

Kitty Hawk Board of Adjustment
Minutes
December 19, 2024

Agenda

- 1 Call to Order/Attendance
2. Approval of Minutes from October 15, 2024 Meeting
3. Swearing In of Speakers
*** NOTE: The Board of Adjustment is quasi-judicial body and anyone participating in a public hearing before the Board must be sworn in prior to speaking. When appearing before the Board, please state your name and address for the record and address the Board members in a courteous manner.*
4. Appeal- Appeal of staff interpretation of Sec. 42-251(d)(1) regarding building area
5. Other Business:
 - a. Chairman Meads
 - b. Board of Adjustment Members
 - c. Town Attorney
 - d. Planning Director
6. Adjourn

1.) Call to Order/ Attendance

Chairman Meads: Called the meeting to order at approximately 6:00 p.m., the attendance was noted by Jessica Everett.

Board Members Present:

Blair Meads, Chairman
Abby Berquist
Kipp Tabb, Alternate
William Yetzer, Alternate
Natalie Smith

Staff Present:

Rob Testerman, Director of Planning and Inspections
Casey Varnell, Town Attorney
Jessica Everett, Administrative Zoning Technician/ BoA Clerk
e Zoning Technician/Clerk to the Board

2.) Approval of Minutes from October 15, 2024 meeting

Kip Tabb moved that the board approve the minutes of the October 15, 2024, meeting. Seconded by William Yetzer. With a call for the vote, the motion carried 5-0.

3.) Swearing in of Speakers

Chairman Meads: At this time, I guess it'd be appropriate to swear in.

Mr. Gallop: We can go ahead and skip that. I'll cover that.

Chairman Meads For this meeting, Ben Gallop is going to help us and so I'm going to turn it over to him to go over our guidelines.

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Ben Gallop: Thank you, Mr. Chairman. To the rest of the Board of Adjustment members, some of whom I've met and others with whom I haven't, I had the chance to speak with a couple of you. I'm Ben Gallup. I'm going to represent the board as an entity tonight, and as Mr. Varnell said, he will represent the town and staff. The applicants will be represented by Mr. Ellis, who is wearing the blue tie. And because of the bunch of attorneys being involved in this being a quasi-judicial hearing, the reason I'm here is to help guide y'all through that process to get you in the right ballpark in the proper way to answer the question that's before you tonight. And you'll have two fine attorneys who will tell you what those questions are and what their position is on what the answer should be, and you'll have an opportunity to decide which one you agree with when the hearing's done. And as part of this I usually have a script that I go through that's boring but it also gives you a little bit of a reminder and it gives everyone else a reminder of what a quasi-judicial hearing is and what it isn't and what it's about and so I'm going to step my way through that and work my way through the process. Everybody's ready.

Mr. Gallop: So, we're here today to hear and decide on an appeal application submitted by GHK Development Inc. and GEG Real Estate LLC regarding October 15, 2024, formal interpretation issued by the town's Director of Planning and Inspections, which interpreted town code section 42-251(d)1 as it relates to a proposed development of a self-storage facility at 6100 Croatan Highway. Please bear with me while I provide a brief overview of the Board of Adjustment for those who may not be familiar with how it functions, and as a reminder to those who are familiar. The Board of Adjustment is a formal quasi-judicial board which operates under rules and procedures set forth by statute in a fashion similar to a court of law. The board's decisions must be based upon substantial, competent, material, factual evidence presented under oath at this hearing. While the board is not strictly bound by the courtroom rules of evidence, it is guided by those rules and the general statutes as to what evidence is admissible. Hearsay, generalizations, speculation, most lay witness opinions may be subject to objections precluding them from being considered in the board's decision-making process. In that regard we ask that anyone who's going to testify restrict your testimony to only factual information that is relevant to the limited issues under consideration. Testimony by all witnesses must be given under oath. All witnesses must go to the lectern and identify themselves in order to provide their testimony. No other discussion by the audience is allowed. Any physical evidence presented will be made part of the official record of the proceedings and be retained by the board clerk. Parties may object to testimony and cross-examine one another's witnesses and members of the general public who provide testimony. Parties' counsel will be provided with an opportunity for closing arguments at the end of the evidentiary portion of the hearing. If you have an attorney, then questioning objections and arguments must come from your attorney. It's imperative that no member of this board participates in or vote on any quasi-judicial matter in a manner that would violate an affected person's constitutional rights to an impartial decision-maker. Impermissible violations of due process include, but are not limited to, one, having a fixed opinion prior to the hearing of the matter that is not susceptible to change, two, undisclosed ex parte communications, and three, having a close familial business or other associational relationship with an affected person or financial interest in the outcome of the matter. Previously undisclosed ex parte communications, so those would be

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communications with a party without the other party present, which have not caused you to develop a fixed opinion, may be cured through disclosure of the facts or information obtained on the record. A party or a member of the board, including the board member at issue, may object to any member's participation for lack of impartiality. If an objection is raised to a member's participation that member does not choose to recuse himself or herself, the remaining member shall by majority vote rule on the objection. Do any of you have any conflicts which would potentially make you an impartial decision-maker or have any undisclosed communications or information you would like to disclose at this time? Seeing all no's. Do any parties have any objection to any member's participation in this hearing? No. Hearing none from both the applicant and the town. So, let me give you a quick roadmap of the process for today's hearings. First, I'll ask if there are any motions by the parties. I don't expect that there are any. They didn't mention any a little while ago. The parties as we've discussed are the town and the applicant in this case. Upon opening the evidentiary hearing, we'll go first to the town, which will provide their testimony, and then to the applicant and each time that someone comes up to testify, the other side will have an opportunity to cross-examine and possibly to again have the other side the first person come back up and testify again. At the end of the party's testimony, we'll open it up briefly for the general public to see if there's someone in the general public I'm not seeing, but a couple of people here, but if someone shows up from the general public who wishes to provide evidence, that will be their opportunity. They will not be allowed to call or ask questions of witnesses, make objections, or make arguments, and their testimony will need to be factual and relevant to the issues. Once we complete the evidence the parties will have a brief opportunity provide closing arguments to put together their position for the board's consideration and following the closing arguments the board will deliberate on the issues in the appeal and attempt to reach a decision whether to reverse or affirm wholly or partly or modify the decision that was appealed from and you'll have the opportunity to make any order or requirement or decision that ought to be made as if you were the official who made the decision initially. So tonight, you have in front of you a decision by the planning director any decision that he could have made you could change his decision to be that decision.

Ms. Smith: Can you back up to the beginning of that paragraph and read that part again, reverse?

Mr. Gallop: You can reverse, affirm wholly or partly or modify the decision. In looking at it it's the vast majority of cases are reversed or affirm rather than modify and they're usually wholly or partly and in this case I think the high likelihood is that you'll be in one of those two categories rather than one of the others but I wouldn't set that in stone until we get to the end of that. I don't see any other formal parties that have any interest in intervening. We've already discussed Mr. Ellis. Do you have any motions or anything that you'd like to hear before the evidentiary stuff?

Mr. Ellis: None

Mr. Gallop: How about you, Mr. Varnell?

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Mr. Varnell: None

Mr. Gallop: Okay. All right, so we'll move on to the hearing on the merits of the appeal, and we'll open the evidentiary portion of the hearing. All persons who expect to give testimony to this during this hearing, please step forward to be sworn in. Lawyers intending to provide arguments only and not substantive evidence need not be sworn.

The Clerk for the Board, Jessica Everett, swore in by oath those persons who would be offering testimony during the hearing.

- Rob Testerman, Director of Planning & Inspections, Town of Kitty Hawk
- Eddie Goodrich, applicant

4.) Appeal- Appeal of staff interpretation of Sec. 42-251(d)(1) regarding building area

Mr. Gallop: so now, we'll move forward with the town's evidentiary showing. And before I get into that Mr. Varnell and Mr. Ellis both agreed that all of the information in the notice of appeal that was included in the packet and in the statements of the town, everything that was included in the packet is in the record and is evidence that they've all that both agreed would be led into the case.

Mr. Varnell: I'll call Rob Testerman. Can you state your full name for the record please?

Mr. Testerman: Robert Testerman.

Mr. Varnell: And Rob, what's your official passage in the county?

Mr. Testerman: I'm the Director of Planning and Inspections.

Mr. Varnell: How long have you been a director of planning and inspections?

Mr. Testerman: For the Town of Kitty Hawk, just over 10 years.

Mr. Varnell: And Rob, we're here tonight for an appeal of its own interpretation. Just for the record, can you explain to them what ordinance is subject to this appeal? What particular ordinance? Or portion thereof.

Mr. Testerman: It's section 42-251(d)(1). A portion of that language states that no use of an owner or tenant on the site shall exceed the maximum area of 40,000 square feet of building area, as shown on the commercial sites.

