but if you start dialing into this issue and really look at the bigger picture, there are a number of issues that are of very serious concern, and they all relate to, again, the wholesale distribution of the product.

So staff, basically, has a number of points, four major points. The first point is that the subordinate relationship is evidenced by the percentage of building square foot dedicated to the drinking component versus the brewery component. And, again, that's where you have either the 2,585 or the 2,985.

So somewhere between 43 percent and 48 percent. It's still under 50 percent so, therefore, it's subordinate and, therefore, it's a permitted accessory use.

But the issue really is Comprehensive Plan consistency and whether the Land Development Code identifies as a permitted, as a conditional, or as an accessory use, whether it's specified, and it does not.

The second point with staff is traffic counts. A subordinate relationship is established by the traffic counts. I think they had -- I forget the total number, but six p.m. peak hour for the distribution component. But, again, it's the wrong merit and, also, it's important to point out that the TIS doesn't take into account potential storage capacity, because if you have storage capacity, it's -- you inherently do not have a lot of trucks coming in and out because you're storing it on site, and then you could have one truck. So, again, it's not indicative. There's no causality.

The third point is that a subordinate relationship is evidenced by the direct interconnection with the beer garden as a source of the beer product, and that is correct as it pertains to the consumption on premise. But my testimony, in addition to the comprehensive planning consistency is that, you know, this is not just on-premise consumption, you know. It may be shipped out, and then it's wholesale, and it's a different game.

As counsel said, if you look at the BMUD-NC category, the only legally permitted accessory use is open storage. And there's, you know, the documents there. And, again, based upon the definition, and in order to be consistent with both the code and, more important, the Comprehensive Plan, the bar has to be the sole source of the beer consumption. It has to. It has to be consumed on site.

In our particular case with Orange County Brewers, yes. We also sell Growlers, you know, 16-, 32-ounce jugs, if you will, people -- you know, you buy the jug, you buy the beer, take it home. But that's not what we're talking about. We're talking about wholesale distribution.

So, again, when you look at the subordinates by the interconnection, yes, on the small scale, but if you step back and if they start selling at -- and I'll get into this right now, the 49 percent ratio, then it's not an accessory use. Staff's proposed condition to try to make sure that this stays as a legal accessory use is to limit the gross sales to 49 percent or less of the total sales, and there's monitoring involved, annual monitoring.

But the standard, again, is not relevant. I mean, what they're saying -- what the condition says is that if you have a hundred dollars a sale, a $2 difference makes all the difference between having it as a permitted use by right versus a legal accessory use; a $2 difference. It doesn't work like that. A $2 difference doesn't differentiate a permitted use from a legal accessory use. It doesn't work. It's the wrong -- it's the wrong metric.

HEARING EXAMINER STRAIN: Mr. Stuart?

MR. STUART: Yes, sir.

HEARING EXAMINER STRAIN: Are you basically claiming, then, that a microbrewery or anyplace that brews beer is considered an industrial use?

MR. STUART: Yes, yes.

HEARING EXAMINER STRAIN: Okay. So the people that create home craft beers in residential neighborhoods in their garages and stuff, you would consider that an industrial use?

MR. STUART: If they are selling their product, that wouldn't be allowed. That wouldn't be permitted as a home occupancy.

HEARING EXAMINER STRAIN: Let's back up, though. What constitutes the industrial use? Is it the production of the beer or the sale of the beer?

MR. STUART: Actually both.

HEARING EXAMINER STRAIN: Okay. So if someone produces beer, the method by which they sell it would be the trigger by which you would think it's an industrial use versus a nonindustrial use?

MR. STUART: If you're using someone in their garage with --

HEARING EXAMINER STRAIN: I just say any quantity, because your -- I'm trying to understand what is your trigger for saying it's industrial versus a craft component, like a specialty craft market of some type. Maybe not related to beer, but there are other crafts out there that are produced and sold on premises. Even pizzas are produced in pizza ovens and sold, and a lot of those are in deliveries.

MR. STUART: Yes.

HEARING EXAMINER STRAIN: How do you differentiate this as industrial use versus those uses, similar uses?

MR. STUART: Well, pizza would be classified under the food/restaurant food service type categories, which would be retail --

HEARING EXAMINER STRAIN: Right.

MR. STUART: -- versus this is as manufacturing. It doesn't fit anywhere else.

HEARING EXAMINER STRAIN: But it's manufacturing because you believe it's sold wholesale? It that how it hooks together for you?

MR. STUART: Well, it's sold wholesale maybe. Because, again, there's -- the information's rather thin. But the actual plant, the physical plant, is a manufacturing plant. You cook the hops, you transfer the hops into the fermentation, you ferment for two weeks, you then stream it into a -- into your barrels and refrigerated areas for on tap or for off sale. You always end up pressurizing and pressure cleaning the type of vats to make sure you meet various health and safety standards. It is a manufacturing -- it's a manufacturing process.

HEARING EXAMINER STRAIN: But if this wasn't selling wholesale and they were manufacturing, as you want to term it, on site to sell within the building, they wouldn't be considered industrial; is that your position?

MR. STUART: No, because the -- I take a strict constructivist position on the Comprehensive Plan, and the Comprehensive Plan calls out three areas for industrial/manufacturing, and in this particular case if they wanted to have that, you need a text amendment for the Bayshore mixed-use district, so...

HEARING EXAMINER STRAIN: And that's another point. I understand now why you referred to six uses in the manufacturing wholesale segment of the table. There are nine listed, but only six are relevant; only six are permitted. So now I think we're working from the same table.

MR. STUART: Thank you.

HEARING EXAMINER STRAIN: You just didn't count -- if you had said there are nine and only six, I would have understood it better. I thought you were looking at just six.

In those six, when you did your analysis -- and the reason I'm asking you questions now it's wrapping up to over an hour.

MR. STUART: Yes. I'm very sorry.

HEARING EXAMINER STRAIN: We're still going to go through this. I'm not going to cut you off. I just want to finish up with some issues I need to resolve.

How did you determine -- maybe you or the applicants -- the legal counsel. I noticed that you're insisting there are no industrial uses allowed in the Bayshore area. How did you determine that?

MR. STUART: Well, by policy, by reviewing of the Comprehensive Plan, not in regards to --

HEARING EXAMINER STRAIN: Well, the Bayshore overlay is part of the Comprehensive Plan.

MR. STUART: Yes. By reviewing the Comprehensive Plan.

HEARING EXAMINER STRAIN: The Bayshore list of elements that you've pulled out of the tables and the LDC, which has been deemed to be consistent with the Comp Plan, allows manufacturing and wholesale, and it lists a series of 1 through 9, of which six of those are allowed.

MR. STUART: Yes.

HEARING EXAMINER STRAIN: Have you checked the SIC codes that attach to each one of those uses to determine what other zoning districts they're allowed in within Collier County?

MR. STUART: No. I was really focusing in on the uses that, you know, would be, at least to my professional opinion, evidence of manufacturing. So those were the uses.

HEARING EXAMINER STRAIN: Okay. So you really don't know if any of those other six uses that are permitted under the manufacturing and wholesale section of the Bayshore overlay are, in fact, not found in an industrial category in Collier County?

MR. STUART: I haven't done that analysis, sir.

HEARING EXAMINER STRAIN: Okay. And this is just a sidenote. You mentioned your operation in Orlando. Just out of curiosity, is that a -- do you actually produce beer there on that location?

MR. STUART: Oh, yeah. It's a microbrewery. We have a -- we have a -- excuse me. We have a seven-barrel system with a 14-barrel fermentation ancillary system. And we opened this past August, and we're looking at around 2,000 barrels annually.

HEARING EXAMINER STRAIN: Are you -- what zoning are you in, that location, do you know?

MR. STUART: The Downtown Orlando has a -- has a -- it's an overlay for entertainment, special uses. It's -- I would have to get back to you in terms of the specific --

HEARING EXAMINER STRAIN: What's the name of the company?

MR. STUART: Orange County Brewers, B-r-e-w-e-r-s. You can Google it, go online.

HEARING EXAMINER STRAIN: Just out of curiosity, I will. Thank you.

MR. STUART: And, look, I'm not standing here saying I am an expert in production. I'm just saying that I have working knowledge in this. You know, I was involved in the finance and stuff. And so when I see the setup, yes, it's manufacturing, you know. I mean, it is what it is.

HEARING EXAMINER STRAIN: The storage capacity, you mentioned that the additional storage capacity would have an impact. Why is that a concern?

MR. STUART: Well, it's not a concern per se. Staff was using traffic counts as a metric to substantiate that it's subordinate. And my point is the traffic -- and I'll elaborate on this in just a bit. But traffic counts -- if you have ample storage, then -- and, again, it depends on the production. It depends on the volume. But if you have storage, then you, inherently, may not have that many truck trips at all because you're storing the product on site.

HEARING EXAMINER STRAIN: Right. And limit your trips then by --

MR. STUART: Yes.

HEARING EXAMINER STRAIN: So that's a bad thing?

MR. STUART: No, I'm not saying it's bad. I'm saying that staff -- if you look at the staff report, they're using that as evidence of a subordinate relationship. And my point is that it's not evidence of a subordinate relationship. They're using the wrong metric.

HEARING EXAMINER STRAIN: Are you aware of the comparable/compatible language in BID and, basically -- it's actually, no, b.i.f. If it says -- I'm sorry, b.ii.b. I'll get it right yet. It says, any use not listed in the table of uses is prohibited unless the County Manager or designee may determine that it falls within the same class as a listed use to the process outlined in LDC Section 1.06.00, rules of interpretation.

MR. STUART: Yes.

HEARING EXAMINER STRAIN: I believe that is the section that was followed for what brought us here today. So --

MR. LEWIS: Let me handle that.

HEARING EXAMINER STRAIN: And staff's OI is what is part of the appeal that's being here today.

Doug?

MR. LEWIS: Yeah. Let me address that.

We vehemently reject that analysis. And I would say that the zoning verification letter that staff opined that in that letter, they described the business as most similar to that of a bar under the SIC 5813. And they said that the remaining uses could be accommodated on a limited basis as being accessory to C4 permitted bar.

The zoning verification letter does not say that the remaining uses can be accommodated under the BMUD-NC, so I want to make sure that we start with the history first, and that's the zoning verification letter back in 2015.

In that opinion it was tied to the C4 accessory. They did not make an opinion there, a determination. A key reason why they didn't make that opinion is that the only nonresidential use permitted in the BMUD-NC is outdoor storage. That's the only permitted accessory use, period. That's not debatable.

Under the maximum espresso unis est exclusion alterius, which is Latin -- my kids take Latin at MCA. I don't speak Latin. But, basically, what -- the legal principle is that when there are more things of a class that are expressly mentioned, others of the same class are, by inference, excluded.

And so in the zoning verification letter, the staff said, you can do this, in essence, through the C4 as an accessory use, and they understood that the only nonresidential accessory use under the Bayshore mixed-use NC overlay permitted is outdoor storage.

The owner understood this before they purchased the property, and they didn't appeal the zoning verification letter.

Further, in connection with our official interpretation request, we didn't even ask the staff to opine specifically as required under your interpretation section to make a determination under 2.03.07.i.b.ii.b, whether an accessory brewery falls under a similar use category -- accessory use category like outdoor storage. I don't even know how you could make that request, because the only accessory use that's permitted there -- because we've already said it's not a principal use, not a conditional use. We didn't request that. And I don't want to be argumentative --

HEARING EXAMINER STRAIN: But I think you started out by indicating, or maybe your planner did, that the underlying zoning of C4 is still an option on the property, and this would be, then, considered -- I think staff was trying to place this as an accessory use to that original zoning underlying category of a drinking place.

