

# **TOWN OF LAUDERDALE-BY-THE-SEA**

## **TOWN COMMISSION**

### **REGULAR MEETING**

#### **Minutes**

Town Commission Meeting Room

**4501 Ocean Drive**

**Tuesday, January 23, 2007**

**7:00 P.M.**

### **1. CALL TO ORDER, MAYOR OLIVER PARKER**

Mayor Oliver Parker called the regularly scheduled meeting to order at 7:00 p.m. Vice-Mayor John Yanni, Commissioner Jerome McIntee, Commissioner Jim Silverstone, and Mayor Pro Tem Chuck Clark were present. Town Manager Robert Baldwin, Town Attorney James Cherof and Deputy Clerk Andrea Gerlach were also in attendance.

### **2. PLEDGE OF ALLEGIANCE TO THE FLAG**

### **3. INVOCATION, TOWN CHAPLAIN**

Prior to the presentations, Commissioner Silverstone motioned to move 14B immediately after Item 8G, but believes that the ordinances were more important to move forward. Mayor Parker asked if there was any objection to moving Item 14B after Item 8G.

Commissioner McIntee stated that they had a process that they followed and there were eight ordinances, including old and new business with Commissioner comments at the end, and he did not feel they would get to address all the matters within the allotted time period.

Town Attorney Cherof advised because of the importance of the matter and the amount of time it has been pending that the public hearing process be conducted as advertised.

Susan Delegal, on behalf of the applicant Pier Pointe LLC, stated that their presentation alone would take 30 to 45 minutes.

Staff stated that their presentation would run about 15 minutes, and another hour could be added for public input.

Commissioner McIntee asked if it was reasonable to assume that the entire matter could be addressed in approximately 3 hours.

Mayor Parker seconded Commissioner Silverstone's motion.

Commissioner McIntee stated that they should just follow the procedure and proceed accordingly.

Commissioner Silverstone stated that a reasonable restraint could be placed on the amount of time individuals would speak to prevent unnecessary delay or filibuster of the issue.

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Town Attorney Cherof stated that he was not sure if the 5-minute rule regarding speaking applied to citizens at a public hearing, but since this was such an important hearing a decision should be made as to how long individuals could speak on the matter. Therefore, everyone would have a fair opportunity to speak. He added that the applicant and staff would not have a time limit regarding their presentations.

Commissioner McIntee motioned to give individuals 15 minutes to speak on the matter.

In regard to the motion to amend the agenda, Vice Mayor Yanni, Mayor Pro Tem Clark, and Mayor Parker voted yes with Commissioner McIntee and Commissioner Silverstone voting no.

Mayor Parker announced that the agenda would be amended so that Item 14B would be heard after Item 8G.

Commissioner McIntee amended his motion to provide individuals 20 minutes to speak on the matter. Commissioner McIntee amended his motion once again to provide individuals 15 minutes to speak on the subject matter. Commissioner Silverstone seconded the motion.

Mayor Parker asked if 5 minutes would be sufficient for individuals to speak with the option being provided to extend that time if an individual had various questions on the subject matter.

Town Attorney Cherof stated that 5 minutes would not be sufficient, but that a minimum of 10 minutes be provided.

Mayor Parker amended the motion to provide 10 minutes to individuals wishing to speak on the subject matter. Mayor Pro Tem Clark seconded the motion.

Commissioner McIntee stated that he would compromise and move that 15 minutes be provided to the individuals who wanted to speak on the matter.

Vice Mayor Yanni, Commissioner Clark, and Mayor Parker voted yes with Commissioner McIntee and Commissioner Silverstone voting no.

The motion to amend carries 3-2.

Mayor Parker explained that the Commission would now vote on the underlying motion as amended which was to limit debate regarding Item 14B, other than the principal and staff, to 10 minutes. Vice Mayor Yanni, Commissioner Clark, and Mayor Parker voted yes with Commissioner McIntee and Commissioner Silverstone voting no.

Debate on Item 14B, except for the presenter and staff, would be limited to 10 minutes unless the time was extended for good cause.

#### **4. PRESENTATIONS**

- A. Certificates for the 2006 Holiday Decoration Contest (Property Owners Association/Mayor Oliver Parker)

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Cindy Geesey stated that Alana Brady and her husband Regis were in charge of the contest, which consisted of six categories. Interior Digs who had a great presentation represented the business category. Sea Ranch Club A represented the condominiums and the certificate was presented to Maureen Terrien. The winner of the single-family homes was Bill Vitello and Daniel Webber. The winner for the best decorated restaurant was Aruba Beach Café. The winners for hotels/motels were Paul Novak, Seafoam and High Noon. The winner of the multi-family homes was Ruby and Bob Skyler at 242 Neptune. Certificates were awarded to all winners.

Ms. Geesey announced that tomorrow night at 7:00 p.m. there would be a Lauderdale-By-The-Sea Property Owners Association meeting.

Mayor Parker thanked everyone for their participation in this event.

- B. A resolution of necessity of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, promulgated pursuant to Section 163.355, Florida Statutes, in order to begin the formal process of creating a Community Redevelopment Agency to function within the Town of Lauderdale-By-The-Sea; approving a slum and blight study; defining the redevelopment area; determining that the redevelopment area suffers from one or more indicators of blight; determining that the redevelopment area is appropriate and critically necessary in the interest of the public health, safety, morals, and welfare of the residents of the Town; making certain other required findings and determinations; and providing effective date therefore (David Nixon, Economic Development Task Force)

Mayor Parker read the ordinance by title only.

Staff stated that this was only a presentation only and the resolution would be adopted at the Commission's next meeting.

David Nixon stated that tonight would be the first reading, and at the February 13, 2007 meeting a formal presentation would be done of the blight study and notice has been done. Then a public hearing would be held and a second vote would be taken.

It was suggested that this resolution be assigned No. 2007-A and be subject to later changing to be in sequence with the resolutions of the Town.

Mayor Parker stated there were no objections, and therefore, it is so ordered that this be Resolution No. 2007-A subject to revision.

Vice Mayor Yanni moved to adopt Resolution No. 2007-A and seconded by Mayor Pro Tem Clark.

Commissioner Silverstone stated there had been a lot of press regarding problems in Hollywood and he was confident this Town would not have those same problems.

Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. There were no votes against. Motion carried 5-0.

## 5. REPORTS

### A. Month Report for the period ending December 31, 2006

Commissioner Silverstone moved to accept the budget report for the period ending December 31, 2006, and seconded by Mayor Pro Tem Clark. Vice Mayor Yanni, Commissioner Silverstone, Mayor Pro Tem Clark, Commissioner McIntee, and Mayor Parker voted yes. There were no votes against. Motion carried 5-0.

### B. Discussion and/or action to authorize the Town to enter into a Sister Cities relationship with Henley-on-Thames and setting a presentation and signing ceremony for February 13, 2007.

Commissioner Silverstone moved to authorize the Town to enter into a Sister Cities relationship with Henley-on-Thames, and seconded by Mayor Pro Tem Clark. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. There were no votes against. Motion carried 5-0.

Commissioner Silverstone moved to set a signing presentation for noon, February 13, 2007, and seconded by Mayor Pro Tem Clark. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. There were no votes against. Motion carried 5-0.

Mayor Parker stated that there was a request that the Town pick up the tab for a lunch at the ceremony not to exceed \$250.00.

Commissioner McIntee stated that previously the Commission had approved a budget for this in the amount of \$2,000.

Mayor Parker stated that the Commission was requested to approve a schedule of events.

Commissioner McIntee suggested that the Town Attorney provide copies of the schedule to all Commissioners.

Mayor Pro Tem Clark moved to direct the Town Attorney to accept the schedule of events presented, and seconded by Commissioner Silverstone. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. There were no votes against. Motion carried 5-0.

### C. Walk Around Committee

Christie Furth, 4525 El Mar Drive, stated that she was stepping in as the substitute Chairperson. There was no meeting in December due to the holidays, but direction was needed on how to proceed because so far there have been no results. A format and protocol was needed.

Mayor Parker stated that the Committee was to meet and make proposals in connection with three areas where work needed to be done by Public Works.

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Commissioner McIntee stated that was not how the Committee had been set up. He explained the Committee was to recommend two items each month where work was to be done by Public Works. The Committee was now at a different stage, and therefore, he moved that this matter be tabled for two meetings until issues could be resolved. Seconded by Commissioner Silverstone.

Town Manager Baldwin stated that he had asked Mr. Mason to meet with the Chairman of the committee and himself to discuss the issues.

Commissioner McIntee stated that at the next meeting a new member could be appointed to the Committee who would then elect a new Chairman.

Mayor Parker asked for the Town Clerk to obtain the minutes when this Committee had been created.

Commissioner McIntee stated that there was no discussion on a motion to table.

Ms. Furth advised that the Commission that the committee preferably wanted to work directly with Bill Mason.

Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Commissioner Clark, and Mayor Parker voted yes. There were no votes against. Motion carried 5-0.

Mayor Parker directed the Town Clerk to obtain the minutes of the meeting where this committee had been created and attach them to the report for the Commission.

Commissioner McIntee stated that according to Section 3.6 of the Town Charter, the Mayor could not direct a Town employee to perform a specific job and a motion would be required.

Mayor Parker stated that he was the Chair and a motion was not necessary.

Town Attorney Cherof stated that the Commission could provide directions to staff through the Town Manager. He further stated that it was inherent in the process that a direction to the Town Clerk during a Commission meeting was through the Town Manager.

## **6. APPROVAL OF MINUTES**

### **A. September 14, 2006, Regular Meeting (*tabled from January 9, 2007*)**

Mayor Pro Tem Clark motioned to table the regular meeting minutes of September 14, 2006 as written because they had not been fully reviewed.

Mayor Parker stated that the matter was on the table and there was no motion to remove this off the table, and therefore, it would remain so until the next meeting.

Mayor Pro Tem Clark asked if they could be struck from the meeting until they were completed. Mayor Parker stated that would be an alternative.

It was asked if the issues raised at the September 14, 2006 meeting could be discussed at this time.

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Town Attorney Cherof stated they were presently on the table and there was no discussion on the matter presently on the table.

Mayor Parker moved to strike the minutes for the September 14, 2006, September 26, 2006, and September 28, 2006 Regular Meetings from the agenda. Vice Mayor Yanni seconded the motion.

Commissioner McIntee asked for further clarification regarding the striking of the minutes.

Town Manager Baldwin explained that they were to be removed from the agenda until their review was complete, and then they would be placed back on the agenda.

Town Attorney Cherof recommended that the Commission set a date for the minutes to be placed on the agenda, which could be changed if necessary.

Commissioner Silverstone suggested that the minutes be placed on the agenda for the second meeting in February.

Commissioner McIntee stated that these minutes were important and should be placed on the agenda for every meeting until the matters were resolved.

Town Attorney Cherof stated that if the motion to strike was approved the minutes would be removed from the agenda and would be placed back on at the direction of the Commission.

Mayor Parker amended his motion to strike from today's agenda.

Commissioner McIntee stated that he did not want the minutes struck from the agenda, but should be tabled and rolled over to the next Commission meeting.

Mayor Parker moved to strike the minutes from today's agenda and have them placed on the agenda for the second Commission meeting in February.

Town Attorney Cherof advised that there was a motion on the table, which had been seconded.

The motion to strike failed with Vice-Mayor Yanni and Mayor Parker voting yes, and Commissioner McIntee, Commissioner Silverstone, and Mayor Pro Tem Clark voting no.

Mayor Parker clarified that if no further action were taken the minutes would be tabled to the next Commission meeting.