Mr. Varnell: Rob, does that come from a larger ordinance? Is that a portion of a different chapter of our code?

Mr. Testerman: It's a section for the BC2 Beach Commercial District.

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Mr. Varnell: And it's governing what?

Mr. Testerman: It's the dimensional requirements.

Mr. Varnell: And to that particular portion of the ordinance, were you asked in writing for formal zoning interpretation?

Mr. Testerman: I was.

Mr. Varnell: As Ben said, we've got some exhibits that are attached to our application. The applicants application and our response to that. So, I would point to Exhibit 3 in our application. Rob, is that the written zoning interpretation that you issued?

Mr. Testerman: It is.

Mr. Varnell: And what date did you issue that?

Mr. Testerman: October 15th, 2024.

Mr. Varnell: And did the applicant request that you issue this interpretation of this particular code provision?

Mr. Testerman: They did.

Mr. Varnell: And after review of the code provision, as you said, section 42-251 (d)(1) what particular portion of that ordinance was the applicant contesting, or questioning?

Mr. Testerman: Requesting an interpretation of the maximum area of 40,000 square feet of building area, whether that refers to the total building area or the square footage. My interpretation was that it refers to the total building area.

Mr. Varnell: And the example of a multi-story building, for example, how in your opinion would the building area be calculated?

Mr. Testerman: The area of each floor, totaled together, would be the total building area.

Mr. Varnell: And what you were doing, whether it was research, whether it was just knowledge to you, what factors led you to this interpretation?

Mr. Testerman: Typically, if our zoning ordinance doesn't contain a specific definition, we will refer back to these common definitions, in my mind and practice that I've seen in building areas as long as it's talking about the total square footage. When you're looking at real estate listings, you see the area of the dwelling, it's talking about the area of all floors combined. In my dealings with a building inspector and the building code, it refers to the area enclosed in the four walls multiplied by the story of the building area.

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Mr. Varnell: And what you just described there, is that a definition from a particular code?

Mr. Testerman: I won't say it's the quote definition, but it's generally what the building code says for the building area.

Mr. Varnell: And didn't you recite that portion of the building code within your application?

Mr. Testerman: It is in the building code.

Mr. Varnell: And again, from the building code, using that language, it is your interpretation that the North Carolina Building Code says the building area is the total area contained within the four walls of the building.

Mr. Testerman: Yes.

Mr. Varnell: And you had mentioned Mr. David Lewis. Who is that?

Mr. Testerman: That's our Chief Building Inspector.

Mr. Varnell: And did Mr. Lewis send an opinion?

Mr. Testerman: He did send an email of opinion.

Mr. Varnell: And is that exhibit 4 attached to our response to the applicant?

Mr. Testerman: Yes.

Mr. Varnell: And would you just, for the board what was Mr. Lewis's opinion? Stated directly.

Mr. Testerman: He stated a building area is total square footage of the entire building. The square footage is based on the total of the completed project for each floor.

Mr. Varnell: And was there something within, I believe, in your response at least, was there something within the intent portion of our ordinance and or land use plan that you feel is somewhat at least persuasive in this matter?

Mr. Testerman: Yes. The BC2 district and the scope and intent, and I don't recall the code of the section off the top of my head, it states that the BC2 is intended for medium intensity commercial development. Specifically, it states that big box retail is not appropriate for that use. And while the proposed use here is not big box retail, the scale of the development could be comparable in my opinion.

Mr. Varnell: Are you talking about proposed use? What do you mean?

Mr. Testerman: I mean the mini warehouse facility.

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Mr. Varnell: Okay. And how many square feet was the proposed use in this case? How many square feet was that mini warehouse going to be?

Mr. Testerman: 105,000 square feet.

Mr. Varnell: And, again, just for reference, 105,000 square feet is the total area of that building inside all four walls. How many stories?

Mr. Testerman: Three stories.

Mr. Varnell: At this point, Rob, I will let you speak as to anything else you think may be relevant to this matter, I'd like to make sure the board understood precisely what we were disputing and arguing over tonight and how and why we came to your opinion. So I'll turn it over to you. If you don't have anything, we'll press the board for questions.

Mr. Gallop: Mr. Ellis, do you have any questions for Mr. Testerman?

Mr. Ellis: Rob, what is the date of your report that you were going over with Casey?

Mr. Testerman: Can you repeat that response

Mr. Ellis: Whatever he gave you to get you to pull it up.

Mr. Testerman: Let me get it off my desk.

Mr. Varnell: Rob, he's talking about these two docs.

Mr. Testerman: Oh, okay. The interpretation was dated October 15th, 2024, and the opinion of the Chief Building Inspector was dated December 12th, 2024.

Mr. Ellis: So the building inspector was just a few days ago?

Mr. Testerman: Yes, when I asked him to put in writing his opinion.

Mr. Ellis: And did he cite any authority, or was that just his pure and simple statement that an e-mail from him would nullify the cite?

Mr. Testerman: My thought would be the authority of the Chief Building Inspector, and in the definition from the building code.

Mr. Ellis: All right. Does he cite the building code in that statement?

Mr. Testerman: I believe he did.

Mr. Ellis: And then he says that a building area is a total square footage of the entire building. There's no code provision in the town code that says that. Is that true?

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Mr. Testerman: Right. The town code does not provide a specific definition for building area.

Mr. Ellis: And that's why we're here. Because the word building area, as used in the ordinance were talking about, is not defined in the town code, correct?

Mr. Testerman: Correct.

Mr. Ellis: The square of floor area, gross is defined.

Mr. Testerman: Correct.

Mr. Ellis: All right. And that means what you said, a total square footage of the entire building, every floor.

Mr. Testerman: Correct.

Mr. Ellis: And the building footprint is defined.

Mr. Testerman: He said that.

Mr. Ellis: You're the planning director. Is the building footprint defined in the town code?

Mr. Testerman: I believe so. I don't have the Town Code in front of me. I can pull it up.

Mr. Ellis: It is defined in the list of definitions in Chapter 42 of the town code. And what is the building footprint? How is that defined?

Mr. Testerman: I'll have to defer back to the building code definition.

Mr. Ellis: Isn't it basically just whatever area on the ground the building actually sits on?

Mr. Testerman: That would be my general understanding, but to give the definition of the town code, I would have to pull it up.

Mr. Ellis: But, again, is it just as easy to say that building area is building footprint is building area is total gross footage?

Mr. Testerman: I Don't believe so. I think if it was referring to building footprint, Section 42-251, you'd want to state building footprint.

Mr. Ellis: Okay. But it also does not state floor area gross, does it?

Mr. Testerman: It doesn't.

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Mr. Ellis: It doesn't say either one of them. That's our dilemma. That's what we're trying to define is what this building area means as used in this ordinance. Correct?

Mr. Testerman: Correct.

Mr. Ellis: And in your interpretation came at the end of a fairly lengthy process. Is that true?

Mr. Testerman: The formal interpretation?

Mr. Ellis: Yes

Mr. Testerman: Yes.

Mr. Ellis: In other words, Mr. Goodrich, the owner of the land and its developer, Mr. Cobb, had submitted a proposed site plan for an extra space storage, self-storage facility. And it was initiated in January or May 2024?

Mr. Testerman: Correspondence began in January. The application came in May.

Mr. Ellis: And, again, the architect asked you what that 40,000 square foot of building area would have meant. Correct?

Mr. Testerman: Correct.

Mr. Ellis: And you told him you'd have to get back to him.

Mr. Testerman: Correct.

Mr. Ellis: And that you wanted to talk to the town attorney.

Mr. Testerman: Correct

Mr. Ellis: And subsequently, you told him that your thinking was that it meant the total floor area gross. And as a result of that, Mr. Varnell recommended that there be a text amendment made specifically about the building footprint.

Mr. Testerman: I believe the response was that a text amendment would be required to exceed 40,000 square feet, something to that nature.

Mr. Ellis: Well, again, what the text amendment, you're familiar with a text amendment, and you were familiar that what it attempted to do was say that 40,000 square foot was the limit of the building area. It didn't limit the total floor area or gross of the whole building.

Mr. Testerman: Right. And if I recall correctly, specifically for mini warehouse facilities, a 40,000 square feet footprint and defines the number of floors as the 35-foot height-wise.

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Mr. Ellis: And actually, what was proposed was 105,000 floor area, gross.

Mr. Testerman: 105,000 square feet floor area, gross.

Mr. Ellis: And that was 35,000 on each floor and three floors.

Mr. Testerman: That's right.

Mr. Ellis: And no problem with the building height it was within the height limitations

Mr. Testerman: Right

Mr. Ellis: So that got submitted and the planning commission unanimously approved each one of them, right? The text amendment and the special use permit application.

Mr. Testerman: They recommended it. They're an advisory body, the chairman is very clear at each meeting that the council is not bound by their recommendation.