MR. LEWIS: The zoning verification letter made a determination that you could -- which we think is ultra vires -- that you could have an accessory -- again, very -- accessory, very incidental, not substantial, to a bar under the C4.

They did not opine in 2015 that you could bring this in under the overlay, and the reason for that, frankly, speaks volumes, because the only permitted -- the only accessory use that's available for a nonresidential development in that overlay is outdoor storage.

HEARING EXAMINER STRAIN: But why would they need to bring it in through the overlay if they can bring it in through the underlying zoning?

MR. LEWIS: Well, we reject that position. I just was addressing --

HEARING EXAMINER STRAIN: No. I am not taking a position they're right or wrong. I'm simply asking the question. If they can bring it in under the existing zoning, what would they need to worry about bringing it in under Bayshore overlay for? It would be irrelevant at that point.

MR. LEWIS: My comments that I just made to you was in direct reaction to your statement that this was -- my understanding of what you said was that this was -- this determination under 2.03.07.i.b.ii.b. So my comments were limited to that. As to your question --

HEARING EXAMINER STRAIN: Okay.

MR. LEWIS: -- now, which is a different question, I would say, look, I mean, staff is entitled to their opinion. We think that that was an ultra vires determination. But I want to be clear that that was a determination under the C4, not under the overlay.

HEARING EXAMINER STRAIN: Okay. Understood.

Mr. Stuart, how much time do you need to finish up?

MR. STUART: Five, eight minutes more; five to eight minutes.

HEARING EXAMINER STRAIN: Okay. Let's limit it to that, and then I'll have some remaining questions, and we'll finish up after that.

MR. LEWIS: I just need to address that. I have information that I need to put into the record to preserve my client's case. So I would ask, as a matter of due process, that I'm afforded the opportunity. I have some case law, some precedent, interpretations the county's already set that's very relevant that I need to get into the record.

HEARING EXAMINER STRAIN: Is it information beyond what you've already provided --

MR. LEWIS: Yes.

HEARING EXAMINER STRAIN: -- in this hearing binder?

MR. LEWIS: It's new information that I have not been able to --

HEARING EXAMINER STRAIN: Is it going to be provided in hard copy, or are you suggesting --

MR. LEWIS: I'm going to -- yes, I'm going to provide it to you in hard copy and verbally.

HEARING EXAMINER STRAIN: Okay. Well, hard copy. We'll see how much time's left for

verbal.

Go ahead, sir.

MR. STUART: I'll try to be quick, Mr. Hearing Examiner.

Okay. Getting into the heart of the staff report. The staff, when they say the BMUD, neighborhood community permits manufacturing, wholesale, and storage, yes, it does, but when -- again, when you look at the code, they're using C4, and we've discussed that. So I just want to be clear, and I believe counsel said that.

When you look at the staff statement that the manufacturing uses that are listed are also C5 -- so it kind of justifies their interpretation, but in this particular case a hierarchal zoning interpretation is not applicable because the specific accessory uses are identified both using the C4 and also using the Bayshore mixed-use development. So it's not applicable.

And, basically, I have to point out that the reason why it's not applicable is that when you have a Land Development Code, it has to identify your accessory uses. It has to identify your conditional uses. All those uses are identified for predictability and equal protection.

The official interpretation appeal, the heart of our appeal also, is that -- is that it's not -- the interpretation is not consistent with the Comprehensive Plan. So even if you have the ability to interpret and bring in a new conditional use or a new accessory use, it still has to be consistent with the Comp Plan, and in this particular case it's not.

Okay. The staff -- the BMUD neighborhood community allows for a wide variety of uses, residential, commercial, and relies on use groups and not SEC (sic) classifications. Heck, I've covered that. I don't need to go into that.

Well -- and getting into -- okay. But let me finish up with two points. Both -- the square footage. You know, it's subordinate because it's smaller than the permitted use. You know, again, it's the wrong metric. And, as an example, you could have a resort hotel and spa, okay. The spa component is also a permitted use along with the hotel. The spa footprint is far smaller than a hotel footprint, but it's a permitted use.

So there's no real nexus between floor area and whether it is a legally permitted accessory use and a permitted use. So, again, that's why I was saying it's the wrong metric.

Another example, when you look at the traffic counts, again, it's the wrong metric. Using orthopedic practice, there are orthopedic practices that -- you know, they all -- most orthopedic practices have a physical therapy capability. Some have now opened up the physical therapy to -- a wellness spa to the public, and so when you have -- when you evaluate traffic, well, you know, the traffic still is far, far greater for the orthopedic use than for the use that's open to the public.

And my point is, traffic, again, is not the accurate metric because you can have -- you could have permitted -- legally permitted uses by right, you know, with huge discrepancies in your traffic counts, which we have in here.

And then when you look at -- finally, when you look at the gross sales, it's very important. Again, the gross sales aren't a metric. The application was thin. I have no idea, ultimately, what, you know, production buying, what capacity, how much expansion they're planning for, because if you look at the site plan, there's areas stated for expansion. Plus, from my experience with the Orange County Brewers, when I look at the site plan, they've got plenty of space. I mean, we're doing 2,000 barrels plus in almost a third of the space. So, again, it's hard to get my handle on that.

But, again, a percentage of sales is always used for COP-type uses, for state, you know, liquor licensing. But they're using a state liquor license standard and criteria to try to separate what is a legally permissible accessory use from the primary use. And, again, it's just the wrong metric.

The big picture -- and I'll wrap up. The big picture is this: I mean, everyone here, I'm sure, wants this microbrewery. They want a local beer tavern. I can understand that. But the big picture is that if you allow staff interpretation to stand, then -- using an example, Glassworks. You have a really nice Glassworks. Glassworks is an industrial manufacturing use. They manufacture vases and trinkets and all kinds of really nice -- glass babies, that type of thing, and they sell retail, storefront.

But, over time, let's say, if they have the capacity, they dialed into an Internet provider, Amazon or something, and then they start wholesaling these glassworks to Amazon. So then what you will have is a

legitimate accessory use that ties into the retail storefront, and then it morphs into a wholesale business, which is not.

And so there's a big picture here. And I can go through -- I mean, leather products. It's the same thing. So there's a big-picture issue here that I wanted to emphasize. I'm running out of time. So thank you.

HEARING EXAMINER STRAIN: And I understand your emphasis, but I've got a question. You said all accessory uses must be listed.

The storage, outdoor accessory uses listed in the Bayshore may have been there -- and I'll get the Collier County zoning manager or zoning director to opine on this eventually -- that may have been there simply to acknowledge that that's now an allowed use within that particular area, not that is the only accessory use to all those other six allowed principal uses.

For example, we have taverns, and other places might serve food. If food's not the primary use, it would be a secondary use. The primary use would be the beer and tavern. It would be under a 5813 instead of 5812 or vice versa.

We've had this happen in Collier County before; Stevie Tomatoes was a prime example. It was an area up in North Naples. They were operating as a restaurant, but they were making -- I think -- we had to verify that they weren't becoming a bar, and we used that metric to get there.

MR. STUART: My point -- and I'll conclude with this. The interpretations to allow for uses not listed have to be consistent with the Comp Plan. It's that simple. And in this particular case it's not.

HEARING EXAMINER STRAIN: And in your opinion it's not consistent. We'll hear more from county staff and others today. Thank you.

Doug, how much time do you need to finish up?

MR. LEWIS: I want to first address your comment -- I think it's important -- because I want to make sure you're aware of the language. And I think it's a fair comment.

Under the interpretation of tables -- this is on the overlay -- it says, blank sales -- sells, meaning there's no information indicated. Use is not allowed in the corresponding subdistrict; however, such use may be permitted in the underlying zoning designation.

So they understand that just because you don't list something there, if it's a blank sell, for example, that the underlying zoning may permit it, but it says, uses -- a use not listed is prohibited.

So that's really -- in answer to your question, the only accessory use that's permitted in that -- in the overlay is the outdoor storage.

Tab 22 -- just so we can be -- expedite our time. This is a really important -- another example. He talked about Glassworks. This is the example of the high capacity storage tanks. And I would submit that, you know, when we start to, for a particular person, provide special accommodations and when we disregard the law, that gets problematic, and there's unintended consequences.

One of the consequences -- there's a staff clarification that was issued under SC 0605. This is a perfect analogy. So what you had going on out in the Estates is you had people that were getting these big high-capacity fuel tanks, and they were saying, well, wait a minute here. You're bringing these 500-gallon tanks that you're using to fuel your accessory use lawn business. And, in addition, what you're doing is you're using some of those tanks to take care of your home needs, which is understandable.

So the staff correctly drew the distinction between what's accessory to the principal use, meaning this is -- the high-capacity storage, this is an accessory. The 250 gallons is what they figured was an amount, a quantity. So you could say 15 -- you know, a thousand barrels is what they're going to consume on site. That -- they can brew that if that's your determination; there's no Comp Plan violation, and you can do it under the C4, if that's your conclusion.

Then consistent with this you would say, okay, well, you could do a thousand barrels produced that you're going to use for retail purposes on premise, but the excess capacity that you're providing is not accessory.

And so in this staff clarification they said, for purposes of the classification, high capacity tank is defined as any tank --

THE COURT REPORTER: Can you slow down. Sorry.

MR. LEWIS: Yes -- in excess -- I apologize. I'm trying to expedite the time to get my case on the record. But 250 gallons of fuel. So that was a limit that was set by staff.

The staff then said, this amount should be sufficient to power lawn tractors, lawnmowers, chainsaws and other motors used as an incident -- again, it needs to be incidental and subordinate -- as an incident to the single-family home. And, by the way, that's very consistent with the Florida Supreme Court case that's in your packet, the Third District cases that make a very clear line about what is permitted -- what's an accessory use.

Consistent with that, staff correctly ruled in 2007 that this percentage of the storage capacity is an incident to the single-family; however, the fact that the code allows home occupations employing heavy vehicles and equipment, others accessory uses powered by gasoline/diesel does not justify the storage of large amounts of fuel in support of the home occupation. So, again, that's not incident to the permitted use.

I wanted to make sure -- because you'd asked the question before. If you look at Tab 11, or Tab 14 as it relates to the interpretation letter, I think it's really important as staff observed that the proposed brewery use is most similar to a brewery described under SIC Code 2082. Now, how do we get that inference? If you look at Tab 14 --

HEARING EXAMINER STRAIN: Doug, you've got five minutes to finish up, so one way or another, let's just finish.

MR. LEWIS: Okay, thank you.

It says -- it says, the allowance of a microbrewery, on site brewing of beer. Again, they're tying that back up to the statement above. It says, the industrial manufacturing of beer more typically known as a brewery, SIC Code 2082. That's staff determination, which I think is the correct determination that what they're doing is an indust -- the SIC code for 2082 is industrial manufacturing of beer. That's -- and that was not appealed by the property owners.

So the allowance of this industrial manufacturing of beer associated with the bar -- they use the term "drinking establishment," just so we're clear. The language says "drinking establishment," but I think what they said earlier was a drinking establishment is tantamount to a bar, which is for retail on-site consumption, is an accessory use that's directly related to the principal use. And our clear testimony is the only way you can get there is through the C4.

And the final thing I wanted to mention was that if you look at the case law that's provided -- and there's an attorney opinion there as well -- there's several cases, but there's really a two-part test. And this is the Turnberry case. This is Third District Court of Appeal. This is where you had basically a place that was zoned for residential. There was a hotel spa, swimming pools, and whatnot, and they were seeking to have a medical group provide services to not just the residents but the community at large. And the Court said, to be accessory it must benefit the property residents and -- and there's an "and" part -- not be available to the general public at large. So it's got to be contained on the site, and it's incident to, which is the clear law.