Town Attorney Cherof confirmed.

**7. PUBLIC COMMENTS** *(Random selection of individuals limited to a half-hour)*

John McMillan stated that he published By-The-Sea Times along with his wife, and since public comment was going to be limited on certain items, he would offer individuals to make their comments in his newspaper, but they would be limited to about 200-250 words.

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Mr. McMillan further stated that it had been his impression that the Town Attorney's job was to protect the Commission and not to protect the Town's citizens. At the last meeting, the Town Attorney attacked Commissioner McIntee by referring to McCarthyism. People who write and converse are very tired of that old expression, and by using that term the Town Attorney showed a prejudice and dislike for a member of the Commission. Therefore, he believes that the Town Attorney should step down and no longer represent the Commission.

Ron Piersante, 227 Lake Court, stated that he wanted to mention some things that had occurred since the last election. A citizen had nails put in their tire, along with the same being done to a Commissioner, which required a replacement of tires. Also three other Town employees had the same thing occur to them at different times, along with a Committee member including a dead fish on the hood of the car. He stated that damage had been done to a fire truck, and he asked about the illegal signs put up by the recall committee. He stated there was a sign ordinance and asked if the committee had received permission to put up those signs. Outsiders could do the vandalism because this had never been a problem in this Town. He hoped the Commission would not condone such activity and speak against it. He asked for the Commission to present their comments on these matters during their comment portion of the meeting.

Beverly Kennedy stated that the Commission had her support, and that Vice Mayor Yanni had her respect along with Mayor Parker. She thanked Mayor Pro Tem Clark for representing the citizens well. She stated that Commissioner Silverstone appeared to becoming a leader and she would like to see more of that. She further stated that Town Attorney Cherof was doing an outstanding job. She remarked that the Town Manager was doing as well as he could considering the circumstances. She stated that the newspaper did not have her support because they did not have the credentials of journalism and posed a lot of fiction in the content. She added that citizens' comments should be quoted verbatim in the newspaper because those individuals were not sworn when making their comments. She thanked the Commission for letting her voice her opinion and wished them luck.

Larry McGinnis, 5100 North Ocean Boulevard, stated that he had brought to the Commission's attention the vast difference in building permit fees paid in comparison to what a resident of Fort Lauderdale pays. Citizens in this Town pay over five times that amount which was unacceptable. He said that small towns tend to disappear.

Mayor Parker asked if staff could do a comparison of the Town's permit fees with those of Pompano Beach and Fort Lauderdale. Commissioner McIntee stated that the Commissioners would have to agree for such a study to be done. Mayor Parker continued stating that he would bring up this matter at a later time during this meeting.

Jim Pollock, 4244 East Tradewinds Avenue stated he was concerned about a call he received from a woman whose dog fell in a pool. After calling 911 he was informed that the fire-rescue personnel did not resuscitate dogs. A dog had been saved by the fire department in a canal recently, which had been his dog. He stated that he belonged to a volunteer group who went to the scene and checked the dog's vitals and told her to take the dog to her vet as soon as possible. He asked why the fire-rescue department is no longer going on calls to assist such animals.

Barbara Cole, 221 Washingtonia and 5000 North Ocean Boulevard stated that tonight was a sad situation and she hoped they would be able to find individuals they could approve of. She stated that she voted for everything that came in front of her for planning and zoning, and she

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joined the Walk-Around Committee because the Commissioners did not have an individual to do the job. Therefore, she volunteered to help out. She said this all has to stop because they are telling people what they can and cannot say. People are being discouraged from speaking and everyone is entitled to their opinion. She believes that her intentions were good and honest, but she could not say the same about other individuals. She further stated that this could be a pretty little town and not the dirty one it has recently become. She stated there could be planned development and that the projects that had been submitted within the Town's parameters had moved forward. The same criteria should apply for everyone and there should be no innuendo to an ongoing court case since the facts have not yet been uncovered which could be different than what is being represented by members of the Town.

Maureen McIntee, 1612 SE 21<sup>st</sup> Avenue stated that many people at the north and south ends of the Town support and appreciate what their Commissioners are accomplishing for this Town. Response and lower taxes were the requests made by the citizens during the campaign. At the September 28, 2006 budget meeting, the Broward Assessor of Taxes recommended a millage rate of 3.7974, and Commissioners Silverstone and McIntee stated they were interested in the lowest possible millage rate for the citizens. The Town's Financial Director explained that the 3.7 millage rate was not best for the Town, and the millage rate suggested for approval was 3.9639. At that time Commissioner Silverstone told the citizens that all capital improvements, safety and services were included in the 3.9639 millage rate and there would be no financial jeopardy to the Town. The Finance Director confirmed. It was moved and seconded to raise the millage rate to 4.35, and then Town Manager Baldwin made a recommendation of a 4.7 millage rate, which had been the current rate. The millage rate of 4.35 was approved. It was voted 3-2 for higher taxes.

Raymond Walowitz, 1620 South Ocean Boulevard stated that he was criticized for not mentioning names at the last Commission meeting. He feels it is about time that someone from the north end of town spoke up regarding the lack of concern shown by Commissioners McIntee and Silverstone in regard to the Town's business if it did not pertain to their Volunteer Fire Department. He believes that these Commissioners sought election to serve all the citizens and have the best interests shown for the Town. He stated that these Commissioners were ruining the integrity of the Commission with their antics and self-centered speeches. He believes these two Commissioners should be recalled from the Commission. He stated that when they had been annexed to Lauderdale-By-The-Sea he had served on a transition committee comprised of nine citizens who had high hopes that they would serve a valuable purpose, but John Thompson ruined those good intentions resulting in the dissolution of the committee. He stated that person continues to agitate, but no longer lives in this Town or pays taxes to it, and yet he is allowed to use this forum to hear himself speak.

Gail Schwartz, 4629 Ponciana Street stated that in regard to Item 8E on tonight's agenda, she suggests that individuals check the color chart in Town Hall before repainting their house. She stated the bureaucracy was unbelievable regarding this process. She mentioned the Walk-Around Committee and asked what has happened to our people living in the north end and the beach access they were supposed to have by Christmas.

Lisa Mitchell, 4238 Sea Grape Drive stated she had an experience with the Town's EMS which was not favorable because she had been admitted to the hospital when she was only having a reaction to prescribed medication. She further stated that the equipment in the Fire Department is not adequate and she believes the citizens were better off with the volunteer group. She believes enough is enough with the people being discharged from planning and zoning. She

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stated that the Town Attorney should be attempting to solve these problems. The Town should be pulling together and she is very disappointed. She added that Commissioners McIntee and Silverstone were the best men she knew and the only individuals who listened to the citizens.

Mayor Parker asked the Town Clerk to place on the Commission's next agenda discussion and/or action regarding directing the Town Administration to look into the licensing fees being charged and the building permit fees in the cities of Pompano and Fort Lauderdale. He also asked that on the next agenda the fire department state their policy regarding dogs.

Commissioner McIntee asked the Town Clerk to place on the Commission's next agenda discussion or action regarding the State Attorney's investigation into the fraudulent minutes of the September 14, 2006 town records.

Mayor Parker stated there had been no evidence introduced that such minutes were fraudulent.

Town Attorney Cherof asked if a status report was being requested from the State Attorney's office.

Commissioner McIntee stated he just wanted to discuss the matter and see what could be done.

Mayor Parker asked the Town Clerk to clarify that a status report was not being requested from the State Attorney's Office, but that the Town Attorney was to provide information as to what could be done.

Commissioner McIntee clarified that he was requesting that the next agenda have listed a discussion or action item regarding the unusual arrival of minutes of the September 14, 2006 Town records for which a source could not be found.

Mayor Parker stated that since there appears to be a criminal investigation launched by Commissioner McIntee should that item be discussed by the Commission.

Town Attorney Cherof stated that it would be appropriate to place the item on the agenda, but where it goes from there would be the subject matter of discussion at that meeting. All judgment should be reserved until that time.

Mayor Parker proceeded to explain the procedure followed regarding public comments. Names were chosen at random. If time were available at the end of the meeting additional public comments would be taken.

Commissioner McIntee asked if there could be a five-minute recess. There was no objection and a recess was taken.

Mayor Parker recessed the meeting at 9:30 p.m.

Mayor Parker reconvened the meeting at 9:45 p.m.

**8. ORDINANCES (2<sup>nd</sup> Reading) "Public Hearings"**

- A. **ORDINANCE NO. 2006-15:** An ordinance of the Town of Lauderdale-By-The-Sea, Florida, amending Article III "Maintenance of Property" of Chapter 6 of the

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Code of Ordinances to add a new Section 6-42 titled "Site Maintenance of Projects Under Development;" providing for minimum landscaping requirements for sites under development; providing for severability; codification; and an effective date. (Tabled from January 9, 2007)

Town Attorney Cherof read Ordinance No. 2006-15 by title only.

Mayor Parker opened the public hearing. There were no individuals wishing to speak on this matter, the public hearing was closed

Vice Mayor Yanni motioned to approve Ordinance No. 2006-15 on second reading. Mayor Pro Tem Clark seconded the motion.

Commissioner McIntee asked for further clarification of the ordinance.

Town Attorney Cherof stated that if a site plan approval required the demolition of a structure at the site, it had to be demolished within 45 days of the site plan approval. If an illegal use were being conducted at the structure, then it would be 45 days after the discontinuation of the use, and if the construction of the approved project did not commence within 60 days of approval of the site plan, then a perimeter fence must be erected around the project. The fence was to be erected within 30 days of the approval of the site plan if no demolition was required or within 30 days when demolition was required. The perimeter fence must have a windscreen material sufficient to block view of the site, and was to be maintained until the project was completed. Portions of the perimeter fence could be removed once construction began in order to allow the contractor access to the property. If construction of the project had not commenced within 90 days all vacant property was to be seeded or sodded with grass, which must be irrigated and maintained less than 4" in height. He explained that if the project was located in an overlay district, then the Town Commission could require the developer to sod or seed the vacant property in lieu of the security fence when they find that the use of a security fence would cause visual blight or have a detrimental aesthetic affect on the neighborhood. When the Commission makes such a finding, they would fix the time that the property was to be sodded or seeded with grass and the security fence removed.

Town Manager Baldwin stated that this arose due to the project known as the Villas-By-The-Sea.

Commissioner McIntee stated that there were several sites in Town where such fences were located, and he asked if the developer would be forced to seed the site if the time frame expired for the fence.

Town Attorney Cherof explained that this ordinance would apply to future projects. The rule previously had been that they would not retroactively apply ordinances requiring new conditions.

Commissioner McIntee stated that they did not want to allow old lots to sit in disrepair and he thought that was the intent of the Vice Mayor.

Vice Mayor Yanni confirmed.

Mayor Pro Tem Clark stated that he remembered there being discussion in connection with new lots.

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Commissioner McIntee asked if the ordinance could be amended to include new and old lots, which had not been greened. He clarified that any property presently fenced and over 90 days, then grass would have to be planted until the project was completed.

Commissioner McIntee motioned to amend Ordinance No. 2006-15 outlined by the Town Attorney as follows: "This ordinance shall apply to all properties in the Town, and that properties under development having fences shall comply with the ordinance 90 days from the date of the adoption of such ordinance." Such language would be included in Item #6. Mayor Park seconded the motion to amend.

Mayor Parker asked for the Town Clerk to call the roll on the first motion to amend. The motion carried unanimously.

Commissioner Silverstone asked if there was some equipment left at the site that had not been removed could the Town require such removal of equipment.