Mr. Ellis: But they recommended it to pass. Correct?

Mr. Testerman: Correct.

Mr. Ellis: And then got to Town Council and that's where the text amendment was denied.

Mr. Testerman: Correct

Mr. Ellis: Do you acknowledge that there's been some confusion on one of them?

Mr. Yetzer: Sir, who recommended it unanimously?

Mr. Ellis: The Planning Board, The Planning Commission.

Mr. Yetzer: All right.

Mr. Ellis: They got to the Town Council and the text amendment had to be acted on first. Correct?

Mr. Testerman: Yes

Mr. Ellis: And there was some confusion on whether it's the text amendment that was applicable in the beach commercial or the village commercial district.

Mr. Testerman: I can't speak for what the council thought if there was some confusion. I know there was a discrepancy initially in the minutes referred to VC versus BC. As Casey mentioned when I spoke to him, on a recording the difference between B and a V, is

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difficult. I have to correct his name, from Casey Barnell to Varnell, quite often. I can't speak to what the individual council members thought.

Mr. Ellis: Do you remember some comments Councilwoman Walker that didn't like anything like that on Kitty Hawk Road or in Kitty Hawk Village?

Mr. Testerman: I do not recall the exact words.

Mr. Ellis: So those comment were made, that's applicable to the VC, Village Commercial District. Correct?

(25:12 - 25:34)

Mr. Testerman: If it was in Kitty Hawk Village, The Woods Road it would be BC or VR district

Mr. Ellis: And then, again, the minutes, in fact, the Town Council just corrected the minutes as past assembly. Is that correct?

Mr. Testerman: Correct. At that time the Town Clerk, acknowledged the mishearing of the transcription and brought it forward.

Mr. Ellis: And if anybody's interested, obviously the video of that meeting in August would be the best evidence of that.

Mr. Testerman: Yes

Mr. Ellis: All right, so that tax amendment gets denied, which means the Town Council never even looked at the special use permit and the site plan for the proposed project.

Mr. Testerman: Correct. To be able to approve the special use permit and the site plan the text amendment, as was discussed with the applicant previously, the text amendment had to be approved first without the text amendment the site plan couldn't be approved. Hence, the square footage exceeding the maximum limit.

Mr. Ellis: But it was never even considered.

Mr. Testerman: Correct.

Mr. Ellis: Once the text amendment was denied the applicant, that was it.

Mr. Testerman: Correct.

Mr. Ellis: So they never got to present their plans, their site plan or discuss what the views were and how the plan blended in with where it was proposed.

Mr. Testerman: Correct. They didn't meet the requirements of the ordinance. So, the text amendment was denied, so there was no need to look at the special use.

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Mr. Ellis: So after that occurred, that's when Mr. Goodrich, Mr. Cobb, and I got on the phone with, emailed to you and Casey and said, you know, we really want to see if there's a way to find a way through this to the time and money that's been spent on this plan. Remember that?

Mr. Testerman: Yes

Mr. Ellis: Remember when we had a Zoom call in August?

Mr. Testerman: Yes.

Mr. Ellis: Do you remember that we were all on the same page, that we really didn't need the text amendment? That the amendment dealt with building area which meant building footprint, not gross floor area?

Mr. Testerman: I do not recall being in agreement with that. Understanding where that argument could be made and bringing it forward to see if the Council would agree to that. And then, I believe, Casey asked for something in writing to be able to bring forward to Council. I believe what was submitted in writing caused us to take a further look at it and kind of reaffirm our original position.

Mr. Ellis: But, again, do you admit that when Mr. Goodrich and I and Mr. Cobb hung up from that Zoom call, that we were under the impression that you and Casey were on board with our interpretation that building area meant building footprint?

Mr. Testerman: I can't speak to what your impression was. I remember not saying much on the call and was kind of nodding and listening and then speaking to Casey after the call.

Mr. Ellis: But do you remember at any time in that call saying, hello guys, I've already told you, here's my interpretation in January of this year, that it means floor area gross, it doesn't mean building footprint.

Mr. Testerman: No, because in the years I've been doing this, I try not to be one of the, come down on it, I try to work with people and hear people out but I don't like being the one with an iron fist.

Mr. Ellis: All right, so you admit you didn't say that during that call?

Mr. Testerman: Correct.

Mr. Ellis: All right. And you admit that Casey asked me to submit something on behalf of the applicant to see if that would get the wheels turning on perhaps looking at this again?

Mr. Testerman: Yes.

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Mr. Ellis: And I did that, and he and I went back and forth on a couple of letters and emails and that sort of thing?

Mr. Testerman: Yes.

Mr. Ellis: And then eventually, he sends me an email on October 7th, and I'll give you a copy of it, and that includes Exhibit 8 of the applicant's exhibit. Do you remember that email?

Mr. Yetzer: Excuse me, what exhibit?

Mr. Ellis: It's exhibit 8, and I apologize, this is, I'm walking out of the office and didn't bring a copy for all of you guys this morning.

Ms. Berquist: What's the date of that email?

Mr. Testerman: October 7th, 2024.

Mr. Tabb: All right, so that was an email on October 7th?

Mr. Ellis: Yes, sir. It's an email from Casey to me dated October 7th, 2024.

Mr. Meads: It's near the end of your packet.

Mr. Tabb: It is?

Mr. Testerman: It would be in the notice of appeal, not the staff report.

Mr. Ellis: Again, this exhibit is not in your packet, but I meant to bring extra copies tonight, and didn't, so don't look for it, it's not there. The one I got, is right here. So, can you read, the first two paragraphs of number two from Casey.

Mr. Testerman: It states, concerning the interpretation of, quote, the building area, from the current special use ordinance, governing mini warehouses, Rob was able to locate several items of correspondence, which occurred during January through April of 2024. These written exchanges were primarily between Rob, Gordo, Eddy and Jerry Ducote, agent of GHK Development in form of electronic email. I have attached the same hereto for your ease of reference. Unbeknownst to Rob and myself, when we first spoke via Zoom several weeks ago, the precise issue of Planning Director's interpretation of the building area was addressed within these email exchanges. Specifically, on January 16th, 2024, Mr. Ducote asked Rob to confirm whether the 40,000 square feet is a total building area or a building footprint area. In requesting this interpretation, Mr. Ducote made it clear that the 40,000 square foot structure in total size would take the proposed development out of the realm of economic sense.

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Mr. Ellis: But what Casey said was, from the notes to Rob or myself, when we spoke via Zoom several weeks ago. So again, you understood that he was walking away from the Zoom conversation.

Mr. Testerman: I think unbeknownst to him, the emails that were exchanged in January were ten weeks prior and it wasn't something that the forefront of my mind at all. And Casey was there, he was able to find them.

Mr. Ellis: And once we got that email, that's when we asked you to put a formal opinion to which we could respond.

Mr. Testerman: Sure

Mr. Ellis: And that's why we're here tonight.

Mr. Testerman: Correct

Mr. Ellis: and we're asking them to tell us what the ordinance 42-251(b)(1), what it means when it says 40,000 square feet of building area as shown on the commercial site plan.

Mr. Testerman: Correct

Mr. Ellis: And that, again, a building area is not defined in the town plan. Correct?

Mr. Testerman: Correct.

Mr. Ellis: The building footprint is and floor area gross is, but not building area.

Mr. Testerman: Correct

Mr. Ellis: It is your interpretation that building area means floor area gross as used in this ordinance?

Mr. Testerman: My interpretation is total building area. Total square footage.

Mr. Ellis: But do you know that it could mean building footprint?

Mr. Testerman: I don't believe building footprint unless it is a one story building.

Mr. Ellis: Again, building area is not defined. Right?

Mr. Testerman: Correct.

Mr. Ellis: And the word building area is used not floor area gross which is defined.

Mr. Testerman: Correct.

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Mr. Ellis: And the building area is used not building footprint which is defined.

Mr. Testerman: Correct

Mr. Ellis: And I think that's all my questions.

Mr. Gallop: Thank you. Mr. Varnell, do you have any follow-up questions, redirect for Mr. Testerman?

Mr. Varnell: Rob, just for the record, if the board members want to take a look at the string of emails that was referenced just now during Rob's testimony, Rob, is it accurate to say that Exhibit 2 attached to your application is an accurate copy of those emails starting in January between you and the applicant and or you and representatives?

Mr. Testerman: Yes.

Mr. Varnell: And is it your opinion that the question posed in those emails in January of some 10 months before the Zoom call was being read, is your understanding or opinion that that is a precise question asked of you? What we're here about tonight, was that a precise question asked of you then? As far as interpretation is concerned?

Mr. Testerman: That's how I took it, yes.

Mr. Varnell: And in this email, how would you characterize your response or the Town's response to that request for interpretation back in January some 10 months ago?

Mr. Testerman: I felt it was accepted.