In fact, if you look at the -- another Third District Court case says, if you want to look at Basset's work on zoning, he summaries that many ordinances have elaborate statements regarding accessory buildings, but they can usually be reduced to a prohibition of business, and that's what we're talking about. When you engage in a separate, distinct business of manufacturing and distributing for off-site consumption, that is in no way incident to a bar, in all fairness. And I think the courts understand that, and so there's this two-part test. And the Court said, that's the law.

Now, in this case, in the Turnberry case, they said, well, it's not even close here because, again, that's the law. The facts were that most, if not all, serve the general public. That is what the law said.

Now, the law -- it could have been 20 percent of the volume or 10 percent, didn't matter, because you can't -- it cannot be available -- the law says it cannot be available to the general public.

That's consistent with the Florida Supreme Court case that my partner cited in his opinion.

HEARING EXAMINER STRAIN: You have two minutes, Doug, to finish up.

MR. LEWIS: Two minutes, all right.

Just quickly, the owners raised some other questions about the project being delayed. You know, we filed our appeal. We were trying to get this before the BCC back on September 12th. We spoke to the owners back in May 2017. We asked them if they'd agree to limit manufacturing of beer for retail on site,

consumption only, and they wouldn't agree to that. That's in the tab. That's Tab 20.

There were concerns about the owner might abandon or might walk away. Well, the zoning letter back in 2015 put them on notice that a brewery is not permitted on the property as a permitted use or as a conditional use, and manufacturing beer must be incidental and subordinate to the retail sale of beer on the premise. So they knew that.

So why did the owner buy the property? And why didn't the owner look for an industrial-zoned site?

I understand the job issue. I get that. It's all good, but that doesn't justify the problems that we're going to create by undermining the Comp Plan, the Land Development Code, and undermining specific precedent and zoning opinions on this issue.

Also, this is not the mixed-use project that we're encouraging. I think that's clear. This is not the type of project that we're looking for, and it's certainly permitted; I understand that.

If there's a desire to bring this use into the Bayshore redevelopment overlay, then they should work, you know, to amend the Comp Plan and address that, and there could be a larger discussion, and the community can weigh in. We can have it go through the front door and not provide special favors to a very popular, you know, owner.

I will note, at the very end, just to be expeditious on time, I did put in there a list of proposed conditions to the SIP approval, and those are in your binder. And we've asked staff to look at those, we've asked, you know, certainly for the applicant, conditions to ensure that if you find that the Comp Plan allows as an accessory to C4 this use, then we would say these conditions would be designed to ensure that's what happens, and those conditions are found in your binder -- under Tab 20 in your binder. And we've also asked for certain modifications. That's the very first page in Tab 20, or Page 1 through 3. Page 3 is the actual specific proposals, and we've asked for certain modifications to the interpretation letter. And that really concludes my presentation.

HEARING EXAMINER STRAIN: Thank you very much. And with that, we're going to take a -- yes. Go ahead.

MS. ASHTON-CICKO: Mr. Chair, I do have two comments to make that you need to be aware of.

The Tab 23 that has the staff clarification, you need to be aware that the Board of County Commissioners directed that in order to be official, all staff clarifications had to be approved by the Board. I can't tell you right now whether this is an official interpretation. We can look into it and let you know; otherwise, it's just an internal staff memo.

And then the second issue as to the conditions that were presented yesterday to Mr. Bosi and Mr. Scott for consideration at this hearing, because the property owner, who's the real party in interest here, was not party to these discussions of the conditions, I told staff that they should hold off, and those issues should be addressed today at the hearing rather than out of the hearing yesterday.

HEARING EXAMINER STRAIN: I'm assuming Mike -- I did not see those. Mike, are you aware of what Heidi just mentioned?

MR. BOSI: Yes, Mr. Strain.

HEARING EXAMINER STRAIN: Okay. You'll be up next, and you'll be able to at least address those.

MR. LEWIS: And thank you for that, Heidi. I appreciate that. If I might as well, I can provide a supplement, as well, to you as you evaluate the merits. I can provide a supplement as well, if that's okay, on the 0605 interpretation.

HEARING EXAMINER STRAIN: I can't accept anything after today's hearing in regards to the decision.

MR. LEWIS: Okay. That's fine. And I would just, again, object on the record --

HEARING EXAMINER STRAIN: I will be able to weigh that accordingly.

MR. LEWIS: Because there's information coming in after the hearing that I'm not able to address, so I just would -- as a due process matter --

HEARING EXAMINER STRAIN: I won't be able to accept anything after this hearing today.

MR. LEWIS: Okay. I'll just object on the record. I appreciate that. Thank you.

HEARING EXAMINER STRAIN: Okay. With that, we are going to take a break till five minutes of 11, and we'll come back at that time. About 15 minutes.

(A brief recess was had.)

HEARING EXAMINER STRAIN: Okay. If everybody will please take your seats, we'd like to resume the meeting. Ladies and gentlemen, if you'll please come in and sit down and stop talking.

Thank you.

With that, we'll resume the meeting. We left off with the presentation by the appellant and some questions that I had. We are going into the presentation by county staff. The appellant did have one expert witness testify today. I'll open the -- let the county staff know that they're able to cross-examine that county -- that particular expert witness before you're done with your presentation.

Mike?

MR. BOSI: Thank you, Mr. Strain. Mike Bosi, Planning and Zoning director.

Before I get into the specifics of my case, I did want to provide to the court reporter a number of emails that I have received post the distribution of the packets to the Hearing Examiner -- these have been provided -- just to complete the record.

HEARING EXAMINER STRAIN: Thank you. Do you have copies for others here, or just the one for the court reporter? That's -- if that's all you've got, we'll make that work.

MR. BOSI: I have one other set of copies of the individual emails.

First, let me -- again, Mike Bosi, Planning and Zoning director. I've been in that capacity for five years for the county. Fifteen years total as either a principal planner or community planning manager, comprehensive planning manager, or the overall planning and zoning director.

I received a masters degree from Georgia Tech University in the mid '90s, worked within the communication industry for four years before I began my career with Collier County. So close to 20 years of experience within the field of planning; am a certified planner by the American Institute of Certified Planners as well, just to proffer my experience within the field of planning.

And, also, from a procedural standpoint, I wanted to clarify, per the Land Development Code, Section 106.019, the County Manager or designee shall have the authority to make all interpretations of the text of this LDC, the boundaries of the zoning districts on the official zoning atlas, and to make all interpretations of the text of the GMP and the boundaries of the land-use districts and the Future Land Use Map, and I would be that designee as the Planning and Zoning director, just for clarification purposes.

HEARING EXAMINER STRAIN: Thank you.

MR. BOSI: Today's hearing is based upon two appeals that were submitted. One to an approved Site Improvement Plan, and the second was to an official interpretation.

The first appeal is the SIP appeal, and there's two primary questions that were the basis of that appeal, and they're highlighted. First, that the industrial manufacturing of beer and related uses within the site work as described on Exhibit A cover letter as filed by the property owner within the Site Improvement Plan application is not a permitted use of the property and that industrial manufacturing of beer is not a principal, accessory, or conditional use that can occur on the property as expressed by the appellant.

Second, within the appeal of the OI is that within the Bayshore Mixed-Use Triangle Redevelopment Overlay, they do not include industrial manufacturing of beer or any other type of industrial uses whatsoever as their first claim and, second, that industrial manufacturing of beer, more typically known as a brewery, is an industrial use that is not permitted on the property and is not permitted as a principal, conditional, or accessory use.

Those are the questions that are being asked of this appeal hearing. What I heard today, which was surprising -- it was proffered by their expert witness -- was that the Bayshore mixed-use district overlay within our zoning code was inconsistent with our Growth Management Plan.

Now, I don't -- as I was listening to that, I went through the appeal for the SIP and the application for the OI appeal, and never was it ever suggested that there was an inconsistency between the adopted Land Development Code overlay and the Growth Management Plan.

So in terms of those questions, I'm not going to address. I'm going to assume that our adopted Land

Development Code is consistent with the Growth Management Plan, and my focus will be upon the questions of whether a restaurant with an accessory microbrewery is a use that's allowed for within the -- within the C4 zoning district or the Bayshore mixed-use neighborhood commercial overlay district.

HEARING EXAMINER STRAIN: Now, Mike, I didn't interrupt the previous speaker at his request during his presentation. Would you prefer I ask questions as you move along or I hold my questions until you finish your presentation?

MR. BOSI: You could ask questions at any time, Mr. Strain.

HEARING EXAMINER STRAIN: Okay. Was the Bayshore overlay reviewed and approved by staff, both comprehensive and zoning, was it reviewed and approved by the Planning Commission, and it was reviewed and approved by the Board of County Commissioners?

MR. BOSI: At the time of adoption, it was, yes.

HEARING EXAMINER STRAIN: And with the uses that we've seen today under previous submittals -- we talked six out of nine uses in the manufacturing wholesale section -- were all those part of that approval process?

MR. BOSI: Yes, it was, Mr. Strain.

HEARING EXAMINER STRAIN: Thank you.

MS. ASHTON-CICKO: Mr. Chair, for clarification --

HEARING EXAMINER STRAIN: Yes.

MS. ASHTON-CICKO: -- of the record, so that we have a record of this, the land planning agency and the Board of County Commissioners are required to make a consistency determination with the Growth Management Plan at the time that they adopt the Land Development Code regulations.

HEARING EXAMINER STRAIN: And that's my purpose of getting Mike to at least confirm that was done and the process was followed. Thank you.

MR. BOSI: The next overhead exhibit that I have is directly from that Land Development Code and the Bayshore Mixed Use Overlay District. The Bayshore Mixed Use Overlay District sits within 2.03.07, which is the overlay zoning district of our Land Development Code. 2.03.07.I.3.b specifically states that property owners within the Bayshore mixed-use district may establish uses, densities, and intensities in accordance with the LDC regulations of the underlying zoning classification or may elect to develop -- redevelopment under the provisions of the applicable Bayshore mixed-use district subdistrict. And in this subdistrict, we deal with the Bayshore neighborhood commercial.

The second section that I have, 2.03.07.I.4.b indicates that -- the uses that are allowed for within the Bayshore mixed-use district overlay. The first is a, is residential, the second is lodging, the third is office, the fourth is retail and restaurant, the fifth is entertainment, the sixth is manufacturing, the seventh is civic and institutional, and the eighth is infrastructure.

Those are relevant because those are the range of land uses that are provided by the Bayshore mixed-use district. And if I was to characterize the proceedings and the guidance that staff utilized to make their determination it would be two words: Scale and focus. Because I think scale is relevant to the operations that are provided for within the beer garden and accessory microbrewery, and focus. And I say "focus" because if you look at the applications for both the OI and the SIP, there's a focus upon the C4 zoning district.

And staff, in staff review of the uses that are permitted, feels that that focus is misguided, that the focus should be on the Bayshore mixed-use district neighborhood commercial overlay.

And why do I say that? Further within the Bayshore Mixed Use Overlay District, within the table that describes the uses that are contained within any one of the neighborhood districts -- and the focus of our attention would be on the mixed-use side, highlighted, the neighborhood commercial. That's the second to the last of the allowance.