Town Attorney Cherof explained there was an ordinance regarding sites under development to be maintained and completed within a time certain.

Town Attorney Cherof suggested that Section 4 be amended which carried an incorrect effective date clause. The amendment should be that the ordinance would become effective upon adoption.

Mayor Parker motioned to amend the effective date to provide as outlined by the Town Attorney. Mayor Pro Tem Clark seconded the motion to amend.

Mayor Parker asked the Clerk to call the roll on the second amendment.

Town Attorney Cherof further explained that it carried over effective date language that dealt with the home occupation license and was not applicable to this ordinance. It should read as all ordinances do that it was effective upon adoption.

The motion carried unanimously.

Mayor Parker stated that it was his understanding that according to how this ordinance was written that within a certain period of time a fence had to be constructed and that the site also might have to be sodded.

Town Attorney Cherof confirmed.

Mayor Parker asked if the fence was located on a site in an overlay district, then the Town could require that the fence be removed.

Town Attorney Cherof confirmed.

Mayor Parker stated that Item #5 on page 2 states: "If a project is located in an overlay district, the Town Commission can require a developer to sod and seed with grass in lieu of a security fence." He continued stating that he believed the wording "if a project is located in an overlay district" should be removed because they should have that power anywhere within the Town where they felt a fence was inappropriate.

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Mayor Parker motioned to delete from paragraph #5 the words: "If a project is located in an overlay district." Commissioner Silverstone seconded the motion.

Mayor Parker asked the Clerk to call the roll on the motion. Vice Mayor Yanni, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. Commissioner McIntee voted no. Motion carried 4-1.

Mayor Parker asked if the ordinance applied to single-family homes or duplexes. Town Attorney Cherof stated that the ordinance did not apply to such dwellings. Mayor Parker stated there was nothing in the language stating that the fence had to be removed after a certain period of time. He asked what authority they would have to require the fence to be removed after a certain period of time.

Town Attorney Cherof explained that could be done by amending Item #5 so that it would read as follows: "The Town Commission may require the developer to remove a security fence and to sod or seed with grass the vacant property in lieu of a security fence." Mayor Parker motioned to amend the language in paragraph #5. Mayor Pro Tem Clark seconded the motion to add the above referenced language.

Mayor Parker asked the Clerk to call the roll on the above moved amendment. The motion carried unanimously.

Mayor Parker asked the Clerk to call the roll on Ordinance No. 2006-15 as amended for a second hearing. The motion carried unanimously. Mayor Parker stated that this was now part of the Code of Ordinances effective immediately.

- B. **ORDINANCE NO. 2006-16:** An ordinance of the Town of Lauderdale-By-The-Sea, Florida, amending Section 24-43(b) of Article IV "Application for Final Site Plan Approval" of Chapter 24 of the Code of Ordinances, to require the submission of a scale model of a proposed project in an overlay district as a condition of site plan submission; providing for severability; codification; and an effective date. (*Tabled from January 9, 2007*)

Town Attorney Cherof read Ordinance No. 2006-16 by title only.

Mayor Parker opened the public hearing.

Barbara Cole, 221 Washingtonia and 5000 North Ocean Boulevard stated she was in support of having a scale model of the projects being presented to the Commission. She urged the Commission to approve this Ordinance.

Mr. Piersanti, 227 Lake Court, stated that this was a good idea, but asked if the Commission decided to change something on the project being presented would the developer have to redo the scale model.

Vice Mayor Yanni stated that the model would have to conform because it was to demonstrate the features and qualities of the project following approval and be available for public review. Therefore, based on the conditions proposed portions of the model would have to be redone.

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Mayor Parker explained that the Planning and Zoning Board would present the model after review in conjunction with Commission's review of the project.

John McMillan, 223 Commercial Boulevard, stated that this idea was an excellent one and provided the public the opportunity to better review the project.

There were no further comments and the public hearing was closed.

Mayor Parker asked about the language stating that the model was to be presented after review by the Planning and Zoning Board.

Town Attorney Cherof explained that reference would have to be made to the section of the Code that would be applicable that this was the submission requirement at the level of final site plan approval. Therefore, this was not reflected in the language but was in the context of where it fell within the code.

Mayor Parker asked if this applied to properties within the overlay-zoning district, which were not using the overlay zoning.

Town Attorney Cherof confirmed.

Town Planner Walter Keller stated that he did not feel this should apply to projects within the R-25 zoning district.

Town Attorney Cherof clarified that the language stated: "When the project is in an overlay zoning district."

Vice Mayor Yanni further stated that he thought the intent was that this would coincide with an overlay project, and not something necessarily located within the overlay district.

Commissioner McIntee stated this was being done so the lay people would be able to give the project a fair shake. He reiterated that he was not here to make the developer's life easy, but to keep the citizens of the Town happy. He further stated that if a scale model had been submitted for the Seagrape Drive building, he would never have voted in favor of it because it was atrocious. He stated they were now throwing in a new curve, which he believed to be pro-development and not pro-Town in his opinion.

Mayor Parker stated that he did not believe policy decisions could be based on slogans such as pro-developer or not pro-Town. It made sense to him to require a scale model if a developer was requesting a variance, but he saw no reason if someone was building in conjunction with the RM-25 requirements that they should be treated differently because they were building in the overlay district. If the developer was utilizing the overlay elements in his design, then they should have the right to see a scale model so they could decide whether the project deserved overlay elements.

Commissioner McIntee reiterated that discussion ensued about this matter previously and they were not going to pick on the small developer, but would choose a reasonable figure. Such figure was set at \$1 Million.

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Mr. Keller stated that the only projects being built at this time in the Town are duplexes and overlay district projects. Some duplexes could be required to submit a scale model, and there could still be ugly projects. Scale models would not solve all problems.

Commissioner McIntee stated that a scale model shows what is being built and was a benefit and was a cost that would have to be accepted.

Commissioner Silverstone asked for an approximate cost of a duplex in this Town. Mr. Keller stated that lots in Town were going for around \$1 Million. Duplexes are selling from \$500,000 on up.

Mayor Parker asked what language would have to be included if they wanted to exempt properties not utilizing overlay elements.

Town Attorney Cherof stated that the first line of Section 12 states: "When the project is in an overlay zoning district," and they could add the following language: "and is being developed utilizing the development standards of the overlay district regulations."

Mayor Parker motioned that they amend Ordinance 2007-16 for second reading to include the above-stated amendment. The motion died for lack of a second.

Mayor Pro Tem Clark motioned to adopt Ordinance No. 2006-16. Vice Mayor Yanni seconded the motion.

Mayor Parker asked the Clerk to call the roll on Ordinance No. 2006-16. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark and Commissioner Silverstone voted yes and Mayor Parker voted no. Ordinance No. 2006-16 passed 4-1.

- C. **ORDINANCE NO. 2006-17:** An ordinance of the Town Commission of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, amending Section 24-43(g) effective period of final site plan approval; providing clarification of the effective period of an approved site plan; providing for conflicts, severability, codification and an effective date. *(Tabled from January 9, 2007).*

Town Attorney Cherof read Ordinance No. 2006-17 by title only.

Mayor Parker stated this was the second reading for this Ordinance. Mayor Parker opened the public hearing.

John Thompson, 671 Lakeside Circle, Pompano Beach, stated he was an expert in government finance, planning and management. He continued stating that they were proposing to extend the period for which site plans were granted. This matter had been discussed during the budget process, and an important aspect being paid for was fire expenses, which were not covered until the building was completed. By extending the length of time, they would be extending the period of time for which the building would not be covered by any expense. He further stated that fire was not being financed by taxes, but through a special assessment. Therefore, he suggested that before the time period be extended that they state that any person requesting a site plan would be expected to pay a fee comparable to the fire assessment for the subject property when completed.

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There were no further comments and the public hearing was closed.

Mayor Parker asked for the Town Attorney's opinion regarding Mr. Thompson's recommendation.

Town Attorney Cherof stated that he wanted to review the matter before making any comments, but it would not have any affect on this ordinance based on the preference upon which this ordinance was suggested which was that they could not realistically, in some cases, secure a building permit within the time periods under the current Code due to the regulatory process for approval.

Mayor Parker stated that since fire assessments were to benefit the property would they be able to have an assessment on a parcel of land that did not have a building on it.

Town Attorney Cherof stated that he was not going to answer any questions regarding the impact of the ordinance on the fire assessment until further research was done.

Commissioner McIntee clarified the amount of time for the extensions and stated that it was his understanding that it could be up to three years before any bricks were laid.

Town Attorney Cherof explained this ordinance was not in regard to an extension, but that it would be fixing the time for the original site plan.

Town Attorney Cherof explained that it was about one year for most projects, and then two six-month extensions were allotted.

Commissioner McIntee stated that all the extensions and renewals amounted to 30 months. He did not feel that it made sense that site plan extensions did not demand a penalty or the payment of a fire assessment once they went over the initial assessment.

Town Manager Baldwin explained that they had discussed putting into effect a fire assessment for buildings under construction, but vacant land would not be assessed because it had no impact on fire coverage.

Commissioner McIntee disagreed and stated there was an impact on fire coverage due to the construction equipment at the site.

Town Manager Baldwin stated that there was an impact once construction began.

Commissioner McIntee stated that it would still be taking away the tax base and the fire assessment since the parcel would be vacant for 2-3 years before construction commenced.

Vice Mayor Yanni stated that it was his understanding that the basis for a fire assessment on vacant land was that a fire would have to be created that would impact neighboring properties.

Town Attorney Cherof advised that a legal opinion was approving their methodology as legally sustainable. He did not want to build into a new ordinance a "poison pill" with respect to the fire assessment. He reiterated that the issue of fire assessment was not related to this ordinance as a stand-alone issue, and he wanted to fully research the matter before bringing the ordinance forward.

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Commissioner McIntee stated that he wanted the Town to have something for properties that were site plan extensions after one year, and he wanted direction as to how that could be accomplished.

Town Attorney Cherof reiterated that he would research that item and report back to the Commission. He added that he did not recommend tabling this matter because he believed it to be independent of that consideration.

Commissioner Silverstone pointed out that this matter was placed on tonight's agenda for discussion.

Commissioner Silverstone motioned to adopt Ordinance No. 2006-17 on second reading. Mayor Pro Tem Clark seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. The motion carried 5-0.

Mayor Parker announced that Ordinance No. 2006-17 was adopted on second reading and was now part of the Town's Code of Ordinances.

Commissioner McIntee stated that the meeting was scheduled to adjourn in 25 minutes and many individuals came to speak on another matter. Therefore, he suggested that a date be chosen for the discussion so the individuals could leave the meeting.

Town Attorney Cherof advised that the Commission had the right to extend the meeting past 11:00 p.m.

Mayor Parker asked Town Attorney Cherof how much time he would need to complete his research.

Town Attorney Cherof advised that he would provide his report to the Commission in two meetings.

Mayor Parker asked if there was any objection from the Commission to place the Town Attorney's Report on the agenda for the second meeting of February.

Hearing no objection, Mayor Parker so ordered.

- D. **ORDINANCE NO. 2006-18:** An ordinance of the Town of Lauderdale-By-The-Sea, Florida, providing interpretation of the November, 2006 Charter amendment regarding qualifications for office and term limits; providing for severability; codification; and an effective date.

Town Attorney Cherof read Ordinance No. 2006-18 by title only.

Mayor Parker opened the public hearing.