Mr. Varnell: And is it the same exact response that you're testifying to today? Having your interpretation then in January? Is it the same response you're testifying to today?

Mr. Testerman: Yes.

Mr. Varnell: And just, so you've established that building area is not defined, there's no dispute over that, correct?

Mr. Testerman: Correct.

Mr. Varnell: The floor area ratio is. Building footprint is. is the term building area are those two words within those two words that are defined? Isn't floor area, you've got area. You've got building footprint, so it's building. If you put building footprint and floor area together, containing now the word building area? Phrase building area. What would be your definition of the combination of building footprint and floor area? So, it's referring to the building.

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Mr. Testerman: Say that one more time

Mr. Varnell: So we've got the building footprint, that's defined. We've got floor area gross, that's defined. Well what's up tonight for consideration is the phrase building area. So we've got two definitions, floor area and the building footprint. If you use those, does that equal, if you conglomerate two definitions, right, is that the total square footage of a building? Would that be your understanding?

Mr. Testerman: Yes, the total floor area.

Mr. Varnell: For each floor atop the building footprint?

Mr. Testerman: Yes.

Mr. Varnell: Okay, thank you.

Mr. Gallop: Anything else, Mr. Ellis? Mr. Ellis, before you go for it, are we sure that they're getting recorded?

Ms. Everett: Yes

Mr. Gallop: Okay, I just saw the microphones were kind of facing away and I just wanted to make sure that all this was on the record and being recorded.

Mr. Ellis: Ready?

Mr. Gallop: Yes, sir.

Mr. Ellis: Robert, basic math, geometry, algebra, how do you calculate area? So, it's two dimensions.

Mr. Testerman: For a two-dimensional plane, you know, sure. We commonly talk about buildings and I'm talking about a block.

Mr. Ellis: Which is three-dimensional.

Mr. Testerman: Right.

Mr. Ellis: Okay. And a commercial site plan, is that typically a two-dimensional document?

Mr. Testerman: Typically, the site plan itself is typically two-dimensional, but there's typically reference to the overall size of this elevation.

Mr. Ellis: Okay, I might have noticed some things of that that explain that, but basically what you visualize is two-dimensional. What's shown on the, what's moving on the map. And

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again, the coordinates in question talk about the 40,000 square feet of building area as shown on the commercial site plan, isn't that what it says?

Mr. Testerman: It is.

Mr. Ellis: And again, the commercial site plan is a two-dimensional picture.

Mr. Testerman: The site plan is an areal view looking down.

Mr. Ellis: Which is two-dimensional. Thank you.

Mr. Gallop: Mr. Varnell.

Mr. Varnell: On that commercial site plan, was it prepared by a licensed professional engineer on behalf of the applicant?

Mr. Testerman: I believe it was

Mr. Varnell: And that professional engineer, how many square feet on this two-dimensional site plan, how many square feet did he identify that building had?

Mr. Testerman: 105,000 square feet.

Mr. Varnell: Thank you.

Mr. Ellis: How many per floor

Mr. Testerman: I don't recall

Mr. Varnell: We rest.

Mr. Gallop: Do you have any more, you don't have any more evidence?

Mr. Varnell: We would now rest.

Mr. Gallop: Mr. Ellis, do you have anyone who you'd like to have testify?

Mr. Ellis: Yes. Mr. Goodrich

Mr. Gallop: Mr. Testerman, you can sit down now if you'd like.

Mr. Yetzer: Are we going to have time to ask Rob questions?

Mr. Gallop: Do you have any questions for Rob?

Mr. Yetzer: I have a whole bunch of questions.

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Mr. Gallop: Let's back up and let Mr. Testament again. I'm sorry about that.

Mr. Yetzer: Do I got to use this button thing? It's green.

Mr. Testerman: If it's green, you're good.

Mr. Yetzer: All right. Rob, just what, as a planner and a professional and somebody who's been doing this forever, what is the intent of that paragraph that we're arguing about tonight? What is it there for?

Mr. Testerman: My reading is, so we've got the BC1, which is our general beach commercial, BC2, which is beach commercial, and then the BC3, which is the area for big box retailers, higher intensity commercial development. So, the BC1 is lower, I guess a lower intensity development scale. The same language exists in the BC1, except it's limited to 25,000 square feet of building area. And then the BC2 is supposed to be kind of a medium intensity commercial development. And then, as I mentioned, the BC3 is where the Wal-Mart and the Harris Teeter and the larger intensity commercial use.

Mr. Yetzer: In that paragraph, it says the site can't be over seven acres, which means it could be 6.99.

Mr. Testerman: Correct.

Mr. Yetzer: This site is about five?

Mr. Testerman: I believe so.

Mr. Yetzer: If you want a three-story building, and it can only be 40,000 square total, three floors, that's 13,300 building footprint.

Mr. Testerman: Correct.

Mr. Yetzer: More or less. That's only about 5% of that lot being covered by the building. And I believe this zone allows 60 to 72%, depending on permeable pavement.

Mr. Testerman: Correct. And there is language in that same section, I believe it's in the intent, where it says You can find that in the staff response that was provided to you. So it says, unless otherwise stated, the section applies to the BC2 commercial district. The BC2 district is established to provide for the development of commercial facilities in Kitty Hawk Beach to furnish a broad range of services and commodities to serve the entire community. The BC2 district has been established to provide for the commercial needs of the town. The commercial development within the BC2 district will be characterized by medium-sized to large-sized land parcels with commercial development of medium intensity. Commercial centers may be authorized in this district, but large shopping centers or shopping malls and big-box retail wholesale businesses exceed the scale development

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plan for the district. So, the commercial centers, as I read it, is dealing more with, it's zoned BC1, but kind of the same with the Dune Shops, the area where the veterinary office is just to the north. So, it's a larger overall building, but there are multiple tenants, users inside. The language that we're here talking about tonight, it also says that no use of an owner or tenant on the site shall exceed the maximum area of 40,000 square feet. So it's saying you can have multiple users on site up to the 40,000 square feet of building area, but no one user, no one tenant is going to exceed that amount.

Mr. Yetzer: So I can have a 400,000 square foot building as long as nobody's over 40, they're good? I mean, let's just say we have this dream huge parcel, well, whatever. Whatever 72% of 6.99 is.

Mr. Testerman: Right. I mean, that's the way it reads. No use of an owner or tenant on the site shall exceed the maximum area of 40,000 square feet of building.

Ms. Smith: With respect to that part of the conversation, since the site plan has another building on it, that's not relevant?

Mr. Testerman: No, there's no issue with that. I believe it's a 10,000 square foot multi-unit commercial building.

Ms. Smith: Right.

Mr. Testerman: The specific uses weren't identified in the proposal for that, but if there's retail or what have you, that could be done by right.

Ms. Smith: But since it's a separate building, it doesn't play into the square footage?

Mr. Testerman: Correct.

Ms. Smith: Okay, thank you.

Mr. Yetzer: So if these guys made three shell companies and they said, we each are going to own one third of this self-storage thing, you'd have to, okay it?

Mr. Testerman: I would probably defer to Casey on that.

Mr. Yetzer: It seems to me this paragraph is trying to limit density, right?

Mr. Testerman: I believe so, yes.

Mr. Yetzer: All right. Is self-storage allowed in BC2?

Mr. Testerman It is permitted in a planned commercial development as a special use, not in the BC2 district. But the site in question has been approved as a planned commercial development, and then there was a previous text amendment that got mini storage

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warehouse facilities allowed as a special use permit within the planned commercial development. The P.C.D. is an overlay district that can be applied through a rezoning legislative decision, rezoning either the BC1.BC2, I think BC3 districts. There's certain site considerations that has to be considered. A certain size has a certain road front that we have to handle all the things that have to be met.

Mr. Yetzer: And that, what did you call it, P.U.C. or whatever?

Mr. Testerman: Beach commercial.

Mr. Yetzer: I mean, the special overlay?

Mr. Testerman: So, the language in the P.C.D. says that, you know, it refers back to the underlying zoning district when you're looking at the lot coverage and dimensional requirements and this falls under dimensional requirements. The P.C.D. kind of gives a little bit more flexibility for development. Different uses have been written specifically into the P.C.D. There's language in there for when calculating lot coverage, roadways within the P.C.D. aren't counted towards the sidewalk. So, it gives a little greater flexibility than just the standard BC2 and BC1.

Mr. Yetzer: Well, a P.C.D. then, that has to get approved by council and the whole thing.

Mr. Testerman: Correct.

Mr. Yetzer: And they can say, no, we don't think a self-storage is what we need in this town. And if they can get a majority, that's the end of it, correct?

Mr. Testerman: Correct.

Mr. Yetzer: Because it isn't allowed in that district.

Mr. Testerman: Well, the P.C.D. is already in place.