And it goes through. And the first page it lists your typical dwelling units, single-family duplex, row houses, multifamily as permitted uses, and then we go to the second category which was lodging. Within there, hotels and motels are permitted uses. Conditional uses would be bed and breakfast. Then the third grouping would be your office and service, and there's a wide range: Banks, credit institution, government

services, medical services, personal care, post office, professional office service. It continues on and allows for rental services, studio, veterinarians, video rental, and then goes onto the next category which is retail and restaurants.

I think the second listing within there, your bars, tavern, and nightclub is squarely the permitted use that is the primary use of this property. And it goes through another listing of retail and square footage limitations within your general retail and how that works.

The next group is your entertainment: Galleries, museums, meeting facilities, cultural community facilities, theaters, recreation facilities, amusement indoor, community garden.

And then it goes to the next grouping, and that's your manufacturing: Metal products and fabrication is one of the permitted uses; laboratories; laundries; metal -- warehouses; repair shops; storage outdoor; and the one I found most interesting was research and development. And why do I find that interesting? Is one of the things that you'll notice, that there's no SIC codes that are associated with these groupings. They're open. They are a large umbrella of activities.

So if I was to try to make a determination of a use underneath one of these umbrellas, how would I go about determining that as the administrator of the Land Development Code? Collier County's Land Development Code traditionally uses the SIC code approach to designate what land uses would be provided for.

This a little bit more flexible. It's a redevelopment area. It's a mixed-use redevelopment area, and I believe that flexibility was specifically intended within these groupings.

So what I did is I went to the SIC code website, and it's SIC code -- SICcode.com. And, basically, the first search that I performed was research, and it had a list of SIC codes for various kind of land uses that would be provided for underneath that permitted -- permitted land use of research and development.

And one said space research and technology. And then you went down, and it's aircraft engines and engine parts. It's guided missile and space vehicles. So I was satisfied with that.

So then I went to research -- or I went to development. So within the development SIC location lookup, metal mining surfaces was one of the ones I thought as rather intense from a land-use perspective. Again, the guided missile systems, the space vehicle parts, your wholesale trade, air and water research, and solid waste management. And I thought those were pertinent; those were pertinent to the type of land uses that were allowed by this individual zoning district.

So, finally, I said, the umbrella category that we were looking at is research and development. Why not -- why not input research and development within the SIC directory search? I put that in, and if you can see at the very top, that's the second page of 25. I have 23 pages of individual land uses that were provided within that search.

What I found as extremely interesting, that if you look underneath the SIC code lookup for research and development, on Page 24 of 25, 2082, malt beverages. That's a brewery. 5181, beer and ale. That is packaging of beer and ale manufacturing.

So based upon a traditional premise towards how an applicant could make a presentation or the case for a use that could be provided for, this approach could find both the manufacturing of beer as well as the restaurants being provided as permitted uses within that individual zoning category.

HEARING EXAMINER STRAIN: Mike, in regards to that issue, that under the research category this pops up as those SIC codes that could apply, you've already opined through the OI that's in discussion here today that 2082 would not apply.

MR. BOSI: Right.

HEARING EXAMINER STRAIN: How do you differentiate then between those issues that theoretically would apply by the broadness umbrella format of the language in the Bayshore versus the more specified application that's more, let's say, practical for that neighborhood; how did you do that?

MR. BOSI: As I stated, I said there were two words that were really guiding our determination, and the first was focus, and that's about where the zoning focus was, whether it was C4 or the Bayshore mixed-use district, and then the second was scale, and it is scale. And it's the scale of the operations in subordination to the primary use of the property that allowed me to make that determination that a use category that could be

argued could be permitted, could be accommodated within an accessory capacity to a principal use that has a direct relationship to that principal use. And that was how that determination was arrived upon.

HEARING EXAMINER STRAIN: Thank you.

MR. BOSI: And I know within the expert testimony there was a discounting of some of the factors that staff utilized to make that determination of insubordination -- or subordination, I'm sorry, and they discounted trips, they discounted square footage, and they discounted sales as inappropriate ways to gauge that relationship, even though from a planning standpoint, we would traditionally utilize those as some of the primary means to gain an understanding of intensity and a relationship between activities.

And if you look at the trip generations report that was supplied for the SIP, 47 total p.m. trips were generated by this facility; three of them were allocated to the light industrial activity for the manufacturing of beer. That's 6 percent. That's 6 percent of the trips generated by this facility would be associated with that manufacturing activity, which is a permitted use group within the Bayshore mixed-use neighborhood commercial subdistrict.

HEARING EXAMINER STRAIN: Well, how -- if this is the limitations and the research technology analysis you previously put up indicated 2082, and I now know you don't approve of that because of the OI, but how far could this go before it reached a threshold, either the TIS or the use, before it reaches a threshold that would be prohibited, that would be broaching that 2082? Is there a trigger that you see, or is it just something that would be based on --

MR. BOSI: Well, 2082 is an establishment that primarily operates as a brewery. This facility primarily operates as a beer garden.

HEARING EXAMINER STRAIN: Is the accessory use considered then a -- it's not considered a primary use?

MR. BOSI: It's not considered a primary use.

HEARING EXAMINER STRAIN: Okay. Thank you.

MR. BOSI: The second aspect of the determination that's subordination was related to the square footage limitations. And just remember, outdoor storage is one of those facilities or one of the accessory uses that could be provided for. This proposed architectural renderings will show you -- shows the front end of the individual -- of the proposed brewery.

Remember, this replaced that Small Engine World, and that Small Engine World is allowed by code to store engines, equipment, whatever they need outside of their facility, and it's deemed appropriate by this individual -- by the individual overlay.

The proposed use in regards to its impact, its visual impact upon the surrounding property owners in my regard, from my professional planning opinion, is a great improvement to the visual quality and the overall impression that the area will be provided with this.

And towards the end of the architectural renderings, it has a allocation of where the -- and it's over to this side is where the front end of where the Bayshore or the front facing the road system is, where the public gathering aspect would be, and the back area here is where the brew operations are provided for. That's another -- that was another factor utilized to establish that subordinate relationship. And then, ultimately, we suggested that a sales limitation be placed as 49 to 51 percent to ensure that that subordinate relationship can be maintained. So three individual factors that we arrived -- that we utilized to try to justify and establish what that subordinate relationship will be.

HEARING EXAMINER STRAIN: Mike, in establishing that subordinate relationship, at the time that you were writing the OI, did you anticipate either off-site activity with the remaining 49 percent or wholesale activity?

MR. BOSI: There was -- when I wrote the OI, the official interpretation, there wasn't a direct contemplation of the off-site, but in constructing the staff report for the appeal, I recognized that microbreweries can have off-site activity, and based upon limitations of what that could be, I was comfortable in providing for that limitation that only 49 percent of sales could be related to off site.

HEARING EXAMINER STRAIN: So with that limitation, do you feel comfortable that the activities on that site could never broach the threshold of being an industrial operation under the 2082 section of

the code or SIC?

MR. BOSI: If those -- if those relationships are maintained, I believe that it never becomes an establishment that is primarily engaged in the production of malt beverages.

HEARING EXAMINER STRAIN: Thank you.

MR. BOSI: And, finally, this is from our Growth Management Plan. This is the Bayshore Mixed-Use Triangle Redevelopment Overlay.

There's two areas where it talks about intent, and intent matters, especially when you're dealing with the Growth Management Plan and the Growth Management Plan subdistrict. I'll read you the first of the intent. The intent of the redevelopment program is to encourage the revitalization of the Bayshore/Gateway Triangle redevelopment area by providing incentives that will encourage the private sector to invest in the urban area, and the second intent statement is, intent of this overlay is to allow for more intense development in an urban area where urban services are available.

And I believe that the intent of the overlay is met with the specific application of the SIP and the determinations that have been provided for within the OI. And with that, I'm happy to respond to any questions you may have.

HEARING EXAMINER STRAIN: Okay. I do have a few that I didn't ask already.

There's issues of capacity that are involved in the accessory use. The TIS was submitted. You put that on the screen earlier. How was the TIS determined to be a limitation, and how strong of a limitation is the TIS in regards to how does it get changed? How could they expand with that TIS on record?

MR. BOSI: Well, they would have to change the -- if they were to change the configuration of the interior space, they would have to submit for a building permit, and that building permit would be reviewed by our site -- or development review staff, and at that period in time they would be able to make a determination as to whether the square footages have changed within the proposed beer garden and accessory microbrewery. And within the SIP, I believe there was conditions placed that that subordinate relationship has to be maintained.

HEARING EXAMINER STRAIN: Right. But as far as the TIS goes, once a TIS is submitted as a document for staff to make a decision on when they issue such a -- like an SIP, is that TIS locked into those standards or those thresholds that are placed on that TIS, or is it a flexible document?

MR. BOSI: The trips associated with it are locked into what's being committed to for that -- at that submittal.

HEARING EXAMINER STRAIN: Okay. Did you ever get into a discussion about the amount of production that the facilities approved in the SIP could produce as far as either barrels or kegs or however that -- I think it's barrels is what they generally go by.

MR. BOSI: No.

HEARING EXAMINER STRAIN: Okay. If barrels were introduced as a threshold, do you see an issue with -- do you see that as an assist to make sure that we don't go beyond a threshold that would produce more than what you would anticipate at that location?

MR. BOSI: I would agree with the appellant that that is most certainly a rational nexus to be able to control that subordinate relationship.

HEARING EXAMINER STRAIN: When you did the OI, the questions you specifically answered related to industrial uses, and I believe in the OI's language the accessory part of it was still considered industrial, but it wasn't to the threshold of the 2082. But wouldn't it be more of a -- would you consider it more of a commercial use in relationship to the drinking establishment rather than an industrial use that, according to the SIC manual 2082, it's titled establishments primarily engaged in manufacturing of malt beverages.

An accessory use, by your definition, can't be the primary element. So if it can't be, how would they ever meet that threshold?

MR. BOSI: Maybe I didn't follow the question. I don't think they could.

HEARING EXAMINER STRAIN: Well, that's exactly what I was -- that's what I was expecting. I just wanted to make sure I was thinking correctly. If they're primarily a beer production operation, then they would fall under 2082, but as long as they're accessory to another one and they haven't reached those thresholds

that you've reviewed the OI by or the thresholds that can be placed on their operation, they may never get to that primary production.

MR. BOSI: Correct.

HEARING EXAMINER STRAIN: You do agree that 2082 is not allowed in the overlay, right, based on your OI?

MR. BOSI: Yes.

HEARING EXAMINER STRAIN: Why does the -- and I think you've said this, but I just want to make sure. The overlay does not use SIC codes, and that was intentional?

MR. BOSI: I was not involved with the individual adoption of that overlay. I can only make that assumption that it was because of the flexibility that it does provide for within the determination of the range of uses.

HEARING EXAMINER STRAIN: The use of sales figures to establish the accessory versus primary use, have we used that before in Collier County?

MR. BOSI: We have used it before. I can -- I will have to do a little research to give you the specific cases where it's been utilized to establish those thresholds.

HEARING EXAMINER STRAIN: But it has been used before?

MR. BOSI: Yes.

HEARING EXAMINER STRAIN: How does the scale of the microbrewery drinking place we have here limit its external influence? For example, we know a 2082, an Anheuser-Busch or one of those big manufacturers, has a different external impact than a production as limited as this facility may be, and I was just trying to figure out from the perspective of the applicant, or the appellant, what the issue is externally, because what's done inside isn't really going to necessarily affect everybody outside.