Christie Firth, 4525 El Mar Drive stated that she was the chairwoman of the Term Limits Ad Hoc Committee for the Citizens Initiative Committee, and that this ordinance was not anywhere near the true intention of the petition circulated. This ordinance was an abomination, and she asked if they could realistically assume that this would not affect the Commission's term of service. She

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reiterated that this was self-serving and had nothing to do with what the people voted for or what the committee walked the streets to do.

Barbara Cole, 221 Washington Avenue and 5000 North Ocean Boulevard, stated that she helped with the petition and everyone understood its meaning. The problem was that the Commission was trying to change things and it was one thing to throw people off boards, but this involved all voters in the Town and the Commission should show their respect to those individuals. She continued stating that they needed to step down for a while and then run later on if they so desire and the public elects them.

Stuart Dodd, 232 Imperial Lane, stated that 75% of the people of this Town voted, and this had an eligibility clause, which was not pro-active or retroactive. This was another attempt to force the will of the people in order to remain in power. They were trying to make black into white, which was illegal.

John Thompson, 671 Lake Side Circle, Pompano Beach, stated that he was not a resident of this Town but was a member of the Citizens Initiative Committee and spoke with the Town Attorney regarding this ordinance. There was a lot of discussion regarding retroactivity, but there was nothing about that in the ordinance. This ordinance looked to the future and to the next election. A "look-back" provision was provided in this and it was legal. He continued stating that under Article Four of the Town Charter, people of this Town have the right to initiate any ordinance or to repeal or amend such ordinances. He urged the Commission not to waste everyone's time and money because everyone understood what they were voting for and wanted to establish term limits as a condition, not retroactively either.

Mayor Parker stated that the copy of Ordinance No. 2006-18 in the Commission's back-up materials was not the correct copy, but an earlier version.

Town Attorney Cherof recommended tabling this matter.

Commissioner McIntee requested that if the item is tabled that there be another notice provided.

Town Attorney Cherof explained that if this matter is now tabled, the public hearing would continue when the item was reheard. He explained further that the title was not in error, but the body. He added that the matter would not have to be re-advertised.

Mayor Parker motioned to table Ordinance No. 2006-18 to the next Commission meeting so that a correct copy could be provided to the Commission. Vice Mayor Yanni seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark, and Mayor Parker voted yes. Commissioner Silverstone voted no. The motion carried 4-1.

Mayor Parker advised that the public hearing would continue when this matter was re-heard.

Commissioner McIntee stated that some individuals might not know that this matter was tabled since there would not be another advertisement.

Commissioner McIntee motioned to direct the Town Clerk to re-advertise this item. Commissioner Silverstone seconded the motion.

Mayor Parker asked if it would be simpler to make the announcement on Channel 78.

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Town Attorney Cherof explained that was a policy decision for the Commission because there was no requirement to re-advertise the item.

Mayor Pro Tem Clark suggested that they make the announcement on Channel 78 and re-advertise the item in the newspaper.

Mayor Parker asked if this was a friendly amendment and was it accepted. All parties agreed.

Mayor Parker asked the Town Clerk to call the roll on the motion to instruct the Town Clerk to advertise Ordinance 2006-18 for the next meeting for second reading and to also place an announcement on Channel 78. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. The motion carried 5-0.

- E. **ORDINANCE NO. 2007-01:** An ordinance of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, creating an Article IV of Chapter 6, Buildings and Building Regulations of the Code of Ordinances; providing for regulations of building color; providing for permits; providing for amortization of non-conforming buildings; providing for conflicts, severability, codification and an effective date.

Town Attorney Cherof read Ordinance 2007-01 by title only.

Mayor Parker opened the public hearing.

Barbara Cole, 221 Washingtonia Avenue and 5000 North Ocean Boulevard, stated that she agreed about the home occupation licenses because she believed some were an intrusion. She stated that having a color palette was a good idea, but to go through the permitting process just to paint your home was a hassle and unnecessary.

Penny Dodd, 232 Imperial Lane stated this would be unfair to obtain a permit just to paint your house, and she resents being told what color to use on her house.

John MacMillan, 223 Commercial Boulevard stated that in today's climate lying has become a political asset.

Mayor Parker interrupted the public hearing stating that he believed the wrong ordinance had been provided to the Commission.

Commissioner Silverstone motioned to table this matter until the proper document was provided. Commissioner McIntee seconded the motion.

Mayor Parker advised that the public hearing would continue on this matter at the next Commission meeting.

Commissioner McIntee asked if the individual speaking could finish their comments.

Mayor Parker asked the Town Clerk to call the roll on the motion to table. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker. The motion carried 5-0.

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Town Attorney Cherof clarified that the ordinance was the correct one, but at the last meeting the Commission had adopted an amendment to the ordinance, which was to exclude single-family homes from the permit requirements, which would be, applied Town wide and not just fronting on a major corridor.

Commissioner McIntee again recommended that this item be re-advertised in the newspapers and an announcement be placed on Channel 78.

Mayor Parker stated that if no one objected, he would so order.

Commissioner Silverstone asked about the process to be followed if additions or deletions were to be made regarding colors.

Town Attorney Cherof stated that changes could be made because there was a provision, which stated that the Commission could add additional colors following a public hearing.

Mayor Parker asked if this should be re-advertised.

Commissioner McIntee motioned that Ordinance No. 2007-01 be re-advertised in the newspaper and that an announcement would also be made on Channel 78. Commissioner Silverstone seconded. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. Motion carried 5-0.

- F. **ORDINANCE NO. 2007-02:** An ordinance of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, amending Section 4-32 of the Code of Ordinances to prohibit animals in Town parks; providing for conflicts, severability, codification and an effective date.

Town Attorney Cherof read Ordinance No. 2007-02 by title only.

Mayor Parker asked if the correct ordinance had been submitted to the Commission.

Town Attorney Cherof stated that he was not sure without comparing the language to the document he had sent from his office.

Commissioner Silverstone motioned to table Ordinance No. 2007-02 until notification is received that the proper ordinance had been submitted. The matter would then be discussed at the Commission's next scheduled meeting. Mayor Parker seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. Motion carried 5-0.

Mayor Parker stated that if there were no objection, he would order that Ordinance No. 2007-02 be re-advertised in the newspaper and that an announcement be provided on Channel 78. There were no objections, and therefore, the Mayor so ordered.

- G. **ORDINANCE NO. 2007-03:** An ordinance of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, changing the date of municipal elections from the second Tuesday in March to the first Tuesday in November; providing for a transition period for elected officials who are serving a term of office at time of adoption of this ordinance; providing for amended qualifying periods;

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amending conflicting provision in Section 6.1 of the Town Charter; submitting the amendment to approval by referendum; providing for conflicts, severability, codification and an effective date.

Town Attorney Cherof read Ordinance No. 2007-03 by title only.

Mayor Parker explained that this ordinance would not extend his term, nor Vice Mayor Yanni's term or Commissioner Clark's term. This would only extend Commissioner McIntee and Commissioner Silverstone's term. The first election this would apply to would be in 2010. In order for this ordinance to become part of the Town's Charter, the voters would have to approve it at the general election in 2008.

Mayor Parker opened the public hearing.

John Thompson, 671 Lake Side Circle, Pompano Beach, stated that he was afraid that this would be used in the future to benefit Commissioners Silverstone and McIntee and no other Commissioners, and therefore, it would be reprehensible that those Commissioners participate in discussing and voting on this ordinance. His primary concern was in moving this from March to November. He believed there was a serious misunderstanding and that during the discussion of this matter, the issue was raised that more individuals voted in November than March, and by having this voted on in March people were being disenfranchised. Therefore, if that had been stated this would be a serious misrepresentation of what the word disenfranchised means. Mr. Thompson explained that franchise was the right to vote. He believed that individuals who vote only in November were not interested in municipal affairs and only state or national affairs. Voting then becomes more of name recognition instead of a concern regarding the issues. He suggested that it would be better if this ordinance were voted on in March.

Commissioner McIntee motioned to adjourn the meeting. Mayor Parker explained that the meeting could not be adjourned because they were in the middle of a discussion. When the matter was completed, then a motion could be made.

Barbara Cole, 221 Washington Avenue and 5000 North Ocean Boulevard stated that the March elections should be retained. She believed there were enough people interested in government matters to vote in March. She reminded everyone that there was a copy of the tape of the meeting regarding earlier discussions on this matter, which could be reviewed.

Ron Piersante, 227 Lake Court, stated that he believed there was an article in the newspaper recently stating that many towns were holding their elections in November, and that was based not only on the number of people voting but the cost to the Towns for the election, along with the cost for the Board of Elections.

John MacMillan, 223 Commercial Boulevard stated this Town was not like other towns and they did not want to be because it was unique. The Commission should only be complimented on keeping the Town different because it basically sells itself.

Maureen McIntee, 1612 S.E. 21<sup>st</sup> Avenue stated they should not consider changing the election from March to November. She further stated that this Commission's inappropriate actions caused the CIC membership to grow beyond belief.

There were no further comments and the public hearing was closed.

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Mayor Pro Tem Clark motioned to adopt Ordinance 2007-03 on second reading. Vice Mayor Yanni seconded the motion.

Commissioner Silverstone stated this Town was unique and very seasonal, and asked if there were more people present here in March or November.

Town Manager Baldwin stated that he believed there were more people present in the Town in November.

Town Planner Walter Keller stated that normally in Broward County there are more people in March. February, March, and April are the busiest months from both a hotel and seasonal residential standpoint. Some people begin returning in November, but the largest influx is after the first of the year. Town Planner Keller reiterated that most of these residents are seasonal.

Commissioner Silverstone stated that it did not make sense to hold the election in November.

Commissioner McIntee stated that either there was a clerical mistake in the ordinance or it was structurally wrong, and stated: "changing the date of elections from the second Tuesday of March to the first Tuesday". Commissioner McIntee believed it should read after the first Monday.

Town Attorney Cherof explained that it did not affect the ordinance.

Commissioner McIntee reiterated the difference in days being stated.

Mayor Parker stated it would be the first Tuesday following the first Monday in November.

Commissioner McIntee agreed and stated that the wording was incorrect. He further stated that there also appeared to be an error regarding the number of years. He reiterated that it should be after the first Monday, and therefore, the wording needed to be changed.

Town Attorney Cheroff stated that was the same thing as in the heading.

Mayor Parker clarified that there were not an even number of years.

Commissioner McIntee agreed.

Commissioner McIntee further stated that he wanted to change the ordinance so it would push things out to 2012, and then individuals could not state that he and Commissioner Silverstone were attempting to get a free ride for eight months.

Mayor Parker stated that such debate had already taken place and they had agreed on 2010.

Commissioner McIntee motioned to amend the year to 2012 in the ordinance. Commissioner Silverstone seconded the motion.

Mayor Parker agreed that they needed to amend the ordinance and the title, and therefore, there could not be a second reading. He asked if this could be a first reading.

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Town Attorney Cherof confirmed.

Mayor Parker advised that this would be a first reading, and the second reading would take place at the Commission's next meeting. He stated that he wanted to amend the title to read as follows:

"An ordinance of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, changing the date of municipal elections from the second Tuesday in March to the first Tuesday following the first Monday in November in even-numbered years; providing for a transition period for elected officials who are serving a term of office at time of adoption of this ordinance; providing for amended qualifying periods; amending conflicting provision in Section 6.1 of the Town Charter; submitting the amendment to approval by referendum; providing for conflicts, severability, codification and an effective date."

Mayor Parker further stated that he also wanted to change on page 4, line 128 to read as follows:

"Commencing in 2010 municipal elections will be held on the first Tuesday following the first Monday in November in even-numbered years, rather than in March, with the corresponding extension of terms for those elected officials who hold office at that time."