Mr. Yetzer: Oh, it's in place. And self-storage is allowed.

Mr. Testerman: The text amendment to make self-storage allowed is a special use permit with a list of specific requirements.

Mr. Yetzer: Okay. I think that's all I got.

Mr. Gallop: Does somebody else have a question?

Mr. Meads: Is the same language or similar language used in BC3?

Mr. Testerman: Regarding square footage?

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Mr. Meads: Yeah, how does BC3 read?

Mr. Testerman: I believe it is listed in BC3 district. I can, I don't know, pull it up in the middle of this? I'm not sure they have that up. I don't recall if it's in there or not.

But I think the BC3, I believe, was specifically written for that small area where big lots, retailers are. So, I don't think that language is included in it.

Mr. Tab:b Could you, or is there somewhere in town code that says, this is the square footage that we allocate to this site, that we allocate for your footprint or whatever you want to call that, and this is the total amount of square footage for the structure?

Mr. Testerman: I don't believe there's anything like that specifically in there. There's the language in the BC1 and BC2 regarding the square footage that we're talking about tonight. And then the rest of the site constraints are going to be dictated by your lot coverage, building requirements, open space requirements.

Mr. Tabb: Well, I guess my question would be, though, I mean, could you say, well, this is what, this structure is 40,000 square feet is what we permit, but you can have up to 120,000 square feet of space, allowing for three stories, three floors.

Mr. Testerman: If I'm understanding the question correctly, that's basically what the text amendment request was that was denied.

Mr. Tabb: I know, right, but my question is, could there be specific language in, or is there specific language that says that somewhere in other areas in the town code?

Mr. Testerman: I don't believe there's any existing. It could be drafted and proposed to Council.

Mr. Yetzer: Is the proposed bigger building three stories of self-storage? Is that what it is?

Mr. Testerman: Yes, sir.

Mr. Yetzer: Do you have any idea what kind of septic load that is? Okay. I'm not seeing a lot of room for septic, nor do I think you need a lot of toilets in a self-storage.

Mr. Gallop: I'll backtrack again, and Mr. Ellis, now is your opportunity. And had I followed my script, I would not have made that mistake.

Mr. Ellis: I think included in our appeal, was some small copies of what was submitted to the town as the site plan. And Mr. Cobb sent us some bigger ones, if you all are interested in seeing the bigger copies.

Mr. Ellis: State your name for the record.

Mr. Goodrich: My name is George Edward Goodrich.

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Mr. Ellis: Where do you live?

Mr. Goodrich: I live at 111 East Baltic Street, Nags Head, North Carolina.

Mr. Ellis: And how long have you lived in Dare County?

Mr. Goodrich: Since 1983.

Mr. Ellis: How are you employed?

Mr. Goodrich: I am a real estate broker, a real estate developer, and I am in the utility business, sewer utility business.

Mr. Ellis: Who do you work for when you did real estate?

Mr. Goodrich: I associated with Village Realty.

Mr. Ellis: Do you own the property that we are talking about here tonight?

Mr. Goodrich: Yes

Mr. Ellis: You acquired it as a bigger track and you since gotten permission and spun off what is the 7-Eleven

Mr. Goodrich: Yes. That's correct. The property had an old service station on it. It had been there for around 20 years, and I went through the process of dealing with the Division of Environmental Quality. I removed it, sold it to a group that built a 7-Eleven. The only neighbors we have are the State of North Carolina, the Dominion North Carolina Power, an automobile repair shop, and a candy shop.

Mr. Ellis: And you entered into a contract to sell the property to GHK

Mr. Goodrich: I did.

Mr. Ellis: And again your understanding of how it works with them on this process is they would like to develop it to mainly include an extra space, a self-storage facility.

Mr. Goodrich: That's correct.

Mr. Ellis: Have you seen the plans for the remainder?

Mr. Goodrich: I have.

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Mr. Ellis: All right. Tell us, just sort of, you know, without going into great detail, from the moment this project, when Mr. Cobb came to you with this project and you all went to the town, where has it gone since then?

Mr. Goodrich: I met Mr. Kolb, in the fall of last year, about this time, as a matter of fact, and he's a developer. He develops Walgreens. The Publics in Kill Devil Hills would be something y'all would recognize. It was a company's about 50 years old. And he was interested in buying the property and building a self-storage warehouse facility. And, of course, I showed it to him. He liked it. We started working on it in January of last year. And everything went very well. We were sailing along. We got, you know, we had all our permits from the State of North Carolina that we needed, let's put it that way, and the federal government. And we went to the , and it was unanimously approved. And then at the Town Council meeting, everything seemed to go sideways for a minute. We were denied on by 4-1.

Mr. Ellis: And what was denied was a text amendment

Mr. Goodrich: That's correct.

Mr. Ellis: It was, again, the language we've been talking about in the town code section 42-251(d)1, which says that no use of an owner or tenant on the site shall exceed the maximum area of 40,000 square feet of the building area as shown on the commercial site plan. That's correct. And do you remember in January that Rob Testerman, the planning director, said in an e-mail that it was his thinking that this applies to the total area of the building?

Mr. Goodrich: By refreshing my memory, it would be e-mails, yes.

Mr. Ellis: And that you and Mr. Kolb decided to submit a text amendment?

Mr. Goodrich: We decided that was the more practical than arguing about it, let's put it that way, the path of least resistance.

Mr. Ellis: In other words, as opposed to arguing under the interpretation at that point in time, you accepted the town's recommendation on how to handle it and move forward.

Mr. Goodrich: That's the way I remember it.

Mr. Ellis: And when the Town Council denied the testimony, that's when you went back to the drawing board?

Mr. Goodrich: That's correct.

Mr. Ellis: And tell us, in your understanding of what you believe this ordinance has written, what, in fact, his interpretation is.

Mr. Goodrich: Well, it says what it says, no more, no less. First, I'd like to mention something about the word area. Area doesn't mean anything. This is a meeting area. Outside is a

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parking area. Everything else is a vacation area. So, building area doesn't mean anything until you look at it in the context of a sentence. And if it meant floor space, it should have said floor space. If it said gross building area, it should say gross building area. But what it says is building area as shown on a commercial site plan, which to me means the area of which you can build upon. I've talked to a lot of people over the past couple of months, and everybody that I asked what building area was...

Mr. Varnell: Objection, hearsay

Mr. Gallop: Sustained

Mr. Ellis: Sustained.

Mr. Goodrich: I understand. Where was I?

Mr. Ellis: Well, in other words, what do you think it means and why do you think it means that?

Mr. Goodrich: I think it means when you take a parcel of land and apply all the restrictions, setbacks, front, rear, and side, area for septic, open space, and any other restrictions that you have, you have an area that you can build on, and that's the building area.

Mr. Ellis: And you're familiar with site plans?

Mr. Goodrich: Very, very familiar.

Mr. Ellis: What do you understand site plans to mean, and show?

Mr. Goodrich: Well, site plans show driveways and parking areas. They show buildings and the building's footprint. They don't necessarily show the square footage, except for the footprint square footage. Wetlands, anything else, there may be a restriction on building on that particular area.

Mr. Ellis: Is there a difference between a site plan and a construction plan?

Mr. Goodrich: There's quite a bit of a difference. A construction plan is three-dimensional, something an architect would draw or an engineer would draw. You don't have to be an architect to draw a house plan, but a site plan is two-dimensional.

Mr. Ellis: I'm showing you the site plan proposed master plan for this proposed development for the extra space storage facility.

Mr. Ellis: Do you see the facility shown on that site plan?

Mr. Goodrich: I do.

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Mr. Ellis: Is it located on the property that you were going to sell GHK?

Mr. Goodrich: It is.

Mr. Ellis: And what does it show as the square footage of the storage facility?

Mr. Goodrich: The footprint is 35,000 square feet, three stories, 34 foot height.

Mr. Ellis: So, 35,000 is less than the 40,000 requirement in the ordinance.

Mr. Goodrich: That's correct.

Mr. Ellis: Does it also show in the notes what the floor area gross is?

Mr. Goodrich: I'm putting my glasses on for that one. I'm sure it does.

Mr. Testerman: It does..

Mr. Goodrich: Yes, it does.

Mr. Ellis: What does it say?

Mr. Goodrich: 105,000.

Mr. Ellis: Which would be three stories times 35,000.

Mr. Goodrich: That's correct.

Mr. Ellis: Do you remember the Zoom call we had with Mr. Varnell and Mr. Testament in August of 2024?

Mr. Goodrich: I remember you and Mr. Kolb on that Zoom call. I think I missed it. I think I was traveling. But I remember the content of it.

Mr. Ellis: Okay, so you weren't a part of it.

Mr. Goodrich: No.

Mr. Ellis: And at some point in time, did you understand that the town, at least through their attorney and planning director, agreed with our interpretation of the ordinance?