We look for compatibility standards to assure that it doesn't. And I haven't seen yet where they're going to have external impact that's any greater than uses that I find allowed in C4 such as -- well, we know what ancillary plants are. They're bus stations that the -- that's allowed there. They're like the school bus depots. The auto and home supply stores; auto vehicle and equipment dealers; eating and drinking establishments, which is what this is; food stores; here is one, gasoline service stations with services and repairs are allowed in C4. So we could actually see a Racetrac, potentially, go there as a use that's allowed; hardware stores. Hardware stores have a lot of deliveries coming and going with lumber and other things; hospitals.

I saw those elements and I thought, well, these seem to have a greater external impact, and they're allowed in the C4. And I was just trying to understand why this particular use may have such an impact that -- it's more disturbing than that particular -- those uses I just gave as example, because there's 142 uses in C4.

MR. BOSI: And I'll go back to the very premise of what my focus has been: Focus and scale. It's scale. If you have a facility that's under 3,000 square feet, there's only a limitation to the amount of product that could be provided. And we talk about distribution, and we talk about distribution in a way that is referenced or alluded to as an activity that's unusual for a drinking establishment or a bar.

But to provide for my education, I was a bartender for six years, so I know how -- I know how our product is brought in. It's brought in on dollies, and it's brought in through beer delivery trucks. Now, a beer delivery truck comes and drops its product off. A beer delivery truck can stop and pick the keg up. And the same external effect is provided for on the surrounding property owners.

So the term "distribution" and the way that it's alluded to in terms of a disrupter is only when the frequency is of a magnitude that creates overburdened pressure upon the external transportation system. And this TIS indicated that that industrial production capacity was going to yield three trips or 6 percent of the peak hour demand upon our transportation system. So scale is very relevant to this application.

HEARING EXAMINER STRAIN: Okay. Mike, let me make sure I've got all the questions I need answered before I go further. Yes, I do.

Okay. Mr. Lewis, since you did the first presentation, do you have any questions of Mike?

MR. LEWIS: Mike, you mentioned that -- you mentioned that the production of beer is an inappropriate -- it's not a permitted use within the C4, is that your testimony, or the Bayshore mixed use as a

permitted use, neighborhood commercial?

MR. BOSI: In the C4 or the Bayshore mixed-use neighborhood commercial, a malt beverage production 2082 is not a permitted use.

MR. LEWIS: Okay. Is the use, the manufacturing -- it's your understanding that they're manufacturing beer, correct?

MR. BOSI: Manufacturing, producing, creating, yes.

MR. LEWIS: Okay. So they're engaging in manufacturing of beer. And is it your opinion that that is not a -- we're talking now about permitted uses. First of all, let's just make it easy. Is that a conditional use that's appropriate in the C4, underlying C4, or the overlay?

MR. BOSI: No.

MR. LEWIS: Okay. Is that a permitted use that's available in the C4 or the overlay?

MR. BOSI: No.

MR. LEWIS: Okay. So it's your opinion that it's an accessory use in the overlay; is that correct?

MR. BOSI: Correct.

MR. LEWIS: Okay. All right. And that's consistent with your opinion in the zoning verification letter, correct?

MR. BOSI: Correct. The zoning verification letter is not -- was not authored by me, nor is that what I'm providing testimony to. I'm providing testimony to the appeal, the staff report within the appeal to the SIP, and the staff report within the OI appeal.

MR. LEWIS: But your interpretation does reference the zoning letter, correct?

MR. BOSI: It references the zoning letter, correct.

MR. LEWIS: Okay. Is it your intention to undermine the zoning letter?

MR. BOSI: No.

MR. LEWIS: Okay. So in the zoning letter you concluded that the uses in the outlined -- I think there was eight different sub-uses in there. One of them was an accessory microbrewery, right? Those eight uses which they identified, is it your understanding that the SIP that they've submitted, is that still what they're looking for, those types of uses in the SIP?

MR. BOSI: As I testified, yes.

MR. LEWIS: Okay, great.

So in regards to that, in that letter it was said that staff has determined that those uses described are similar to that of a bar or a lounge, and they identified SIC Code 5813, correct?

MR. BOSI: Correct.

MR. LEWIS: Okay. So it your testimony that what they're doing is really essentially a bar or a lounge and with these accessory uses, which the letter said, staff's of the opinion that these uses could be accommodated on a limited basis as being accessory to a bar?

MR. BOSI: As I testified, there was three individual categories that we went through to determine and ensure that there was a subordinate relationship between the production of beer and the primary operation of a bar or tavern.

MR. LEWIS: Right. But I'm just trying to confirm, because an accessory is always tied to a principal. So your analysis in 2015 and your analysis in the interpretation was that the --

MS. ASHTON-CICKO: Well, I think he's already testified that he did not do the analysis in 2015, and he's merely referencing the background in the staff report as to how you got to where you are. So if you want to ask him any questions related to how he feels about it today --

MR. LEWIS: Let me make sure we're on the same page, because I think you and I are going different directions.

In reference to the eight uses that they identified that you and I have been discussing that they asked for, and you've said, as I understand it, that those uses are the uses that are embodied in the SIP, staff did an analysis that they're describing a bar, and you identified -- the primary use that you identified was SIC Code 5813; is that correct?

MR. BOSI: Correct.

MR. LEWIS: Okay. And that was an analysis that staff did. Staff also said -- and I'm going to read from the letter. It says, zoning services staff is of the opinion that the remaining limited uses could be -- or listed uses, I'm sorry -- could be accommodated on a limited basis as being accessory to a bar, correct? So that was the calculation or the analysis that staff did; is that correct?

MR. BOSI: There was no analysis. Staff said that those uses could be accessory uses to the primary use.

MR. LEWIS: Okay. Well, the conclusion, however you want to describe it. But the opinion or determination of staff was that the remaining uses could be accommodated on a limited basis as being accessory to a bar; is that correct?

MR. BOSI: Correct.

MR. LEWIS: Okay. Are you familiar with staff clarifications? Do you get involved in those? Did you look at any staff clarifications when you wrote any of your -- did any of your analysis?

MR. BOSI: Did not consult any, no.

MR. LEWIS: You didn't review any?

MR. BOSI: No.

MR. LEWIS: Okay. So were you aware when you were doing your analysis of staff clarification as it relates to what is an accessory use in Collier County in the application of SC0605? Did you look at that, or anybody you're aware of look at that?

MR. BOSI: No.

HEARING EXAMINER STRAIN: And, Doug, that's a repetitive statement. He's already commented he didn't use any staff clarifications. So we need to move this along, and redundancy isn't necessary, so...

MR. LEWIS: Okay. I apologize. I was just trying to get the record right. I just want to make sure that we're clear.

MS. ASHTON-CICKO: Was he provided a copy of the package that shows the staff clarification you're referring to?

MR. LEWIS: It's in the binder today, and I've read it.

MS. ASHTON-CICKO: Well, I don't know that he looked through the binder.

MR. LEWIS: Well, to address that, let me lay the foundation.

MS. ASHTON-CICKO: Well, he already answered he didn't use any staff clarifications.

MR. LEWIS: Well, you've raised -- with all due respect, you have raised an objection to his testimony --

MS. ASHTON-CICKO: I'm not raising an objection.

HEARING EXAMINER STRAIN: No. She's just trying to state a fact. He hasn't had time to review that packet that you supplied to all of us, and neither did I, and so --

MR. LEWIS: Well, I view that as an objection.

HEARING EXAMINER STRAIN: -- any questions related to that --

MR. LEWIS: Is that not an objection?

MS. ASHTON-CICKO: Well, I'm assisting the Hearing Examiner in the conducting of the meeting, which he's asked me to do.

MR. LEWIS: Okay. So going back to my question, have you looked at, today, staff clarification 0605?

MR. BOSI: No.

MR. LEWIS: Okay. Do you ever look at staff clarifications when you're making zoning determinations?

MR. BOSI: Yes.

MR. LEWIS: Okay. Why didn't you look at any applicable staff clarifications in relation to this application? What was the reason, if that's your normal course of conduct?

MS. ASHTON-CICKO: Well, we already established that we didn't know whether or not the staff clarification was approved by the Board, so it wasn't any official opinion.

MR. LEWIS: Well, it's listed on your website, and it's there, and it's numbered. So, you know, it's there, and you've said you reviewed those, is the testimony.

So is there a reason why you --

MS. ASHTON-CICKO: He said he did not review it.

HEARING EXAMINER STRAIN: Yeah, that's --

MR. LEWIS: No. My question is, is there a reason why you didn't review it here, given your practice of looking at those?

MR. BOSI: Relevancy.

MR. LEWIS: Okay. Thank you.

Did you look at the TIS in reviewing this, the TIS, the Traffic Impact Study?

MR. BOSI: The TIS was attached as one of the staff report or staff report exhibits, so yes, I did.

MR. LEWIS: Okay. And did the TIS take into account the scale, the scope, the capacity, and the intensity of the beer that's being produced on the property or manufactured?

MR. BOSI: Yes, they had accounted for square footage allocated to the light industrial manufacturing beer.

MR. LEWIS: Okay. Were there any other factors other than square footage they looked at?

MR. BOSI: That I'm not aware of.

MR. LEWIS: Okay. Do you know what traffic calculation they tied this to in terms of a use calculation in the TIS?

MR. BOSI: Land-use Code 110, light industrial.

MR. LEWIS: Okay. Thank you.

Do you recall in the Site Improvement Plan -- did you review that? Are you aware of the --

MR. BOSI: I did not review the Site Development Plan.

MR. LEWIS: You did not. Okay.

MS. ASHTON-CICKO: You might want to let them know that that's a separate department that's not under you, if you want to explain that.

MR. LEWIS: Were you only providing testimony today as it relates to the official interpretation, or were you providing testimony as it relates to the Site Development Plan?

MR. BOSI: I'm providing testimony as it relates to the Site Improvement Plan approval and the OI. The question was, did I do analysis on the Site Improvement Plan, and I assume you were saying for determination of approval. I did not review that.

MR. LEWIS: Did you receive the Site Improvement Plan?

MR. BOSI: I reviewed an approved Site Improvement Plan.

MR. LEWIS: Okay. So you did review it after it was approved?

MR. BOSI: Yes.

MR. LEWIS: All right. So in part of that review, did you look at the parking calculations for the Site Improvement Plan?

MR. BOSI: As I've indicated and put on the overhead, the Traffic Impact Statement that's been provided for was part of my testimony.

HEARING EXAMINER STRAIN: What relevance do the parking calculations have to do with the --

MR. LEWIS: I'm getting to that.

HEARING EXAMINER STRAIN: -- appeal that you've --

MR. LEWIS: I'm getting to that.

HEARING EXAMINER STRAIN: -- the basis of your --

MR. LEWIS: Well, staff -- in answer to your question.

HEARING EXAMINER STRAIN: Well, let's hear --

MR. LEWIS: Let me answer your question, then I'll -- staff has indicated that a factor to look at is the scale, and as part of their staff report, they said that the scale of this is limited to a footprint. So the relevancy is -- and I'm going to get to the question. Are you aware -- or let me -- do you know what the square footage

that was attributed to the brewery, the industrial manufacturing of beer, what that square footage was attributed to on the Site Improvement Plan?

MR. BOSI: Relating to parking calculations?

MR. LEWIS: Yes, sir.

MR. BOSI: No.

MR. LEWIS: All right. Would you disagree with 3,000 square feet?

MS. ASHTON-CICKO: Well, I think he -- when you submitted your appeal, you asked two questions that were zoning related, and that's why it was assigned to Mike to answer the questions, and now you're asking specific questions relating to the Site Improvement Plan approval that was done by another person.

MR. LEWIS: So you're not providing any testimony today on the appeal of the Site Improvement Plan? These are separate appeals?