Mayor Parker motioned to amend Ordinance No. 2007-03 to read in the title as indicated, and on page 4, Section (8) as indicated. Commissioner McIntee seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark, and Mayor Parker voted yes. Commissioner Silverstone voted no. The motion carried 4-1.

Mayor Parker asked the Town Attorney to read Ordinance 2007-03 as amended for first reading by title.

Town Attorney Cherof read Ordinance No. 2007-03 as amended:

"ORDINANCE NO. 2007-03: An ordinance of the Town Commission of the Town of Lauderdale-By-The-Sea, Florida, changing the date of municipal elections from the second Tuesday in March to the first Tuesday following the first Monday in November in even-numbered years providing for a transition period for elected officials who are serving a term of office at time of adoption of this ordinance; providing for amended qualifying periods; amending conflicting provision in Section 6.1 of the Town Charter; submitting the amendment to approval by referendum; providing for conflicts, severability, codification and an effective date."

Mayor Parker moved Ordinance No. 2007-03 as amended on first reading. Mayor Pro Tem Clark seconded the motion.

Mayor Parker stated that Commissioner McIntee moved to amend the wording in Item (8) as follows: That instead of commencing in 2010 he recommends the wording to be: "Commencing in 2012...."

Mayor Parker stated that he would argue against this amendment because if the purpose of the amendment was to get as many people involved as possible, then they needed to do it as rapidly as possible. He added that people visiting in November were mostly visitors and not residents. In 2006, 1800 people voted in March and 2700 voted in November. If the purpose of

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democracy was to get people to vote, then elections needed to be held when people were willing to come out and vote.

Commissioner Silverstone stated that possibly there was a large turn out of people to vote due to the items on the ballot.

Mayor Parker stated there was a larger turn out during November of a presidential election, and the second largest turn out in November of gubernatorial years.

Commissioner Silverstone remarked that many people who lived here only several months out of the year.

Commissioner McIntee stated that there was a large turn out in November because they voted for the national issues. People who vote in March were voting for town issues and were activists.

Mayor Parker asked the Town Clerk to call the roll regarding the amendment to Item (8). Vice Mayor Yanni, Commissioner McIntee, and Commissioner Silverstone voted yes. Mayor Pro Tem Clark and Mayor Parker voted no. The motion carried 3-2.

Vice Mayor Yanni stated that he voted yes for the amendment because this Town could not afford having these two individuals sitting on the Commission for 9 more months.

Mayor Parker asked the Town Clerk to call the roll on the amended Ordinance No. 2007-03 for first reading. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark, and Mayor Parker voted yes. Commissioner Silverstone voted no. The motion carried 4-1.

Commissioner McIntee motioned to terminate the meeting.

Mayor Parker stated that there were several items left on tonight's agenda but it was now past their adjournment time. Therefore, he asked for a motion to recess until 6:00 p.m., Tuesday, January 30, 2007.

Commissioner Silverstone motioned to recess tonight's Commission meeting until 6:00 p.m., Tuesday, January 30, 2007. Vice Mayor Yanni seconded the motion.

Commissioner McIntee stated that the individuals who had signed up to make public comment should be able to return and speak at the next scheduled meeting.

Mayor Parker stated that comments could be made at the end of the next meeting. Mayor Parker continued to say that the meeting would be reconvened and the Oriana project would be the first item of discussion.

Commissioner McIntee stated there was an issue where the State Attorney had subpoenaed records regarding Oriana, and he asked if going forward with the hearing prior to receiving an opinion from the State Attorney would cause a problem.

Town Attorney Cherof stated that he did not see a problem proceeding, but if the Commission directed him to contact the State Attorney's Office, he would do so.

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Commissioner McIntee reiterated that he believed the State Attorney should be contacted so as to make sure they would not be interfering with their investigation.

Mayor Parker stated that he did not believe they would be interfering with any type of investigation.

Town Attorney Cherof stated that he did not think they would be interfering in moving forward with this matter, but if directed by the Commission he would contact the State Attorney's Office and report back to the Commission.

Without objection, Mayor Parker ordered the Town Attorney to obtain a report from the State Attorney's Office regarding this matter.

Mayor Parker announced that at the meeting on Tuesday, January 30<sup>th</sup>, they would begin the meeting with the discussion of item 14 B and then proceed forward with the agenda.

Mayor Parker asked the Town Clerk to call the roll regarding the meeting being recessed. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker. No one voted against the motion. Motion carried 5-0.

Mayor Parker reconvened the Town Commission meeting at 6:00 p.m. on Tuesday, January 30, 2007 and all stood for the Pledge of Allegiance.

Vice Mayor John Yanni, Mayor Pro Tem Clark, Commissioner Jerome McIntee and Commissioner Jim Silverstone were present. Town Manager Robert Baldwin, Town Attorney James Cherof and Deputy Town Clerk Andrea Gerlach were also present.

Mayor Parker explained that the previous Commission meeting had recessed with the close of Item 8 G of the agenda. This item had been redone as a first reading for Ordinance No. 2007-03. The Commission would now move forward with Item 14 B under New Business.

**14. NEW BUSINESS**

**B. PUBLIC HEARING – SITE PLAN Pier Pointe Resort located at 4316-4344 El Mar Drive.**

Mayor Parker stated that Dick Coker had been hired and was to have investigated as to what occurred.

Dick Coker, attorney, stated he had been hired as Special Counsel, but his charge had been different. After reviewing all documents, he concluded that the application stood on its own regardless of the motive as to what occurred. Some mistakes had been made and he was hired to represent the Town's planning staff in this matter and to provide direction to them regarding review of the situation. He stated that the Oriana site plan had been approved in March 2004 and all issues had been resolved. Mistakes were made somewhere down the line by both sides and building permits were issued for the project being built. He stated that whoever is at fault and why these things happened was not relevant to the analysis the Commission would want staff to do.

Mayor Parker reiterated that this information may not be relevant to the analysis staff wants to do, but allegations had been made. The Commission approved the project with certain

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setbacks, and the project built did not conform to those setbacks. He reiterated that he did not have an opinion regarding the allegations made, but it had been stated that the individuals connected with the Oriana project did things deliberately. If that had been done, he felt that would influence his opinion as to whether he would approve an amended site plan. It was his understanding that Mr. Coker had been hired to find out how they got to the present situation, and whether or not there appeared to have been bad faith on the part of the Oriana.

Town Attorney Cherof stated this was a quasi-judicial proceeding and certain formalities had to be followed. He reiterated that he wanted to make sure they started at the beginning.

Commissioner McIntee stated they had directed the Town Attorney to contact the State Attorney's office, and therefore, he asked if whether the State Attorney directed the Commission to move forward regarding this matter.

Town Attorney Cherof stated he wanted to move forward with the formalities of a quasi-judicial proceeding. The procedure to follow was set forth in the Town's Code of Ordinances and one of the elements of such a proceeding was that individuals who testified had to be sworn.

All individuals wishing to testify during these proceedings were sworn.

Town Attorney Cherof explained that statements and opinions of attorneys did not constitute testimony. He added that any documents that were part of the record and distributed to the Commission were part of the record of this proceeding, along with the records introduced to the Planning and Zoning Board during their deliberation in making a recommendation to the Commission. Any other documents to be submitted as part of the record should be given and identified with copies being provided to the Town Clerk. Town Attorney Cherof added that if an individual had special qualifications to testify, such as an architect, engineer or a planner, they must state their qualifications before speaking so the Commission could take that information into consideration in laying the value of the testimony being given.

The procedure to be followed in accordance with the Code was as follows:

First, the Commissioners must disclose any ex parte communications with respect to this project.

Mayor Parker asked if disclosures had to be made regarding what took place at previous Commission meetings.

Town Attorney Cherof explained that matters taking place during the public meeting did not have to be disclosed at this time. Town Attorney Cherof further explained that disclosures needed to be made regarding ex parte communications with respect to the site plan amendment. He asked what date had the site plan application been made.

Town Planner Walter Keller stated that a meeting had been held on October 5<sup>th</sup> in the Development Services Department with the architect, and he believed the submission had been made approximately one week later. The project was presented to the Planning and Zoning Board in November. Normally, projects had to be submitted 45 days prior to being placed on the Board's agenda. He advised that the application was notarized on October 6, 2006.

Commissioner McIntee stated that the diagram of the project was dated January 30, 2004.

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Town Attorney Cherof reiterated that the purpose of disclosing ex parte communication was so the public understood the input received by the Commission that would weigh in making their decision in conjunction with the site plan amendment presented. He realized there were other collateral issues, but the focus now was the amendment for the site plan application.

The Commission made the following disclosures:

Vice Mayor Yanni had no disclosures.

Commissioner McIntee disclosed that he had met with Nancy Nixon, and also spoke with Brad Townsend who was now gone, the Town Manager, Mr. Keller, investigators at the State Attorney's Office. He had also reviewed county records and met with their staff, and spoke with the Chief Engineer at the site. He also stated that he probably forgot some individuals who he had spoken with regarding this project.

Commissioner Silverstone disclosed that he had spoken with Mrs. Nixon, Brad Townsend, and visited the site.

Mayor Pro Tem Clark disclosed that he had been to the site numerous times and spoke with the Town Manager, the Town Attorney, and Attorney Sue Delegal.

Mayor Parker disclosed that he spoke with Mrs. Nixon, the Town Manager, the Town Attorney, Mr. Keller, Brad Townsend, and numerous other individuals including the Dodds, the Carrs, Mark Firth, Peanuts Wick and Sue Delegal, along with principals of the Oriana. Also he spoke with individuals by the name of Howard and Nancy. He stated that he wanted to know what happened and then he would make a determination. He stated that he also drives by the site every day. He added that he could have forgotten other individuals who spoke with him regarding this project. He further stated that he might have also spoken with Chief Gooding.

Town Attorney Cherof continued stating that another formality of the procedure dealt with the issue of evidence, and procedures provide that hearsay evidence could be used for the purpose of supplementing or explaining other evidence. Hearsay evidence in and of itself was not sufficient to support a finding by the Commission. He further stated that the petitioner, the Town, and staff represented by Mr. Coker would have the right to cross-examine all witnesses during tonight's meeting, along with any other affected party. Affected party refers to any person or persons, natural or corporate, who own property within 300' of the site.

Town Attorney Cherof explained the petitioner would first make their presentation, along with an overview of the nature of the application before the Commission, and then Town staff makes their presentation. The public hearing would then be opened. The quasi-judicial portion of the proceeding would not be concluded until all interested parties had the opportunity to make their presentation or cross-examine any witness testifying before the Commission.

Town Attorney Cherof further stated that he had spoken with the State Attorney's Office and there had been no indication that the Town should defer in this administrative proceeding. He disclosed that he had received a subpoena to produce information to the State Attorney's Office, which was unrelated to and had no effect on the administrative proceeding before the Commission at this time.

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Town Attorney Cherof stated that the motive of the site plan amendment application could be pertinent. Therefore, he advised the Commission to limit their inquiry regarding that aspect because he did not feel it was pertinent to the consideration of the site plan or the amendment. He further stated that all individuals granted site plan approval had standing under the Code to seek site plan amendments.

Mayor Parker stated that according to the comments being made by the Town Attorney, they should disregard their review process because anyone could build whatever they want.

Town Attorney Cherof stated he did not want to deal with any hypothetical scenarios. There was a specific site plan before the Commission, and he was not suggesting that the Commission should limit their inquiry to issues that were pertinent, but ultimately the amendment application should be reviewed in the same manner that they would review such applications as to what was permissible under the Code, and then make their decision. Once evidence was heard, they would have a better understanding of the situation, and then determine how to filter the information.