Mr. Goodrich: I remember being told that.

Mr. Ellis: And at some point in time, that changed.

Mr. Goodrich: Correct.

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Mr. Ellis: And then when we asked for a determination from the planning director, we could get a view of this ordinance.

Mr. Goodrich: Yes.

Mr. Ellis: Anything else you would like to tell this board?

Mr. Goodrich: I'd like to give the board the North Carolina General Statutes in Section 160, which is the section that gives municipalities in the state of North Carolina the power that they have to govern, to regulate, sub-divide property, and things like that.

Mr. Ellis: Here is Mr. Varnell's copy.

Mr. Goodrich: This is, the definition here is the site plan. And again, you will see that it clearly separates what a building area is and what is not a building area.

Mr. Ellis: And I would just point out to the board that this statute that Mr. Goodrich handed us has been replaced by Chapter 160D, but that that definition is still in the statute. Anything else you want to tell the board?

Mr. Goodrich: I would like to say that this is far more simple than it's been tonight. It says building area on the site plan. That's all it says. It doesn't say footprint. It doesn't say gross floor space. It says building area on the site plan. And that's where you can build.

Mr. Ellis: Thank you. Mr. Barnhill may have some questions for you. Mr. Varnell.

Mr. Gallop: Mr. Varnell

Mr. Varnell: Mr. Goodrich, I only have one. And it could just be housekeeping The site plan that you handed us that showed the 35,000 square foot building footprint, did you say that was the site plan that was part of the council package in the meeting where ultimately the text amendment that you guys put together got denied? Is that correct? I just wanted to clarify, you were not saying that was the same site plan in that particular package?

Mr. Goodrich: What now?

Mr. Varnell: This site plan here, showing 35,000 square foot building footprint, are you saying that this is the same site plan that was presented to council as part of the hearing where there was a deny?

Mr. Goodrich: Unless someone changed something, but I don't know. Yes, it is the same thing.

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Mr. Varnell: As Rob testified to the fact that it had a 105,000 square foot footprint. Well, not footprint, but 105,000 square feet was what was shown. There was no mention of 35,000 square foot footprint.

Mr. Yetzer: Is this what council saw? Because this doesn't have 35.

Mr. Smith: This is different than what's in our packet.

Mr. Varnell: What does that one say?

Mr. Yetzer: It says self-storage, plus or minus 105,000 square foot, three stories.

Mr. Varnell: That is what I believe was presented to council. That's what Rob testified to. I just wanted to point that out. I missed you when you said you were describing this as a site plan or the one presented to council. I knew the one presented to council had the 105,000 designation on it, and I just didn't see it on this.

Mr. Ellis: I don't think anything was presented to council. The footprint is 35,000. The total gross floor space would be three times that.

Mr. Varnell: Right. Oh, and I'm not saying that you are trying to slide something by on us by any means. I just want clarification as to what council actually saw.

Mr. Yetzer: I have questions. This one's more for you, sir. Because you weren't on the Zoom call, right?

Mr. Goodrich: Pardon me?

Mr. Yetzer: You were not on the Zoom call.

Mr. Goodrich: No, I was not.

Mr. Yetzer: Okay. So, during the Zoom call, you guys had some sort of vibe that the town was agreeing that that area meant building footprint. Do you have anything in writing from the town that says that?

Mr. Gallop: Hold on, just one second, just to make sure. The complexity here of whether or not you've got to be sworn to do this, I'd prefer that you...

Mr. Varnell: I don't object to this.

Mr. Yetzer: It's a real easy question. He doesn't need to be sworn in.

Mr. Gallop: Well, it's a lawyer thing about the difference between facts and argument. I just want to make sure that we're covering the right... That's all I'm here for tonight is to make sure we're following the right steps. All right.

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Swearing in of Mr. Hood Ellis, Attorney

Ms. Everett: Raise your right hand. Do you swear or affirm that the evidence you shall give to the board in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. Gallop: And also, there's a number of questions I've wanted to ask him for years while he was under oath.

Mr. Ellis: I plead the 5th

Mr. Yetzer: Do you have anything in writing from anybody in the town saying they agree that the 40,000 is building footprint?

Mr. Ellis: Nothing. Nothing in writing other than my notes from that conversation where I can still remember, as if it was yesterday, that Casey went on to say that the building footprint, that it meant, you know, you apply the setbacks, you apply all the environmental restrictions and whatever's left, it's the building area that you can build on.

Mr. Yetzer: Understood. Thank you.

Mr. Gallop: Any other questions for Mr. Goodrich? Or I guess Mr. Ellis is technically testifying at this point.

Ms. Smith: I have a question. I think we just went over this a little bit, but the original site plan says 105 square feet, and the handout you gave us says 35,000 square feet footprint. Why did you change it?

Mr. Ellis: I think to make it clear that the 105 applies to the whole building, and the 35 applies to the footprint. The 105 was on the original document set sent up to the town, and then when that, again, issue came up, they went back and put 35 on it.

Mr. Gallop: Any other questions? Any cross-exam, Mr. Varnell?

Mr. Varnell: No.

Mr. Gallop: Any redirect, Mr. Ellis?

Mr. Ellis: No sir.

Mr. Gallop: Any further witnesses, Mr. Ellis? No sir. Thank you, Mr. Goodrich.

Mr. Gallop: Thank you. Are there any members of the public here who have any interest in providing testimony this evening? Seeing no one. Any rebuttal evidence, Mr. Varnell? Any additional witnesses?

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Mr. Varnell: No. Thank you.

Mr. Gallop: So now we'll move on to have brief closing arguments from, well, they may not be brief, but we'll call them brief, closing arguments from the party's council, and we'll start with the town, and then we'll have the applicant's council provide arguments, and after that we'll close the hearing and the board will deliberate.

Mr. Varnell: All right. Thanks for listening to us, guys. And those are good questions, actually, as a matter of fact. You were certainly paying attention, and I appreciate that. And I'll keep mine brief. What evidence you've heard tonight from us and that I don't believe has been in any way conferred by the applicant is that the town planning director and their building inspector have both timed the general definition and use in zone from a general standpoint of building area is the total square foot feet of the building. And I would remind you that this is also the only evidence our planning director and our Building Inspector have been presented by someone who has to interpret these things every day before the meeting.

That is true. And again, their take on this is based in large part on the fact that the N.C. Building Code, as Rob said in his application, and as he testified to it, the N.C. Building Code defines building area as the space within the area within the confines of the walls of a building. We're talking walls. We're outside of this 2D argument, this two-dimensional argument, this argument of a site plan. The Building Code defines it specifically as a combined wall. We're now 3D. So note, this is a 3D measurement. It's exactly what the Building Code tells us. And based on that interpretation, it becomes the total square footage. And just as Rob said in his response, you know, building area, again, is the area included within the surrounding exterior walls. A three-story building has exterior walls on all three levels. And thus, the area within the surrounding exterior walls on each level make up the building. So it is total space times the number of floors, which is also stated, which is also, again, in the Building Code, as he put it in his application, the way in which the Building Code defines how you calculate building. Now, as has been stated, there's also no definition of building area in our code. We submit to that. However, as Rob told you, what you do in those instances as a planner is you look at the common usage of the term. You look to other codes that may have a proper definition of that term to provide you an interpretation of whatever is presented to you. If you have a code that doesn't have that word particularly or phrase particularly defined, you also heard this exactly when he did it. He took the Building Code. That's a code that we're bound by no matter what. We only serve the state.

And that's why that code, that precise code, it actually is part of our ordinance because it's incorporated by reference in full. It's exactly what Mr. David Lewis has to deal with every day, has to interpret every day. Now, I would note that Rob, he did point this out, but I think it is critical to note the intent of the BC2, which is the district that we're talking about. That language concerning PCDs is talking about PCDs within the BC2. The intent per our code, the intent of that is to encourage medium-intensity development. Now, Rob told you he feels the applicant's interpretation is not in line with this code. It is not medium-intensity. This is large-intensity. Somebody asked the question, does the BC3 have the same language, the same limiting language? And Rob says, no, he doesn't believe that it does. What I would point out to you is the reason for that. That's in Rob's application. The BC3 is where our big-box retailers are permitted. You've got Home Depot. That's 120,394 square feet. That's how

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big that is. Harris Teeter, 65,000 square feet. Walmart, 127,914 square feet. That's big-box retailers, what we consider big-box retailers. That's why we've only allowed those to be built in the BC3. And here, we've got a menu. What's at stake, or what's perhaps subject, if this gets approved or, better said, if we don't affirm, our interpretation is 105,000 square foot, mini-square foot warehouse in the BC2, not the BC3. Thank you guys very much. I appreciate your time.

Mr. Yetzer: Casey, are you sworn in?

Mr. Varnell: We do ask that we hope that you affirm the Council's interpretation.