MS. ASHTON-CICKO: No. He's reviewing the appeal of the Site Improvement Plan, but you've asked a couple questions related to that appeal.

MR. LEWIS: And they're related to the appeal of the Site Improvement Plan, because we were forced to have both items combined today. So I'm trying to figure out who do I ask --

MS. ASHTON-CICKO: But the questions -- you asked two questions: That the industrial manufacturing of the beer and related uses with site work as described in Exhibit A cover letter attached hereto is filed by the property owner with the Site Improvement Plan is not a permitted use of a property and the industrial manufacturing of beer is not a principal, accessory, or conditional use that can occur on the property. And now you're asking other questions related to the review of the Site Improvement Plan, so...

MR. LEWIS: So in answer to your question -- I'm not sure -- in answer to your question, we filed two separate appeals.

MS. ASHTON-CICKO: Yes. And I'm reading the questions.

MR. LEWIS: You are reading from one of the appeals. Our second appeal appealed the approval of the Site Improvement Plan. As I understand it --

MS. ASHTON-CICKO: I'm reviewing from the Site Improvement Plan, and we can put your letter on the overhead if that's of assistance.

HEARING EXAMINER STRAIN: Mike is responding to the county's position on both of the appeals.

(Multiple speakers speaking.)

HEARING EXAMINER STRAIN: There is nobody else you're going to hear from the county today. And wait till I finish before you start talking. There won't be anybody else from the county speaking today except for Mike.

MR. LEWIS: Okay.

HEARING EXAMINER STRAIN: So that's the extent of where your focus needs to be is on the answers that he can respond to based on the reviews he did to get here today.

MR. LEWIS: I think we're asking, again, the relevancy of a line of questioning. The relevancy is tied to our statement that the Site Improvement Plan improperly permits the industrial manufacturing of beer as a, quote-unquote, accessory use to the bar.

Part of staff's analysis in refuting that in their staff summary, as I read it -- we're talking now about the Site Improvement Plan -- is a question of scale. And, Mike, in his -- I presume it was -- am I correct you worked on the staff report? You put that together?

MR. BOSI: Correct.

MR. LEWIS: You touched on the issue of scale. So I think it's very relevant, very germane. When you're -- first of all, I don't think scale, frankly, is the legal test under Florida law, but it's the test that you've put in your report. That being said, I think it's a fair question to ask you, when you assert a number, a percentage attributable to the footprint for the bar versus the manufacturing operation, that number, per the Site Improvement Plan, is 3,000 square feet as it relates to the parking calculation. That's the reason for the question. So does that concern you?

MR. BOSI: The Site Improvement Plan indicated 2,500 some-odd square footage. So that's what I based the analysis of subordination.

MS. ASHTON-CICKO: If you didn't look at the parking as part of your analysis, you can say that.

MR. BOSI: I did not review the parking as part of the analysis.

MR. LEWIS: Okay. Okay. Finally, the appeal narrative that was filed -- did you have a chance to review the appeal narrative?

MR. BOSI: Yes.

MR. LEWIS: Okay. And the appeal narrative -- and if you can look at Page 3 of the appeal narrative -- what was the basis stated in that appeal narrative on Page 3?

MS. ASHTON-CICKO: Are we in the SIP?

MR. LEWIS: So we're at --

MR. BOSI: I believe it was the OI.

MS. ASHTON-CICKO: The OI, okay.

MR. LEWIS: Yeah.

MR. BOSI: So which paragraph would you like me to read?

MR. LEWIS: You can look at Page 3.

MR. BOSI: The pages weren't numbered, but I can assume that the third one is 3.

MR. LEWIS: There was a narrative. What was the -- what was the basis for the appeal as you saw that as related to the -- as you read this appeal based -- was the basis for the appeal? Was it tied to a Comp Plan objection, or was it tied to a land-use objection?

MR. BOSI: The property has a Collier County, Florida, land-use map element designation of urban mixed-use district, urban coastal fringe subdistrict, and it's further located in the Bayshore/Gateway Triangle Redevelopment Overlay. Allowable uses within the urban mixed-use district, urban coastal fringe subdistrict designation of the Future Land Use Map in the Bayshore/Gateway Triangle Redevelopment Overlay do not include industrial manufacturing of beer or any other types of industrial use whatsoever.

Further, in the urban designation of the FLUM, industrial uses are only permitted in the urban industrial district and in the urban commercial district, certain quadrants of interchange activity centers.

MR. LEWIS: Okay. So in the appeal we squarely addressed the appeal centered on the Comp Plan. In the staff report, did you address the -- did you respond or address this analysis in your staff report as it relates to the incompatibility with the Comp Plan?

MR. BOSI: No.

MR. LEWIS: Okay. And why did you not address that in your staff report?

MR. BOSI: The focus of the staff report was upon the zoning, because the application was submitted regarding the zoning of the property and the approval against the permitted uses within the property. The statement of the inconsistency was not articulated in a way in which I felt was necessary to address.

MR. LEWIS: So when the statement was made in the narrative, in fact, the urban designation of the future land use, in that designation, industrial uses are only permitted in the urban industrial district and in the urban commercial district, certain quadrants of the activity centers, you didn't feel that that was important to address?

MR. BOSI: I didn't -- I did not verify whether that was a correct statement.

MR. LEWIS: Okay. Does it -- do you typically look at, when there's a challenge, as to whether or not there's consistency with the Comp Plan?

MR. BOSI: When the question is that -- is there consistency issues with the Comp Plan with the uses that are provided for within an overlay district.

MR. LEWIS: Right, but --

MR. BOSI: If you wanted to ask me, was the Bayshore Mixed Use Overlay Zoning District consistent with the Comp Plan in its allocation of industrial uses, I would think that question would be asked of me.

MR. LEWIS: Okay. Well, the question is that the -- the appeal was based on the approval of the Site Improvement Plan and the issuance of the official interpretation, and the basis for the appeal was there's an

incongruency with the Comp Plan. So my question is -- well, I think we already asked the questions, so that's all I have. Thank you.

HEARING EXAMINER STRAIN: Thank you.

Mr. Brooker, I know that you have an opportunity to ask Mike questions, but we'll do that as you finish up your presentation, and -- no, not right now. I wanted to make sure there's -- I had one more question of Mike.

Mike, the question was asked of you about the accessory use being still industrial and, basically, your response, it's allowed as an accessory use due to the scale, but not necessarily does it mean it's a 2082 application; is that a fair interpretation of where your thoughts are on that? Because isn't the accessory use as -- considered industrial based on the fact that it's scaled to a limitation that it won't exceed basically a commercial operation?

MR. BOSI: It's based upon -- 2082 is an establishment primarily engaged in the production of malt beverages, and this is an activity that's subordinate to the principal use of a bar and a tavern. And that's the position the county has established and the county is trying to defend.

HEARING EXAMINER STRAIN: Okay. And your position that the accessory use is allowed to function as that industrial component is because the accessory use has very -- several limitations or does have limitations?

MR. BOSI: It has several limitations and that manufacturing and industrial activity is a use group that's provided for within the Bayshore Mixed-Use Neighborhood Commercial District.

HEARING EXAMINER STRAIN: Okay. Thank you, Mike.

I think you may have already addressed this, but I'd just like it again for clarification. Have you testified that the use of an accessory brewery/microbrewery in the BMUD is consistent with the Growth Management Plan?

MR. BOSI: Yes.

HEARING EXAMINER STRAIN: Okay. Thank you. That's all the questions I have, Mike. Thank you very much for your time. If you'll stick around, of course, until the hearing's over today.

With that, we will move into our next presentation. Mr. Brooker.

MR. LEWIS: I just need to note for the -- for our due process rights that I do lodge an objection to that opinion as it's beyond the scope of the hearing and the appeal with the questions asked in the official interpretation.

HEARING EXAMINER STRAIN: And it's not beyond the scope of a response; thank you.

MR. LEWIS: Thank you.

HEARING EXAMINER STRAIN: At some point, and I'll leave this up to you, Clay, we need to be taking a lunch break, mostly for those people in here that are hungry. I can either ask that we start that now and come back in one hour, or you get your presentation interrupted after about 15 minutes. What would you prefer? We could even go to -- we could spend the -- depending on the court reporter, maybe we could spend the hour. Okay. Well, then we won't -- well, we'll take the hour before we break for lunch then. So you're good to go.

MR. BROOKER: Okay. I think I'm going to be less than 15 minutes.

HEARING EXAMINER STRAIN: I figure you would be, but I wanted to make sure I didn't -- I didn't perceive -- I didn't make some presumption that may not be right.

MR. BROOKER: I appreciate it.

For the record, Mr. Strain, my name is Clay Brooker. I am with the law firm of Cheffy Passidomo. I'm a land-use attorney there; 821 Fifth Avenue South. I represent ANK Crafts, LLC, which is the owner of the property that's being challenged, for lack of a better description, today.

As the property owner, we are directly and immediately affected by the outcome of this proceeding and, under Florida law, that confers party status upon us, so I do appreciate the acknowledgment that we are a party to this proceeding and appreciate the opportunity to be heard.

I would also like to incorporate all of Mr. Bosi's comments into my presentation. We agree with him wholeheartedly. With the exception that I'd like to clarify: We are not going to be producing guided missiles

or space vehicles on the property.

A couple housekeeping matters. This hearing has turned a lot more legal than I'm used to with respect to these quasi-judicial hearings.

HEARING EXAMINER STRAIN: Mine, too. So I have to agree with you.

MR. BROOKER: I would like just a standing objection to everything that has been presented at this last moment without having advance notice of being able to see it and prepare for it, specifically Tab 22 to the appellant's notebook, I believe, includes the CV of Mr. Stephen Thompson, an attorney, which, correct me if I'm wrong, Mr. Lewis, but was proffered as an expert. I know Mr. Thompson very well as an attorney, but I believe the proffer was that he is an expert on Florida law, and I believe Florida law does not permit expert testimony on what Florida law says. So I object specifically to a proffer of Mr. Thompson as an expert on Florida law.

There was also some discussion with respect to Tab 10 of the notebook. That was the cover letter, if you recall, to the SIP submittal in which there was a characterization of the -- as the use being industrial manufacturing of beer. Mr. Lewis neglected to inform you that that cover letter was corrected, revised subsequently. That was a scrivener's error, and I'd like to present the corrected letter that was, in fact, submitted to the county as part of the record.

HEARING EXAMINER STRAIN: That's fine. If you've got additional copies, then you could put one on the overhead if you want to show it to everybody involved.

MR. BROOKER: I'm not so sure I really need to show it, Mr. Strain. There in the second paragraph of the letter it refers to a lounge with microbrewery instead of a characterization as industrial manufacturing of beer.

HEARING EXAMINER STRAIN: Thank you. We're fine, John. Thanks.

MR. BROOKER: So I'm going to try to be brief, and I apologize in advance if there's some duplication. We've been talking about SIC codes, and you're going to hear them again from me and, again, apologize. But I will no doubt be more brief than either of the former two presentations.

The fundamental issue here today is whether a microbrewery -- this is a microbrewery -- is an allowed use on the subject property, and virtually every relevant claim and argument we've heard is based upon and depends upon the claim that the microbrewery proposed is classified under SIC Code 2082. That code, SIC Code 2082, reads as follows: Establishments primarily engaged in manufacturing malt beverages.

This SIC applies to massive breweries, Anheuser-Busch, that produce millions of kegs of beer a year. Painfully, obviously, that is not what's being proposed today. We are a one-acre parcel. We have approximately a 6,000-square-foot structure. It is physically impossible to produce millions of kegs per year on this property.