Mayor Parker asked if they were legally obligated to give a site plan amendment.

Town Attorney Cherof explained that since this fell in an overlay district, there was discretion by the Commission as to what they approved or disapproved.

Commissioner McIntee asked once this review was complete was the Commission obligated to make an immediate decision.

Town Attorney Cherof stated they should deliberate at the conclusion of the evidence, but the rules were not specific as to incidental matters, which could occur procedurally, such as tabling the matter. He believes the Commission had the authority to table a matter, but he would not encourage the Commission to close the testimonial portion of the quasi-judicial proceeding to deliberate and then reopen that discussion.

Commissioner McIntee asked if they had to deliberate in public.

Town Attorney Cherof confirmed.

Commissioner Silverstone stated that he had met with Howard Kaymack. He asked if the Commission was to approve or not approve the site plan or were there other options.

Town Attorney Cherof stated the Commission was to consider the site plan application and to grant it or not. They could condition the granting of their approval based on staff's recommendations or items brought forward during the presentation. The appeal for the denial or granting would be to the Circuit Court for individuals having that right.

Commissioner Silverstone asked if the Commission could make a recommendation regarding this matter.

Town Attorney Cheroff stated the Commission could impose conditions in addition to those suggested by staff or the applicant if there was a code-based justification. He stated that there was no legal action pending by the Town to enforce the existing site plan.

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Mayor Parker asked what would happen if the Commission did not grant a site plan change.

Town Attorney Cherof stated that rather than anticipating the outcome of the quasi-judicial proceeding, he preferred for the procedure to move forward, and then when the evidence was closed, questions would be discussed at that point.

Mayor Parker explained that the Town had a rule against polling, but he did not believe that applied in a quasi-judicial proceeding.

Town Attorney Cherof confirmed.

Mayor Parker proceeded to poll the Commission regarding whether his understanding of the mandate regarding the hiring of Mr. Coker was correct. Vice Mayor Yanni, Commissioner McIntee, and Commissioner Silverstone stated yes. Mayor Pro Tem Clark stated no and said that it was his understanding that Mr. Coker was hired to help staff with the procedures, and did not have anything to do with investigation of what was done right or wrong.

Mayor Parker explained that it was his understanding that staff was to investigate the matter, but did not have the necessary resources to do so. Therefore, Mr. Coker was hired to aid in the investigation. He also believed that there was a request for an independent review of what was happening.

Commissioner McIntee stated that he asked for the attorney to be hired to review the initial site plan and to report back the differences.

Town Attorney Cherof stated that the record could be reviewed as to how Mr. Coker was to be hired, notwithstanding the Commission's intent because the Commission in conjunction with the quasi-judicial proceeding was limited by the procedures available under the Code. The Commission did not have the power to deviate from such process, and he was cautious that he would not violate such process. The Code restricts his ability to represent the Commission and not work as either an advocate or assistant to staff in making their presentation. He recommended that additional counsel be retained to assist staff in their presentation to make certain that all evidence was provided. Staff was to address all points, present them in their case, and Mr. Coker on their behalf would be in the position to cross-examine the witnesses of the applicant in order to bring forth all points before the Commission.

Town Attorney Cherof further explained that he attempted to structure this proceeding in a manner that would be defensible in a court proceeding. Part of his caution to the Commission was not to create a different procedure than what was outlined in the Code.

Commissioner McIntee explained that his rationale for the hiring of Mr. Coker was so that he would talk to all the players involved independently, and then report to the Commission. He asked if Mr. Coker had spoken with Mr. Deal and Mr. Schlagel.

Mr. Coker stated he had not spoken with those individuals and had just reviewed the documents. He reiterated that he understood who those individuals were and the significance of what they did, but he was not present at the meeting when the Commission decided to retain outside counsel regarding this matter. He discussed the situation with the Town Attorney afterwards. He had been involved in hundreds of such hearings and outside counsel was normally hired in accordance with the rules outlined by the Town Attorney, which were the

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appropriate guidelines to follow in hiring such outside counsel. He explained that he was asked to review this in order to make a recommendation as to what should be done in this matter. After reviewing the project, he then directed Mr. Keller.

Mr. Coker explained that the application of the overlay district occurred two years ago, and decisions were made regarding the project. The issue was that this Town was presented with a site plan amendment. Such things occur all the time and this could be on a different level, but there was a procedure to follow. In this case due to the nature of the overlay district, a variance was not necessary, but an amendment to the overlay district site plan was the appropriate mechanism according to the Code. The analysis was that the standards in the overlay district be applied to the amendment. He stated that staff was to point out in as much detail as possible every deviation between the approved site plan and the one before the Commission this evening. Once all presentations were made, the Commission would have before them all information necessary to apply the code to the application.

Mayor Parker stated that no one was disputing the right to the number of units previously approved, and no one was disputing the applicant's right to invade what would have been the setbacks to the extent given permission to invade. Permission was given to invade the setbacks to a certain degree, and it was his understanding that the setbacks were invaded beyond what had been permitted to the amount of 4' to 5'. Under such circumstances, he was not sure if he would have granted such approval due to the size of the project.

Mr. Coker stated it was appropriate for the Commission to apply the criteria listed in the Code in making their decision regarding granting the amendment to the site plan irrespective of the fact that the project was already built. The fact that the project was built was not a point that should be weighed either in favor of or disapproval of the application. The Commission should not provide any benefit for building the project.

Mayor Parker asked if the Town's Code could be amended to allow the Commission to give negative weight to the fact that the project had already been constructed.

Mr. Coker explained that he had never seen such a provision in any code.

Mayor Parker asked the Town Clerk to place on the next Commission agenda discussion and/or action regarding the revision of the Town's standards for site plans amendment to allow the Commission to weigh negatively the fact that a developer had violated the site plan and was coming in after-the-fact with an amendment.

Commissioner McIntee reiterated that it was his understanding that Mr. Coker had been hired to tell the Commission whether the 20' 8" original setback had been changed to approximately 15' for sections of the building, and whether it had been done properly and legally.

Mr. Coker stated that was not the question he had been charged with.

Town Attorney Cherof stated that if the Commission listened to the testimony being provided that they would conclude that all information had been presented, and the Commission then needed to make their decision.

Mr. Coker stated that it would not be appropriate to provide such an answer because the Commission would have to make their own determination.

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Vice Mayor Yanni interjected that Mr. Coker was not on trial and that the Commission needed to proceed with this matter.

Mayor Parker stated that if there were no objection from the Commission, the procedure provided by the Town Attorney would be followed in regard to this matter.

Susan Delegal, attorney representing the applicant, Pier Pointe, LLC, stated they concurred from a legal standpoint with what had been stated by both the Town's Attorney and Mr. Coker regarding the proceedings. She proceeded to introduce some members of her team as follows: Glenn Goldstein and Barbara Howe, Co-Counsel; Mike Dalton, Principal of Pier Pointe, LLC; Rex Nichols, Architect; Mark Jacobson, Landscape Architect; and Michelle Melgren, Planning Consultant.

Ms. Delegal continued stating they were here to present an amendment to the site plan for the Oriana project which was located on the east side of El Mar Drive, south of Commercial Boulevard. The issue being dealt with at this time was whether or not this amendment met the criteria of the Hospitality District Overlay Ordinance. She stated that originally when this project was unanimously approved by the Town Commission on March 23, 2004, the ordinance was known as the Beach Village Overlay District, as well as the provisions of the RM-25 Zoning District. Amendments had been made to create a Hospitality District Ordinance.

Ms. Delegal explained that the Overlay District permitted modifications in setbacks, building heights, reduction of impervious areas, and building separations if certain criteria were met in order to encourage enhancements to the building design, architectural features, and landscaping, including improvements in building materials and other upgrades. The primary change to the original site plan dealt with the intrusion of eight sets of stairwells into the front along El Mar Drive. She proceeded to show renderings of the project. She further stated that they had several exhibits for the Commission to consider and proceeded to distribute them. Such documents included: A transcript of the proceedings before the Planning and Zoning Board held on December 20, 2006, and a series of three letters provided to the Town Attorney which explain where they were and how they got there. Other documents given to the Town Clerk included: A set of condominium documents with a site plan showing the setbacks going further into the right-of-way than what was permitted, and another site plan approved by the Department of Environmental Protection.

Mayor Parker asked if the Planning and Zoning Board had made a recommendation regarding this matter at their December 20, 2006 meeting.

Ms. Delegal confirmed and stated they had approved the amendment to the site plan with a vote of 3-2. Copies of the site plan were distributed to the Commission that showed the subject stairwells.

Commissioner McIntee reiterated that the site plan approved by the Planning and Zoning Board was not the plan followed in constructing the building.

Ms. Delegal explained that on December 20, 2006, the Planning and Zoning Board approved the amendment being presented this evening.

Commissioner McIntee stated that the Planning and Zoning Board had approved a diagram which did not include the 5' intrusion into the setback.

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Ms. Delegal stated they had approved the site plan, which showed the stairwells approximately 4' closer to the right-of-way, than what the original site plan approved in March, 2004 had shown.

Town Attorney Cherof asked for clarification of Composite Exhibit 1.

Ms. Delegal explained that it contained the transcript of the Planning and Zoning Board meeting of December 20, 2006; three letters dated October 20, 2006, November 9, 2006, and November 14, 2006 to Mr. Cherof; and Ordinance No. 2006-01, which was the Hospital District Overlay Zoning Ordinance. She added that there was an error on her index, and it should not state "District Court," but should only state "District." She further stated that also included in that Exhibit was the document of the development order dated April 27, 2004 which approved the project and was recorded in the Public Records of Broward County. The fifth document was the composite itself, which contained the professional qualifications of Michelle Melgren and Rex Nichols.

Town Attorney Cherof stated that two other documents were also referenced which had been filed with the Town Clerk, and he asked for further clarification of such documents. He added that those documents would be labeled as Composite Exhibits 2 and 3.

Ms. Delegal explained that such documents were attachments to the letter dated October 20, 2006 from Glen Goldstein to Mr. Cherof. The exhibits were large, and therefore, had not been distributed to the Commission. One of those documents was the condominium document including a site plan filed with the Secretary of State on June 4, 2004. This site plan showed the change involving the stairwells that was about 3 months after this Commission had approved the plan.

Mayor Parker stated that the applicant should have returned in three months before this Commission.

Ms. Delegal further stated that the letters distributed explain the course of events that occurred with the transition of the architects. This was not really relevant to the amendment, but she understood that the Commission felt this was a point of interest.

Mayor Parker asked what date was on the site plan that had been filed which showed the changes.

Ms. Delegal stated the plan was dated June 4, 2004.

Commissioner McIntee asked why the Commission had not been shown those plans.

Ms. Delegal stated this was their first opportunity to explain the situation to the Commission. She stated they had done their own due diligence in connection with this matter. She proceeded to go through the chronology of events as contained in the letter dated October 20, 2006. The information was titled "Timeline for Oriana Project." She stated that this reviewed the significant steps that occurred since the approval in March 2004, which essentially showed, on the site plan a setback from the property line of about 20' 8".

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Commissioner McIntee stated that in June their company hired a surveyor, but that had not been shown on the timeline.

Ms. Delegal stated that had been two years later, and this was the series of events which would take them through how the site plan was changed from the original setback of 20' 8". She added that she wanted to make the presentation, answer any questions, and then move on to the merits of the amendment.

Ms. Delegal stated that on March 23, 2004 the Town Commission unanimously approved the site plan that showed a setback of 20' 8" from the property line.