Mr. Yetzer: Can I ask a Casey question? You can close it. Well, is it a, I mean. I don't care.

Mr. Gallop: Mr. Ellis, do you have an objection to him asking Mr. Varnell a question?

Mr. Ellis: No

Mr. Yetzer: Is there anything in the building code that pertains to site plans?

Mr. Varnell: I'm sure. I have no idea what it says.

Mr. Yetzer: I bet it doesn't. And you want to know why? Because the building code deals with buildings.

Mr. Varnell: Right.

Mr. Yetzer: And a building, especially around here, is almost the smallest part of a site plan. It's the turd factory. It's the parking. It's the everything else. That's the work in a site plan around here.

Mr. Varnell: Or any site plan.

Mr. Yetzer: Yes.

Mr. Varnell: All I will say is uniformly, the term building area here has been applied as Rob has stated.

Mr. Yetzer: Okay.

Mr. Varnell: Thank you. Any more?

Mr. Gallop: Mr. Ellis?

Mr. Ellis: I'll pass out those memorandums that I did, it sort of outlines our argument On behalf of Mr. Goodrich, and Mr. Cobb, we thank you for your attention to this tonight. Again, the reason were here is we spent a lot of time and money getting here.

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And we feel pretty strongly about, again, our position, which is that this code that we've been looking at, building area, means building footprint when used in the context of a commercial site plan. Again, we started in January, and Rob at that point said it was his thinking that it meant building area meant the overall size of the building. And again, the project architect, Mr. Goodrich, Mr. Cobb, decided, okay, let's do the text amendment if that's what the town has recommended. This is the path of least resistance. They did, and as you heard, that sort of cratered after the planning commission unanimously approved, we got to the town council, and they denied it. We think there was some confusion that they thought we were talking about a village commercial, village, village. Again, district as opposed to beach commercial. The feedback is it may have happened. So that's when we went back to Mr. Varnell and Rob and said, you know, we've got a lot invested in this thing. What path are we trying to go forward? And we ended up on that Zoom call, and again, at that point in time, we all got off the phone, you know, saying hallelujah. They agreed we really didn't need a text amendment. The building area refers to the building footprint, not the floor area gross. So we proceeded down that, had some more correspondence, and that's when, again, we got hit in the face with what I call Exhibit 8, which was an email from Casey saying, unbeknownst to Rob or myself, this issue's already been decided by Rob back in January. Well, you know, why didn't you tell us that in August? But anyway, so that's why we asked for a formal opinion from Rob, a formal interpretation, and we repealed from that to here. Again, it's important to know that the building area that's used in this ordinance is not defined. It doesn't say the building footprint, and it doesn't say the floor area gross as the town wants it to say. We want it to say the building footprint, but, you know, it doesn't say what even one of us wants it to say, but it's going to say whatever y'all determine it says. I hear the discussion about Mr. Lewis and being the building inspector and all the heavy reliance the town places on the building code, but we disagree with that. We don't think the two are related. Again, there's a case in North Carolina that's cited in my brief. I can find it.

It's the town of, it's on page 11 of my brief at the top. It's the *Cardinal v. Town of Madison Board of Adjustments*, a 1991 case from the Court of Appeals, and it said that, the quote I've got from that case is that if the inspector's authority was the state building code, it's also worth noting that the North Carolina Court of Appeals has held that it was inappropriate for the zoning administrator to rely on the definitions from the state building code rather the definitions in the zoning code and it was defined in the zoning code than the administrator is to rely on the term's customary dictionary definition. So that's a case in the Court of Appeals where they said don't mix the two. Don't mix the building code with your zoning and your land use and local land use regulations go to the dictionary and other ways to find common, ordinary meaning for words. We put on page, early on in our brief, page 9 and one over page 10 some rules of construction that courts customarily apply when they're interpreting statutes. Similar to you, you're the Board of Adjustments, you've got to interpret this provision, and I think Ben will tell you, it's your call. You're not bound by what Rob determined. You're not bound by what I argued. It's your right to declare what you believe that or this provision means. The other thing I want to point out on page 11, and this was something that Mr. Goodrich found on looking at, Googling, on AI, Artificial Intelligence. If you look sort of toward the middle of the page where it got single-spaced, this is the definition that AI has for a building area. On a commercial site plan, the building area refers to the designated space on the property where the building structure will be constructed,

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typically outlined by a solid line and clearly marked with dimensions, including the exact footprint of the building within the overall site boundaries. That's the definition in AI of what building area means on a commercial site plan, which is clearly what we've have here. Again, construction plans for the building code are three-dimensional. We're talking about site plans that are two-dimensional, and Mr. Goodrich, that definition that's recited in now what is Chapter 160D-102(29), is the definition of a site plan. The relationship, lot lines, and the existing or proposed uses of building structures on the lot. Again, it's a two-dimensional picture. So, again, in summary, I'm sure we can beat over the head, but we believe the building area as used in this code provision means building footprint. We believe that's based on common ordinary definitions of area, how you compute area as we did in junior high math, length times width. There was no three-dimensional in it. The building code is not the authority to go to according to the court of appeals. We believe that we've cited other sources that talk about similar, including the AI definition, that clearly say that it's the building footprint. Our request is that you would find that Rob's determination was in error and declare that the building area as used in section 42-251 (b)(1) means the area occupied by the proposed building, the building footprint, not the floor area gross, which represents the total area of the building, measured by taking the outside dimensions of each floor. The big box, medium density, there's no evidence to believe that. If you want to really go to extremes and observe results, we can argue that, hey, we're going to have however many units of self-storage space that are going to be rented, so we're going to have multiple tenants. If we had multiple tenants, then we could divide that into 40,000 square feet and really bring it way down. Again, the thought process on big box and medium density, again, properly applied, this 40,000 square foot limitation is the building footprint, and that's all this board should be concerned with. That's what the ordinance says, and we're under that, and we're committed to go forward based on that interpretation. Thank you very much for your attention.

Mr. Gallop: Thank you, Mr. Ellis. Does anybody have any questions for him?

Mr. Yetzer: Are you looking at me?

Mr. Gallop: Yeah. With that, we will close the evidentiary hearing portion of the meeting, and now for the members of the board, it would be your opportunity to deliberate, and again, I'll reiterate what I said earlier as your options. You may reverse or affirm wholly or partly or may modify the town's decision being appealed from, and you can make any order or decision that ought to be made regarding that, and you essentially have the same power that Mr. Testerman had, so you sit in his shoes to reevaluate what you've heard and apply the ordinance in the manner that you've determined it applies, and if that's contrary to Mr. Testerman's decision, then that would be a reversal. If it's the same as Mr. Testerman's decision, it would be an affirmance, and if it's some other area, then it would be some modification.

Ms. Smith: Do you need a motion to allow the public hearing or anything like that?

Mr. Gallop: No, ma'am.

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Mr. Meads: At this time, we can discuss.

Mr. Yetzer: Blair, I have a question for you. You know the building code roughly. I know you don't know chapter, book, and verse. It's like knowing the tax code, but I mean, it is basically foundation up. That's what it deals with, correct?

Mr. Meads: For the most part, yeah. There are some references, I think, to cite in there, but typically, it's dealing with the structure itself.

Mr. Yetzer: I'll give you guys my two cents. As a surveyor, I've done site plans, lots of them. Not a lot of commercial, but because they're so obnoxious that I can't wrap my mind around them. I've actually surveyed in this area. I know this parcel. Nothing much can go in there that requires septic. This thing is, there isn't a lot of high ground there. Really, you're looking at about the only use other than deer habitat that you can do there. To me, this paragraph is all about density. The one we're talking about. To me, density is two-dimensional. How much is covering this size lot? I don't believe the building code is that relevant to site plans. Site plans is engineering, and engineers think we depict the third dimension two-dimensionally. That's what we do. We don't think about levels. When we design our stormwater, that's all about two dimensions. We don't care if there's 100 stories of building there. All we care about is how much is going to come off that roof. To me, and I hope one of you guys can talk me out of it, to me, it's a two-dimensional thing. If they wanted to, this doesn't make sense. When you have up to a seven-acre parcel that can only have a 13,000 and change building on it, if it's three stories, does that make sense? It doesn't make sense to me. That's what they're saying. If they wanted it to be limited that way, they should have rewrote it. This is horrible right here.

Ms. Berquist: From a different perspective, I think if our job is to decide whether we are for how it was interpreted, and I see the interpretation as also including the use and the scale of things, not just the potential based on the other parts of the code, then that's something to consider also, not just what could be allowed.

Mr. Yetzer: I'm not going to lie to you. I don't want a mini storage literally a half mile from my house, but if it fits and that's the way it goes. If I didn't like it, I should have bought that parcel from him and made it keep it what it is.