So from that basis alone, I believe there's doubt whether this property itself could ever be considered to properly be classified under SIC Code 2082.

So if SIC Code 2082 is not the appropriate classification, then where do we fall? Well, you have SIC Code 5813. 5813 is entitled drinking, paren, alcoholic beverages, and it states, quote, establishments primarily engaged in the retail sale of alcoholic drinks such as beer and so forth. Again, the word "primarily" expressly stated in both of those SIC codes.

And some of the examples under SIC Code 5813 are as follows, and this is straight from the SIC code itself: Beer gardens, beer parlors, beer taverns. I suggest to you that what's being proposed is precisely that.

Now, let's look at the express provisions of the Bayshore Mixed Use Overlay Neighborhood Commercial Zoning District. And, for record purposes, that's Section 2.03.07.I.4.

Neighborhood commercial subdistrict states that the purpose/intent of the subdistrict is to encourage a mix of low intensity commercial and residential uses. The subdistrict provides for an increased presence and integration of the cultural arts and related support uses, including galleries, artists, studios, and live/work units.

My understanding is that the county always intended that language to -- its vision was that this was supposed to be the artsy, more eclectic corridor where people make things, and this is precisely what's being done here. We're selling beer that we make for on-site consumption, primarily.

So if you go further into the overlay zoning district language and you get to the table of uses that we've

already seen, Mr. Bosi actually put it up on the screen, there's residential uses, there's lodging uses, there's commercial uses, and those uses include bars, taverns, and nightclubs and several manufacturing uses which, Mr. Strain, you've gone through already this morning. And one example of that is metal products fabrication. That is a use, by a way, permitted in only one traditional zoning district in Collier County: The industrial zoning district. So that demonstrates the wide array of commercial uses that's permitted within the Bayshore Mixed Use Overlay Neighborhood Commercial District.

And while a microbrewery, that term, that specific term, is not expressly listed as a permitted use -- and, by the way, the term "microbrewery" does not appear anywhere in our Land Development Code. It does not appear anywhere in the SIC code. So what we're dealing with, to be frankly honest, is a bit of a hybrid.

The code does allow other uses, quote, within the same class if approved through the OI process. And that, within the same class, is a quotation from -- and I'm sorry to roll your eyes with this long citation, but for the record 2.03.07.I.4.b.ii.b. Ironically, Mr. Lewis did our work for us. An official interpretation was submitted as to whether this was an allowed use, the official interpretation was rendered, and I believe it is well within your discretion, Mr. Strain, to determine today that the use that's being proposed is within the same class as part of your findings as the other permitted uses expressly listed in the district.

So, finally -- I told you this was going to be short. Finally, to conclusively demonstrate that the proposed microbrewery is an establishment primarily engaged in the retail sale of beer, we're willing to offer these stipulations today:

At least 51 percent of all revenues of this business will come from sales of beer for on-site consumption.

No more than 49 percent of the space or square footage of this establishment will be devoted to the manufacturing side of beer.

We will be licensed under Florida's beverage law, specifically Section 561.221(3), as a vendor and manufacturer, and that licensing classification by the state requires us to, A, sell beer for on-site consumption and that our production is limited to less than 10,000 kegs per year. We will easily satisfy both of those conditions.

We agree to limit off-site shipments -- remember, we are not a distributor. Distributors must come to us, load up, and ship off site -- to no more than three shipments per week.

And, to the extent necessary, we stipulate to the accuracy and the binding nature of the professional opinions regarding traffic impacts contained in the TIS in your packet.

So, in conclusion, then I would respectfully request that we exercise common sense, reason, and we stop pretending that something -- that whatever's being proposed isn't. We're not proposing a brewery. We're proposing a microbrewery. And we happen to be caught in the twilight zone because no one really has caught on to microbrewery, that term, and inserted it in our code. Notwithstanding that, I believe this use falls -- and I believe Mr. Bosi's opinions confirm that, fall squarely within the permitted uses and accessory uses that are permitted by the Comprehensive Plan for this location.

Therefore, we respectfully request that the appeals be denied and that the OI and the SIP approval be affirmed.

HEARING EXAMINER STRAIN: Okay. I have a few questions, Clay.

When you said you agree to the 51 percent, you agree to it as stated in the recommendation from staff; is that true?

MR. BROOKER: Correct.

HEARING EXAMINER STRAIN: Okay. And I understand about your space will not exceed, for production, 49 percent of the 6,000-square-foot facility; is that true? You're not -- I mean, 49 percent of any facility, or the 6,000 square feet that's there today.

MR. BROOKER: Whatever the actual number is, because --

HEARING EXAMINER STRAIN: Of the facility that's there today. You're not going to -- here's what I don't want you to suggest, that you're going to do 49 percent, but then you're going to triple the size of the building.

MR. BROOKER: If we triple the size of the building, you know we have to come back, and then all of a sudden Mr. Bosi is looking at us in terms of scope and scale again.

HEARING EXAMINER STRAIN: Okay. Maximum of three shipments per week. Coming in or going out? I mean, that's not deliveries for bulk material. That's outgoing sales?

MR. BROOKER: Correct.

HEARING EXAMINER STRAIN: Okay. Then that brings me back to 561.221. Let me read the section to you. You tell me where I'm misreading it. Under 3A of that section, not withstanding other provisions of the beverage law, any vendor licensed in the state may be licensed as a manufacturer of malt beverage upon a finding by the division that: One, the vendor will be engaged in brewing malt beverages at a single location in an amount which will not exceed 10,000 kegs per year. For purposes of this subsection, the term "keg" means 15.5 gallons. But number two is the one that's confusing me. The malt beverages so brewed will be sold to consumers for consumption on the vendor's licensed premises or on contiguous licensed premises owned by the vendor. So you're not going off site.

MR. BROOKER: Yes, we are. We're going to go off site. That is a licensing statute. The Florida beverage law licenses breweries according to the size of them.

HEARING EXAMINER STRAIN: Right. This is the brew pub section.

MR. BROOKER: A manufacturer -- manufacturer that manufactures -- I understand. Let me try to explain.

HEARING EXAMINER STRAIN: Okay.

MR. BROOKER: So the record is clear, we are, primarily for marketing purposes, going to ship off site. So when you go to the restaurant around town you see a tap that says Ankrolab Brewing Co., and that's advertising. But the primary purpose is for on-site consumption on this property.

But going back to the statute, manufacturers -- and Anheuser-Busch cannot be a vendor under Florida's beverage law unless you are minimally producing the amount of beer, which is the 10,000 kegs per year.

So while that doesn't -- while that statute doesn't conclusively determine our right about whether we are going to ship off site, that is, in fact, a license that we are pulling and that is appropriate for this facility.

HEARING EXAMINER STRAIN: Okay. When you started referencing 561.221, you specifically referenced Section 3.

MR. BROOKER: Correct.

HEARING EXAMINER STRAIN: And that's the piece that -- 3.a.2 is the piece I was having a problem with versus what I've heard throughout today versus that statement that the consumption will be on the vendor's licensed premises or on contiguous licensed premises owned by the vendor, the vendor being ANK Labs or Ankrolab, or whatever.

MR. BROOKER: Ankrolab, yes.

HEARING EXAMINER STRAIN: Okay. So then this doesn't restrict them to selling just on the facility in question today in Bayshore, but they could then somehow sell to other facilities even with the statement that it will be on the vendor's licensed premises or contiguous licensed premises owned by the vendor? Because any stipulation would tie to this.

MR. BROOKER: Right. And I don't know how the state enforces that, but what I'm telling you is that is the license that we are going to be pulling for the purpose of demonstrating today's purposes of the scope.

HEARING EXAMINER STRAIN: Okay. That's what I wanted to clear up. I understand.

And then the TIS cap, which you've heard testimony, you're bound by it anyway. So you've agree to adhere to that cap as far as trip counts go?

MR. BROOKER: Correct.

HEARING EXAMINER STRAIN: Okay. I don't have any questions, Clay, after that.

MR. BROOKER: Thank you.

HEARING EXAMINER STRAIN: Thank you.

MR. BROOKER: And, for the record, I have no questions of the prior --

HEARING EXAMINER STRAIN: I was going to ask you -- or Mike Bosi?
MR. BROOKER: Sorry?
HEARING EXAMINER STRAIN: You have no questions of either Mike Bosi or Mr. Stuart?
MR. BROOKER: No, sir.
HEARING EXAMINER STRAIN: And that takes us to the end of the presentations that were scheduled for this matter.
THE COURT REPORTER: I don't need lunch.
HEARING EXAMINER STRAIN: You don't need lunch?
Who here needs lunch?
(No response.)
HEARING EXAMINER STRAIN: Good, because I don't either and neither does the court reporter, and she's the one that we mostly have to worry about.
So without her fingers moving as fast as they do to their utmost capacity, it becomes a problem.
And with that, we will move into the discussions or any members of staff that would -- I mean the public that have comments. Earlier I asked for all those wishing to speak today to stand to be sworn in.
So the first I'm going to ask is when your name is called, if you haven't been sworn in, acknowledge that so the court reporter can swear you in.
Mr. Bosi has the -- yeah, applications for speakers and, Mike, if you'll start reading the first one off, and that particular podium there is where you need to go.
MR. BOSI: Sure, Mr. Strain. The first speaker is Michael Sherman, and following Mr. Sherman will be Ian Bartoszek.
MR. SHERMAN: Good day. My name is Mike Sherman. I'm a member of the CRA advisory board, but today I'm speaking as a small businessman who is building homes in the Bayshore arts district.
I just wanted to say that this is a relatively silly process to watch unfold, because this is exactly the kind of thing that, for the last 17 years, the CRA and the community around it have been trying to achieve, and I just wanted to stand up and say that.
I guess I can't imagine what the motivation is behind this situation. Why would this landlord who lives -- who has property across the street be willing to go to this trouble to stop an improvement to his neighborhood which will benefit that building? It's beyond me. So that's all I have to say.
HEARING EXAMINER STRAIN: Thank you, sir.
Next speaker?
MR. BOSI: Ian Bartoszek followed by --
HEARING EXAMINER STRAIN: You'll need to spell your last name, please.
MR. BARTOSZEK: Sure. Ian Bartoszek, B-a-r-t-o-s-z-e-k.
HEARING EXAMINER STRAIN: Thank you.
MR. BARTOSZEK: I've already been sworn in.
First, I just would like to say that I trust the interpretation of staff as I've heard it through this process today but, more importantly, I'd like to put a face of one of the hopeful end-users to this fine establishment that I hear -- and we've been waiting for for a long time.
I'm a wildlife biologist at a not-for-profit environmental organization here in town. That does have some bearing, because at a microbrew establishment in two days I'm having a fundraiser for my research project. So these establishments are very beneficial to the community.
I've benefited the previous year and have had support for my research project, removing large invasive snakes from Collier County. These breweries supported my cause, and I know of other microbreweries in town that have supported other conservation causes in town for other institutions, and I would assume and expect that when this fine establishment comes up and running, that it would do just that, probably in support of other initiatives as well.
So I've been patient for this one. We have three fine microbreweries in the county. This Ankrolab would anchor the microbrewery establishment in the southern part of the county. And we've been waiting patiently. And I'm very thirsty.

Thank you very much.

HEARING EXAMINER STRAIN: Thank you.

Next speaker, please.

MR. BOSI: The next speaker is Maurice Gutierrez.

MR. GUTIERREZ: Good afternoon. My name is Maurice Gutierrez. I am currently the chair of the Bayshore CRA.