The site plan had been presented to the Commission beginning in December 2003 and the Planning and Zoning Board and the Commission felt the building looked too modern and South Beach. Therefore, Mr. Nichols was instructed to create a décor that would be more acceptable. Once approval was granted, he began to work on the design and development documents preparing for construction, which would be the basis for the building permit. The stairwell shown on the site plan did not make allowances for certain requirements in connection with the elevator code, the electrical code, and the fire code. Therefore, when they realized the stairwells were not large enough to accommodate all requirements of law, Mr. Nichols met with the County Fire Marshall and adjustments were made.

Mayor Parker asked if instead of bringing out the property 5' could the problem not have been solved with the elimination of the elevators. Ms. Delegal stated that in a public project elevators were necessary for ADA purposes.

Ms. Delegal further stated that the balconies on floors 1 through 4 were then closer to the right-of-way by 4' and  $\frac{3}{4}$  of an inch. The change was made shortly after the Commission had approved the project. References and allegations had been made that such changes were made in a manner, which hid these items from the Town.

Commissioner McIntee asked who was the Attorney of Record when the plans were submitted, but had not been approved.

Ms. Delegal stated that had been done by the architect, and her job, as attorney for the project was complete once approvals had been received. Then, the project was in the hands of the architects and engineers, along with the contractors.

Ms. Delegal further stated that another indicator was that the Florida Department of Environmental Protection had received and stamped a document, which showed the intrusion of the stairwell being closer to the right-of-way than what had been originally approved.

Ms. Delegal explained that they were attempting to demonstrate that the change was made, but it was not recognized that there was a requirement to come back before this Commission for approval until September when such recognitions were made. The process then began. Therefore, they are attempting to show the timeline of the construction drawings and when they had been submitted to the County for the issuance of a building permit. They had been put out for bid and Catafulmo Construction was awarded the bid, and it took until January 2006 to obtain the building permit based on the site plan. Such changes were done at the beginning of the project when the development documents were being prepared to submit for the building permits. This occurred due to the application of codes and ordinances, which apply, to such

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types of projects and for no other reason. She explained that if they had known that such change was to come before this Commission, they would have done so because they would not have any reason to doubt that it would have been approved.

Mayor Parker asked when the construction drawings had been submitted, along with the site plan, was a submittal letter attached informing the Town that changes had been made to the site plan.

Ms. Delegal stated that the person involved in the communication would have to answer that question. Some of these issues had been discussed before the Planning and Zoning Board.

Mayor Pro Tem Clark stated that he was concerned why individuals who dealt with such situations would not automatically know that such issues had to be presented to the Town for approval.

Ms. Delegal stated that she understood the Commissioner's concerns, but Mr. Coker indicated that mistakes happened. They recognize that this was a significant change, and there was a lack of recognition that this matter should have been brought back before the Commission, and for whatever reason that had not been done.

Commissioner McIntee further stated that on the timeline it stated: "December 4<sup>th</sup> – Site plan and form previously stamped by FDEP, construction drawings stamped on back, pays by LBTS staff as having been approved." At the bottom it states: "Rex Nichols, architect, stated he assumed the site plan reflecting the stairwell adjustments had been approved by LBTS when he saw the LBTS approved stamp on the back page." He continued stating that he had reviewed the County documents, the Planning and Zoning submittal approved in 2004 without the encroachment, and he only noticed one set of documents with an LBTS approval stamp. He asked how this had gotten on the document.

Ms. Delegal stated that she was not sure how many sets had been stamped, but they were building permit sets. She believed there were 13 building permit sets because there were 13 building permits for this project. There had been a stamp initialed by Mr. Schlegal and Mr. Deal that stated: "Approved subject to requirements of the development order."

Commissioner McIntee stated those individuals had retired before this, but his point was that the LBTS stamp was not on the documents submitted to the County that he had seen.

Ms. Delegal stated she believed they had been stamped because the County relies on zoning approvals by the local government. She reiterated that this was a bifurcated system, and the entity did not issue building permits, approve site plans, and do zoning. The County does that as a contractor.

Commissioner McIntee stated that if they had signed the document as indicated in their records, and then they must have seen the correction.

Ms. Delegal stated that it was their assumption that if they had signed off on this, then it was acceptable. The County then took the plans and issued a building permit based on those plans. What had gone into individual thought processes, she did not know.

Commissioner McIntee asked if the Town Manager had any information that could assist the Commission.

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Town Attorney Cherof stated that he believed this quasi-judicial proceeding was going to be a marathon and not a sprint. The applicant had the burden to prove their case and would make the first presentation. He stated the comments of an attorney did not constitute evidence to the case. At some point, Ms. Delegal should continue her overview and then witnesses would be called who would be subject to cross examination.

Commissioner McIntee asked for assurance that someone would be called who would explain the approval regarding the stamp.

Ms. Delegal advised that Mr. Nichols would provide such an explanation because he had done his own investigation into the matter.

Town Attorney Cherof stated that the Town Manager's testimony would be very pertinent, and he suggested that it be heard at the significant time in the case, unless called upon by the applicant beforehand.

Mayor Parker stated that at the appropriate time the matter of the stamped documents should be addressed, along with whether a submittal letter had been provided regarding the changes. It might have been assumed that the site plan attached had been approved.

Ms. Delegal explained that if a stamped site plan were submitted, they would ensure that the building plans were consistent with the site plan stamped.

Mayor Paker asked if the site plan submitted had been stamped.

Ms. Delegal confirmed and the site plan submitted to the County had the same setback as the DEP, as the condo document site plan. The setbacks were the same as submitted to Mr. Schlegal and Mr. Deal.

Mayor Parker asked who had signed off on the plans.

Ms. Delegal stated that it was her impression that Mr. Schlegal and Mr. Deal had signed off.

Mayor Parker explained they had initialed the plans on the back, but if it had not been brought to their attention that there was a substitute set of site plans, then they might not have noticed that fact especially since other stamps were on the plans from other governmental agencies.

Ms. Delegal emphasized that it would only be speculation as to what they knew. She added that Mr. Nichols would be able to provide further information on that issue.

Ms. Delegal stated there was a plan in front of the Commission showing the current location of the stairs, which are approximately 4' closer to the right-of-way than the 20' shown on the original site plan. There was some variation somewhere between 16.5' and 17.5' as they go down the side.

Commissioner McIntee clarified that there were two stairwells with a veranda running between them also in the encroached area, and therefore, should not just be labeled as stairwells.

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Mayor Parker stated that he did not see where it showed the additional amount of encroachment.

Mr. Nichols was asked about the dimensions from the right-of-way line to the stairwells and the balcony over them.

Rex Nichols, architect, explained that at the north end of the property the stairwell was 16' 8.5" from the property line. At the south end it was 15' 9 3/4".

Ms. Delegal stated that this document should be labeled as Exhibit 2.

Town Attorney Cherof corrected Ms. Delegal and informed the Commission this would be Petitioner's/Applicant's Exhibit 4 which is the existing site plan.

Ms. Delegal advised that Mr. Keller prepared a report that would become part of this record also. Ms. Delegal stated that on January 17, 2007, Mr. Keller issued a report recommending approval of the amendment subject to several conditions. On December 20, 2006, the Planning and Zoning Board by a vote of 3-2 approved with conditions the amendment to the site plan. The changes to the setback equal about 4', but the deviation was not significant and did not impact the building or the development adversely. The ordinance contemplated a setback of up to 15' from the 25' setback established under the RM-25 District if certain conditions and criteria were met. The standards of the Overlay District Ordinance had been met, and they believe they could demonstrate that these changes would not amend the site plan that it would disqualify it from the qualifications it had been approved with, but would enhance the area.

Ms. Delegal pointed out that no portion of the building was closer to the roadway than the 25', and only the stairwells and the balcony that come forward. The main portion of the building was beyond the 25' setback as established in accordance with the RM-25 requirements. There was no additional living space gained by the developer in connection with this approval, nor was there any economic benefit. The project was sold out and consisted of 34 units. She advised that the amendment also enhanced the landscaping in front of the property, and the architect would provide further information. The estimated cost of such additional improvements was over \$46,000, and in addition due to a condition made by the Planning and Zoning Board, they would be installing additional sea oats and sea grass in the rear of the project between the sea wall and the ocean to the extent permitted by DEP.

Commissioner McIntee stated it was his understanding that the site had been fined \$43,000 for illegal tree removal and such trees had to be replanted.

Ms. Delegal stated there had been some relocation of trees, but she was referring to new landscaping. She stated further that she had not been aware of any such fine.

Commissioner Silverstone stated that he was informed of such fine and had copies of the documents. He believed that Broward County had imposed the fine for illegal tree removal.

Mike Dalton, 980 North Federal Highway, Boca Raton stated that he was one of the partners on the project. He clarified that they had agreed to donate 78 trees to the Town of Lauderdale-By-The-Sea to the median at El Mar Drive and the stretch from the site to the southern end by the Holiday Inn. A number of trees did not appear they would survive, and meetings were held with the Town staff and the County in removing these trees. A fine of \$20,000 was imposed

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because they had prematurely moved the trees and donated them to the Town before the issuance of the permit.

Ms. Delegal stated that when this project was approved it was a replacement for a 100-unit hotel consisting of 10 buildings with a density of 27.2 dwelling units per acre. The buildings were two to five stories and would be replaced with a 34-unit project in 10 buildings, and the density would be reduced from 25 units to 18.5 units per acre. The height on the beach side would be two over one, and on the roadside it would be three over one. There would be a courtyard between the buildings. The original approval was granted under the Beach Village Hospitality Zoning Overlay District. In order for a project to qualify in this district, there were eligibility requirements such as the development consisting of two contiguous lots, removal of existing back-out parking, reduced paved sidewalk area, elimination of a legal non-conformity, or improvement in the existing quality of the development. In the case where additional height was being granted, the minimum lot had to be 100'. The development order stated that all criteria had been met, and that the project was consistent with the Town's Comprehensive Plan and Zoning Code.

Ms. Delegal further explained that the Overlay District contained requirements and provided that there had to be certain findings regarding the site plan. The development had to contribute to the design and the community character of the Overlay District, and such finding had been made. It stated "the development as proposed contributes to the design and character of the Beach Overlay District and provides a significant upgrade in the quality of the development." The original site plan included enhanced landscaping and architectural features, including balconies, fountains, terraces, variation in rooflines, plazas, landscaping above and beyond what was required for a normal development, and encouragement of pedestrian friendly movement along El Mar Drive. The conditions placed on this project at the time of the approval in March, 2004 were the following: A dedication of 17' in fee to the Town along the north property line that when combined with 15' of right-of-way that existed would provide a 32' public right-of-way.

Mayor Parker stated that they were to provide 17' in fee and simple, and it could be used however the Town wanted. The site plan states it was to be an easement.

Ms. Delegal clarified that it was not an easement, but was a dedication in fee to the Town. The easement would be located on the beach walk at the rear, which was another condition of the site plan approval.

Mayor Parker further stated that in paragraph 5 of the site plan order, it states: "Prior to the issuance of the building permit, including demolition, the applicant shall provide documentation to this Town showing dedication to the public of a perpetual 17' easement for roadway access drainage, etc." He continued stating that it was not to be a roadway easement, but a fee simple grant.

Town Planner Keller explained that when the original approval was granted, there were setback issues in connection with that roadway. The development order was approved, and the Town came back retroactively and changed the requirements that it could be given in fee simple. As part of that fee simple adjustment, the Town changed the regulations such as the north right-of-way. The easement was part of the original development order because at that time that was what the Town's regulations allowed. After the regulations were changed two to three months later, the fee simple was granted.