Ms. Smith: I don't think what any of us want to see or not see is really relevant. We're just here to define building area and nothing else. I think it's been confusing from the start, starting with the architect. The town code is not specific in defining it.

Mr. Tabb: Blair, you mentioned on plans that it almost seems like you're saying when you're looking at those plans, you're really talking about square footage. I mean not square footage, I mean your total volume. Is that correct?

Mr. Meads: Well, it lists the total volume on there.

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Mr. Tabb: Right, but when you, yeah, I understand that. The thing that I keep coming back to is you could certainly say that we allow a, we're going to use the word footprint just for argument, that you have a 40,000 square foot footprint and a maximum of X amount of square footage in your building. You could say 105,000, 120,000, whatever. You could certainly differentiate the two, is that correct?

Mr. Meads: You could, yes. I mean I guess we're looking at this definition the way it's written.

Mr. Tabb: Yeah, well that's why I'm asking.

Mr. Meads: Yeah, I mean this is a tough one. Yeah. I mean it.

Ms. Smith: I mean the bottom line is the town does not define building area.

Mr. Meads: Right, and they define floor area, gross, and they define building footprint.

Ms. Smith: Is there legal precedent for, if we determine that language is ambiguous or confusing, that, you know, the tie goes to the property owner or is that just our opinion?

Mr. Gallop: In general, in North Carolina the tie goes to the property owner if you find that it's ambiguous because the Supreme Court, and it reiterated this last week actually, or a week before last, that in an opinion that it released, that when there's an ambiguous term that the free use of land prevails. And so that's always in favor of the property owner. However, to get the ambiguity, it may take you more steps than not having a clear answer in the definition. So I think when, if you look on page 9 of Mr. Ellis' memorandum, he's provided some rules of construction that start in the middle of the page.

Mr. Tabb: Where are you at here?

Mr. Gallop: Page 9 of the memorandum that Mr. Ellis handed up. And that's where you start in general. There's not much argument that these aren't the rules, the basic rules of how you construct and understand either an ordinance or any other legislation. And this is how you would look at it at federal legislation or state legislation or local legislation. But you start with the clear, plain, and unambiguous language. If the language is clear, if you can define that by common ordinary means, then you don't necessarily get that ambiguity just because other terms might be defined. You may get there. But I think that the starting place would be to look and see if the terms on their own are clear as to what they mean in that sentence. And one thing, I hear people talking about a definition. It's not a definition. It's in a sentence, it's in a paragraph, it's in an overall ordinance, and it's not trying to define what those terms mean. It's a sentence that means something. And so, the question kind of, you're looking to provide a definition to some degree to those terms, but it's in the context of that concept that's there. It's not like it's in the definition section and you're rewriting it somehow or it doesn't have something next to it.

Ms. Smith: The town code does have a definition section, though, doesn't it?

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Mr. Gallop: It does. And that's where the building footprint and the gross floor area. So the two possible choices are both defined, but they're not in that sentence.

Ms. Smith: Right. I mean, I also did the research on how the AI definition and North Carolina building code and international building code and, you know, there was nothing consistent in my opinion. I would be happy to make a motion if there's no further discussion.

Mr. Yetzer: Wait, what are our choices for motions?

Mr. Gallop: Affirm, reverse, or modify generally.

Mr. Tabb: Can I ask another quick question? So, in other words, if, as an example, we say, okay, we find that, in fact, that the 105,000 is defined for Mr. Goodrich, does that mean that going forward, the town then is going to be held to that standard on all buildings unless the town rewrites certain languages?

Mr. Gallop: It's, this board is said to not be a precedent-setting board. You're not a court in that you set precedent. You're not an appellate court. You're more like the superior court. You would be used as guidance in future individual situations. However, there would be probably expectations of consistency for issues that came to you about that same question. But really what you're here for tonight is really to decide it on this interpretation. And the interesting part of this is the interpretation that was requested. You look at the facts that are provided. So it's, it could have been something different. It could have, there could have been no prior text amendment or application. There could be no site plan. They could have, it could be someone who comes in for an interpretation and just says, I've got a building that's going to be 35,000 square feet footprint and three stories and have the same size floor on all stories. What, can I get it approved under this provision? And it wouldn't have had any of the rest of the things. And my point in telling you that is you're looking at the facts that were provided as part of the question. And I think that's what the ultimate question was.

Mr. Yetzer: Yeah, I mean, I think a lot of this evidence is moot. You could just say this is a nondescript building for whatever purpose I think I might want to use it for and it's going to be this big. Can I do it?

Mr. Gallop: It's essentially that.

Mr. Tabb: The use of the building is irrelevant.

Mr. Yetzer: Yeah

Mr. Tabb: Yes.

Ms. Smith: And the town can update their code later, but you're saying that's not relevant to what we're discussing.

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Mr. Gallop: Correct. Well, let me take that back. The town may and may or may not be able to.

Ms. Smith: Not with respect to this.

Mr. Gallop: But what you're considering doesn't, shouldn't, you shouldn't be affected about what they can or can't change.

Ms. Smith: Okay. May I make a motion or do you want me to move this up?

Motion

Ms. Smith: I make a motion to reverse the town zoning interpretation in favor of the applicant.

Mr. Meads: We have a motion to reverse. Do we have a second?

Mr. Yetzer: I second.

Mr. Meads: At this time, we'll take a vote. All in favor?

Aye: Yetzer, Smith, Meads

All opposed?

Nay: Berquist, Tabb

Mr. Gallop: The motion passes. 3-2

Ms. Smith: I thought Rob said it had to be four-fifths vote

Mr. Gallop: Only for variance.

Ms. Smith: I had it backwards

Mr. Gallop: Yes, ma'am. And it used to be for appeals, too, but they changed that. The next question is, so y'all have made a decision. That needs to be reduced to writing and, you know, and you need to approve that order. In recent years, the way those statutes have changed, there's a somewhat open question about whether or not that has to come back to you to be approved. My opinion is to reduce the risk of it being an issue that it should. And what I usually recommend is that, like in court, the prevailing party, you ask the prevailing party to prepare a written decision with findings of fact that meet your decision, and circulate that with opposing counsel. Mr. Ellis would prepare a written decision, circulate it with Mr. Varnell, and at your next meeting, or if we have to have a special meeting, we would come back and, I did this recently with another board, and the parties agreed, ultimately agreed, on what was to be presented and signed. If that doesn't happen, then Mr. Ellis may present an order, and Mr. Varnell may present an order, and you would have to decide or mix and match between them. But that's how that would go. That would be my recommendation to go forward. And so that would be, unless somebody objects, that

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would be within your discretion to direct Mr. Ellis to prepare that decision and circulate it with Mr. Varnell. And once they've either agreed or agreed not to agree, then we put it back in front of you at a meeting in the future to vote upon. And that wouldn't be an opportunity to change your decision, but it's an opportunity to make sure that everything that needs to be on the table is there.

Mr. Tabb: At that point, we're affirming the language that they present is what we're doing.

Mr. Gallop: Correct.

Mr. Yetzer: I know, but will we need the same five folks?

Mr. Gallop: No.

Mr. Varnell: I think we will be all right with that.

Mr. Gallop: You good with that too, Mr. Ellis? Are you okay with that as well?

Mr. Ellis: Absolutely.

Mr. Meads: All right, so I guess at this time we'll wait for that. We'll move forward with that.

5.) Other Business

Mr. Meads: So we'll move on to other business. And we'll go with, I guess, comments. This was a very difficult task that we had tonight. I have struggled with this the entire meeting. The fact that it refers to the commercial site plan, that is what really confuses it or gives me more reason to believe that it's talking about footprint. So, this is not an easy one. I hope we don't have any more like this for a while. Any other comments?

Mr. Yetzer: I hope this causes the language to change. Because that language is embarrassing.

Ms. Berquist: It seems like it could be easy to solve the problem going forward.

Ms. Smith: The town has an opportunity now to clarify their intentions.

Mr. Meads: All right, so any other comments?

Mr. Testerman: If you guys don't have any, I just got two quick things. One, and I think, Ben, you might have been alluding to it, we might not have the chance to change it because any changes that we make that would be considered down zoning are now kind of out the window, thanks to state legislation. Also, I just wanted to note member Christine Buckner. She served on the Board of Adjustment for several years, and on the Rec Committee before that. She, unfortunately, passed away on November 2nd. So, I just want to take a minute to

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acknowledge that and thank her for her many years of service to the town. Our condolences.

Ms. Smith: And this is also my last meeting on behalf of the area.

Chairman Meads: What?

Ms. Smith: And it was an exciting one.

Mr. Tabb: Go out with a bang, right?

6.) Adjourned

Chairman Meads: All right. Well, if there are no further questions or comments, we'll close this meeting. The meeting is adjourned. Thank you, guys.

Meeting Adjourned at 7:47 p.m.

Respectfully Submitted by

Jessica M Everett