You know, the CRA is tasked with being innovative, being creative, and undoing what our community has been designated as a CRA. You know, CRA is not a blue ribbon award, so we're constantly being challenged but, at the same time, we are up to the challenge to bring new businesses to the area.

For the last two years, the CRA has been in total commitment, all the board members; we've had numerous letters to the commissioner backing this project.

And it was very interesting that Mr. Bosi made the point of scale and focus. I'm not a land professional, although I'm a businessman, but I could tell you walking down the street and looking at that building, this is not Inbev. This is not Anheuser-Busch. They're not applying for a five-story building to manufacture mass productions of beer. This is for the neighborhood. It represents the diversity we've been looking for.

Unfortunately, situations like this have unintended consequences. Not that we're worried about them shipping beer out of there, but we're worried about what the public sees going on here, what other investors can look forward to when they try to redevelop in our area and the potential two-year battle over verbatim and interpretations of compatibility.

It was mentioned walkability is one of our focuses. And, wouldn't you know it, we've got a bike lane right in front of this location. What more needs to be done to understand that a micro -- I think that's a small word -- brewery is a small operation, and a CRA is a micro community. We've been designated, not again because of our attributes, but because of the mistakes that have been made in the past.

So when the CRA looks at a potential project and recommends it, it isn't because we've got nothing better to do or we've got a lot of money to spend on attorneys; it's because we think it's a good fit. All the hearings we've had, public at the CRA office monthly, have dealt with this, and we have never heard one negative comment from the owners and the business owners in our district which this will impact directly.

I can walk to it. I can ride my bike to it. Does that count in the traffic count? I don't know. I'm not a professional. But I can tell you by looking at this location, it is not going to be a mass production.

Now, there were concerns that were presented, and it just makes me think, if a shoelace manufacturer would want to come into our neighborhood, would he be looking at comments saying no because, you know, you can strangle people with shoelaces, so those are weapons of mass destruction?

You know, the reality is, common sense has a place. It breeds in CRA districts because we've been ignored where common sense was ignored in the past, and I'm mostly hoping that this focus will change for other developers who will risk their money, who will come here and challenge for two years with a vision without walking away and saying, you know, I think I'll go to another location that's not being redeveloped because it's easier to build in a non-redevelopment area.

I congratulate the Ankrolab people for having patience. I don't know how financially well that works out for them, but if you're in the neighborhood, I do believe you will be successful. And for the community and the CRA, we have always backed this, and we have not changed our perspective and will continue to do so, and hopefully this will be a place we can all discuss the past over a cold beer.

Thank you.

HEARING EXAMINER STRAIN: Thank you.

(Applause.)

HEARING EXAMINER STRAIN: Ladies and gentlemen, please. I've got to ask that you refrain from response to speakers. It's not the -- it's not the thing we're supposed to be doing.

Go ahead, Mike.

MR. BOSI: The last submitted public speaker form is for Eileen Arsenault.

UNIDENTIFIED SPEAKER: She left.

HEARING EXAMINER STRAIN: Are there any public speakers who have not registered and not spoken who would like to speak? Ma'am, if you'd come up and identify yourself.

(The speaker was duly sworn and indicated in the affirmative.)

MS. SILVA: I do. My name is Mena Silva. I am with Naples Beach and Bay Realty.

HEARING EXAMINER STRAIN: Spell your last name.

MS. SILVA: Sure. S as in Sam, i-l, V as in Victor, a.

HEARING EXAMINER STRAIN: Thank you.

MS. SILVA: So as I said, I'm a realtor, Naples Beach and Bay Realty. We are a small neighborhood brokerage in the Bayshore area.

I kind of represent what's kind of trending in that area. I'm a younger person. I'm a conscientious consumer, so that means that I work in the neighborhood that I love, I support local businesses, and I spend my money there.

And we're kind of seeing a trend with that also in real estate. We're having a lot of younger people. I help out a lot of first-time homebuyers as well as investors. And one of the major selling points that we have that people absolutely love is Amanda Jerome's building, which is the marine, the microbrewery, our hotel that's coming up, the Gardenia, as well as the food truck park.

So when people come to me -- and it just happened yesterday. I had a couple from Sarasota. They came, they wanted waterfront, but they said they wanted to stay somewhere close so they can walk to the microbrewery.

So this business is something that the neighborhood absolutely needs if we're going to want to invite the type of people that we want in our neighborhood, people that appreciate, support local businesses, local art, and the walking neighborhood community.

HEARING EXAMINER STRAIN: Thank you, ma'am.

Anybody else?

(No response.)

HEARING EXAMINER STRAIN: Okay. Thank you.

And with that, we'll move on to the balance of our meeting today, which will require -- which will allow for a 10-minute rebuttal by the applicant if he so chooses. Mr. Lewis?

MR. LEWIS: Staff want to go?

HEARING EXAMINER STRAIN: I'm sorry?

MR. LEWIS: Your notice that you circulated on Monday stated that staff would go first with their 10-minute rebuttal.

HEARING EXAMINER STRAIN: I'm -- Mike, did you have anything you want to rebut?

MR. BOSI: No, Mr. Strain.

HEARING EXAMINER STRAIN: Then that goes back to you. I didn't think he would, and --

MR. BROOKER: And I waive rebuttal as well.

HEARING EXAMINER STRAIN: Okay. So we're back to you.

MR. LEWIS: Great. Thank you. I appreciate it.

HEARING EXAMINER STRAIN: Ten minutes for your rebuttal and summation. Thank you.

MR. LEWIS: A couple housecleaning items.

First, the staff clarification, SC0605 is posted on the county website under staff clarification, and the official interpretation conflicts with both this and case law, as we noted.

That has -- there's really been -- the only evidence that's been presented as it relates to the status of law as to what is an accessory use has been provided in our appeal.

We provided case law in your binder. I've discussed the case law, the Florida Supreme Court case. I'll be getting into that here just briefly in the rebuttal. We've provided an affidavit from a real estate lawyer who is certified or is opining in the testimony that he's an expert in real estate law, and we're proffering him as such. And, yes, under Florida law you can proffer a real estate law expert to provide testimony, competent, substantial testimony in a quasi-judicial hearing, so that's why it was done. But that is really the only testimony, so I'm going to come back to that in a minute.

My original OI request was tied to industrial manufacturing of beer. That's right there in the request. The applicant said that they're not conducting this use and they presumably -- I didn't hear them discuss this on the record, I didn't hear them object, but because of that, I think silence is an objection, but I think they would agree that -- and I think their arguments lended to that because they were talking about scale, and they're saying, well, we're a microbrewery. We're not this.

So I think it's clear that they're acknowledging that a industrial manufacturing of beer use on the property is not permitted as a permitted accessory or conditional use right. That was the reason for the OI.

I've objected to any opinions or determinations that have been given by the planning -- by the zoning officials or anyone else that relate to something other than what we asked for, and that was industrial manufacturing of beer.

So in that regard I think it's very clear and that -- for other reasons that I identified earlier, that there has been no determination under the overlay as to whether or not -- by the zoning official as to whether or not anything other than the listed Table 1 uses for accessory use, conditional use, or permitted uses can occur. There has been no other determination. There's been a determination as it relates to industrial manufacturing, which we're being told today this site is not that.

Let me just kind of summarize this principle. Assuming we move forward and let's say you determine that the Comp Plan permits -- and whether you classify what they're doing as commercial or industrial. But if it's your conclusion that the Comp Plan permits whether it's in C4 or in the overlay, what they're deeming a microbrewery as an accessory use -- again, the staff has said it can't be a permitted use, it can't be a conditional use. The only thing we're left with is an accessory use.

So assuming that we're saying it can be an accessory use, then I think the -- what you're left with is the very clear legal principle that we've articulated that's really been unrebutted, and it's a very clear principle under Florida law, and that is essentially that in order to be -- and it's consistent with the opinion that staff has rendered. If you're going to do that, it's got to be incident to the permitted principal use. I think we've heard testimony the permitted principal use here is a bar, a bar that is primarily for retail consumption of alcohol on premise.

So I want to just -- as I close, I wanted to read you a couple of legal principles that really have been unchallenged today, and that is, really, what is the extent of an accessory use? And I think that, you know, if the residents say, well, yeah, we want to have a beer garden, fine, have a beer garden if you determine -- and have a microbrewery if that's what you determine, if it's compatible with Comp Plan.

But that does not allow you to convert an accessory use under Florida law, which is subordinate and incident to the primary use. In other words, you can't engage in -- and they've testified. I mean, we heard their very clear admission that they're going to apply for a license that allows them to distribute off site and that they're going to be distributing and wholesaling this stuff all over the county.

Now, you've tried to ameliorate that and you've said, well, there's a 51/49. That's not the law.

The Florida Supreme Court, which I've cited, has said very clearly that when you do that, you transform accessories into principals, and that's the International Company versus City of Miami Beach case I've cited. That's a problem. And I think your staff understood that when, you know, residents were trying to bring these 500-gallon tanks in and say, well, you know, it's an accessory. It's incidental to the residential uses. No, it's not. Five hundred gallons -- you need 250 gallons.

So when you get to a 500-gallon limit -- so when you're brewing, you know, 10,000 or 5,000, or whatever that number is, kegs a year, that's clearly -- and they've admitted it's not going to be used on premise.

So there's other cases, the Miami Beach Uchitel case, which is in there, and I think that the Basset analysis, which the Third District adopted, said, essentially, that many ordinances that elaborate statements regarding accessory buildings and uses, they can usually be reduced to a prohibition of business. And it's clear that they're engaging in other business enterprises. And that's the problem.

I think it's been undenied, your planning director said, well, we're not saying that -- in our interpretation or the appeal in any sense we're saying that under the overlay or the C4 that you can be a permitted use. We're not saying it can be a conditional use. We're saying it's an accessory use. Well, the law then says, okay, well, if it's going to be accessory, it needs to be subordinate and incident to the principal

use. And I think that's the issue here.

We've really got the tail wagging the dog. We've got the brewery -- and, by the way, you know, I know he mentioned they changed the letter in April, but the appeals were already filed, so it was kind of self-serving. They didn't change the plan. But either way, you really have the brewery kind of wagging, you know, the tail, and I think that's the problem is that, you know, we have codes; we have provisions. They mean something.

And there are significant dominoes that will happen well beyond that, I can just tell you now. I mean, if this precedent's set, I will tell you it's going to create a caveat business for a lot of local land-use lawyers who are going to say, Collier County has blown wide open the accessory use. What is an accessory use? And that's what this does. And I understand. I'm sympathetic. But they were clearly aware of that back in 2015. If they had competent counsel, they would have been advised in 2015 it's only an incident or subordinate to the on-site consumption of alcohol.

So with that, I would like to end my presentation and let the record speak for itself.

Thank you.

HEARING EXAMINER STRAIN: Thank you. That does take us to the end of today's hearing. I do want to thank everybody that participated. You've given me a lot to consider and think about, and I appreciate that.

There is no other business on today's agenda and -- are there any further public comments?

(No response.)

HEARING EXAMINER STRAIN: Hearing none, this meeting's adjourned. Thank you.

****

There being no further business for the good of the County, the meeting was adjourned by order of the Hearing Examiner at 12:23 p.m.

COLLIER COUNTY HEARING EXAMINER

MARK STRAIN, HEARING EXAMINER

ATTEST
DWIGHT E. BROCK, CLERK

These minutes approved by the Hearing Examiner on 12-15-17, as presented ✓ or as corrected _____.

TRANSCRIPT PREPARED ON BEHALF OF
U.S. LEGAL SUPPORT, INC.,
BY TERRI LEWIS, COURT REPORTER AND NOTARY PUBLIC.