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Mayor Parker reiterated that he wanted the site plan to correctly reflect that this was not to be a 17' easement, but a fee simple.

Town Attorney Cherof remarked that it had already been recorded, and the draft document had been reviewed with the Mayor and revised before finalization.

Mayor Parker stated that Commissioner McIntee was requesting the definition of the term "fee simple."

Town Attorney Cherof stated that fee simple, as distinguished from an easement, was absolute complete conveyance of all right, title and ownership that one party has in a property to another party. In this case it was from the developer to the Town. The difference was that in an easement, the property owner retains ownership and the Town obtains the right to use a portion of the property described as an easement.

Ms. Delegal confirmed that the developer had conveyed fee simple title to the 17' and it had been recorded in the public records as a condition of the development order. Also, a release of any reversionary rights, a Quit-Claim Deed, was given for the 15' alleyway. She stated that in connection with such approval, an easement was dedicated to the public. It was the intention that a beach walk be placed at the rear of the properties, and an 8' easement was recorded which would be about 15' from the seawall extending out 23'. They also agreed to the construction of improvements for El Mar Drive which was in connection with the approval of the Master Plan Steering Committee, as approved by this Commission, to create a typical section of El Mar Drive that the developers had to construct in connection with their project. There was to be a one-laning of that portion of El Mar which was located in front of the project, along with a tapering transition of the lane where it adjoined other properties not subject to such criteria. A bicycle path and 8' wide sidewalk would be installed, along with additional landscaping.

Ms. Delegal stated that another requirement was the varying of overhead utility lines, which was done at the expense of the developer. She stated that in connection to a request made by Mr. Keller during their presentation to the Planning and Zoning Board, Mr. Nichols presented in writing and on the site plan each and every change to the site plan no matter how minor. She explained that there had been 24 items. This list was presented at this time to the Commission.

Mayor Parker announced that he would call for a break in the proceedings at approximately 8:00 p.m.

Ms. Delegal continued stating that each of the 24 changes is contained in Mr. Keller's report. This was included in the back-up materials as part of Item Agenda 14B, and the listing begins on page 2. Mr. Nichols could provide further clarification of the changes and what necessitated such changes. She stated that she had no reason to believe that this was not a true discussion of the changes because she worked with Mr. Nichols on those issues. She believed that Mr. Keller was in agreement that the 24 items listed were the changes made to the site plan. She further stated that he had pointed out the items he believed to be more significant. She explained that the 24 items were listed by Mr. Nichols and presented to Mr. Keller. She explained that Mr. Nichols would explain the stairwell changes, and point out the code requirements that necessitated the changes to the length and width of the stairwells.

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Ms. Delegal further stated that to remain in keeping with the original design of the project, there was a corresponding enlargement of the balconies for 12 of the units to the tune of approximately 72' per unit. There was also a corresponding reduction on those same units of the balconies facing to the east, which were necessitated by other changes in the site plan dealing with the redesign of the internal circulation system, which had to be redesigned in connection with fire requirements. It is important to note that this was not a variance issue. All of the changes being requested pursuant to this amendment were within the context and requirements of the existing code. Under certain circumstances, a setback from the front property line was permitted between 15' and 25'. There has been no intrusion beyond that 15'. She stated that in addition to the ability to go from a 25' setback to 15', the amount of the encroachment could not exceed 30% of the front yard setback area. When originally proposed, the setback comprised of 6.9% of the front yard area, and presently was 14.1%, which was still under the 30% requirement.

Commissioner McIntee stated that the Commission permitted 25' to 15' if a developer came before them in good faith stating that an error was made.

Ms. Delegal explained they were here at this time to present their case, and they understood it was within the Commission's discretion to grant the approval. Mark Jacobson was the landscape architect and would show the enhancements and improvements on the site, which were to soften the impact of any potential intrusion of the stairwell into the area. The landscaping would provide a transitional area between the buildings, the street and the buildings, and soften the view. In addition something not required under the original site plan was the reconstruction of the median, and it's landscaping, from Commercial Boulevard to Daytura Avenue. This was a condition discussed with Mr. Keller and agreed to.

Ms. Delegal further stated that she wanted to address the conditions in Mr. Keller's report. On page 6 there were basically four additional conditions that comprised items 5 through 8. She explained that Item 5 was the incorporation of the additional landscaping on the median at El Mar Drive. Another condition agreed to was to provide improved public visibility through the development's view corridors by reducing some of the gated entryways. There was also an issue regarding the location of the southern fountain to coincide with the location of the fountain at the northern end of the property.

Mayor Parker asked when the photographs had been taken which had been provided to the Commission.

Town Manager Baldwin stated he believed they had been taken yesterday.

Mayor Parker reiterated that the power lines were in view.

Ms. Delegal stated that there was a pole at the southern end of the property that was needed for properties not being undergrounded at this time, and as they transition into the undergrounding of the power lines along El Mar Drive, they would disappear in the future.

Ms. Delegal stated that in Mr. Keller's report there were conditions that had been discussed and recommended by the Planning and Zoning Board. At that time they approved the site plan with three conditions. She proceeded to read the motion made at that meeting by Mr. Wick as follows: "I'd like to amend the motion that's on the floor please. I'd like to amend it to read as follows: 'That the balconies shall not ever be enclosed. That the fountain be re-added and the

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landscaping to the beach be corrected. I would like the recommendation that you people look into underground power all the way to Daytura Avenue”.

Ms. Delegal stated that such concerns were addressed in Mr. Keller’s report on page 6. She continued stating that a condition be included in the development order which would state that any type of enclosure would require a site plan amendment and/or a building permit, and individuals would have to go through the required process for approval.

Mayor Parker stated that he believed the intent of the amendment was that there would be no enclosure of balconies.

Ms. Delegal explained it would be a condition of the development order that balconies could not be enclosed.

Mayor Parker added that individuals could not come forward and make such a request.

Town Attorney Cherof stated that could be a specific condition of approval.

Ms. Delegal stated that they did not have an issue with such a condition.

Ms. Delegal further stated that additional landscaping in the beach area of the development would be done, but advised there were limitations as what could be done beyond the bulkhead line in accordance with DEP requirements. DEP permitted sea oats and sea grasses in the area to the east of the bulkhead or the sea wall. Another issue was varying the utility lines from the south end of the project to Daytura Avenue, and that had been considered and it would encompass 270’. There were three intervening properties in the area that were not required to underground until such time they were redeveloped. She stated they proposed to pay to the Town \$100 per linear foot as a contribution towards the burying of such lines. She explained that was essentially the FP&L portion of the expenditure involving the initial planning and engineering of the installation underground.

Mayor Parker asked why they didn’t just put the lines underground and not pay the Town.

Ms. Delegal stated they would be on other people’s property, and therefore, easements would have to be obtained by FP&L. Therefore, they were willing to pay the public portion of the cost, along with the removal of the poles land wires, including the provision of conduit placed in the ground.

Mayor Parker asked if the Town obtained the easements would they put the lines under ground.

Ms. Delegal explained that a lot was involved and not only easements. Some properties had back-out parking and the pavement would have to be removed. They probably would also have to remove some hardscape and landscape in order to do the undergrounding. Normally the time to do that was during redevelopment. To do this with an ongoing existing property, some connection points would be at the rear of the properties, which would be rather disruptive, and some of the property owners might not be willing to grant an easement and allow the installation.

Commissioner McIntee asked if the architect could further explain items 12 through 22 in Mr. Keller’s report during his presentation.

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Ms. Delegal agreed.

Commissioner Silverstone stated that in #9 it stated that the Oceanside balconies and the townhouse units had been extended, but no square footage had been provided.

Ms. Delegal stated that Mr. Nichols would answer all the questions regarding the items listed in the report.

Ms. Delegal stated that the approval process of the Commission was contained in the Hospitality Overlay District Ordinance, and the applicant had the burden to demonstrate that the architectural characteristics and the landscaping provided in the proposed development and proposed amendment complied with the required conditions and were of the quality to justify the variation in the standards being requested. This was done in connection with the original approval and they believed that based on the testimony regarding the landscaping and the additional mitigation proposed that they would meet the task. At the end of the presentation an animation would be shown that would provide the opportunity for the Commission to see what the project looked like before and after the changes.

Ms. Delegal further stated that the approval of the amendment was discretionary by the Commission, but discretion had to be exercised under and subject to articulated standards in the Town's ordinance. The findings to be made were: (1) that the site plan was consistent with all requirements of the Zoning Overlay District; (2) that the development, as proposed, contributes to the design and community character of the Hospitality District; and (3) that the project provides the design and development enhancements necessary. The original site plan, as well as the proposed amendment, conforms to all requirements of the ordinance. Both the Commission and Planning and Zoning Board had previously made such findings in connection with the original site plan, and such findings should not be disturbed by the deviations presented in the amendment. Upon considering the amendment, the ordinance provided that the amount of modification granted must be based on the extent to which the application presents site design and development enhancements. They believed that had been done. She reiterated that they made a good project even better, and they hoped the Commission would agree with that statement.

Ms. Delegal advised that Rex Nichols would address the questions previously raised, and Mark Jacobson would present the enhancements to the landscaping which were to the tune of approximately \$43,000 for the El Mar Drive portion of the project not previously required. She added that \$27,000 would be contributed to the under grounding, and therefore, over a \$70,000 contribution was being made to the Town over and above what had been required previously. She stated that did not include the enhanced landscaping to be installed. She advised further that Michelle Melgren would then make a presentation. She stated that Ms. Melgren had a master in urban planning and was a consultant to many cities within this County and South Florida.

Commissioner McIntee asked if anyone in Lauderdale-By-The-Sea Town government or their family members or any individuals serving on the Town's Boards or had in the past owned any of the property in question.

Ms. Delegal stated that no current members of the Planning and Zoning Board or this Commission had any interest or were a contract purchaser of the units of the project. She was

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advised that a prior member of the Planning and Zoning Board purchased one unit, but had subsequently sold it.

Mayor Parker stated that if someone served on the Planning and Zoning Board before this project came forward, the matter would be irrelevant.

Town Attorney Cherof stated the question should be limited to current members of the Commission or Planning and Zoning Board who had reviewed the site plan amendment because that would be very pertinent. If it pertained to previous board members it would be irrelevant.

Commissioner McIntee stated that he believed his question was pertinent.

Town Attorney Cherof stated that his opinion did not restrict the Commissioner from asking his question.

Mayor Parker stated that he believed anyone serving on the Planning and Zoning Board years before this development was presented would not be relevant.

Commissioner McIntee stated that he believed anyone serving in the government during the last 4-5 years should make a disclosure because they could have influenced the project.

Commissioner McIntee asked who was the board member who had purchased the unit.

Town Attorney Cherof reiterated that the question could be asked, but in a quasi-judicial proceeding the weight of that answer would be discussed at the time of deliberation.

Ms. Delegal stated that she did not recall a prior board member being an owner or contract purchaser at the time the project was brought forward. She knew that an individual had been a board member at one point, but did not know the timing of the extent of the relationship to the approval. She added that individual had been Cindy Geesey and she was no longer owner of that property. She added that she did not recall the time frame involved for her membership on that board. She asked for the right to provide rebuttal at the end of the presentations.

Mayor Parker confirmed.

Town Attorney Cherof suggested that Ms. Geesey be brought forward as a witness to respond to the question.

Mayor Parker stated that if there was no objection by the Commission, he believed Ms. Geesey should come forward and have the right to defend herself.

Cindy Geesey, 256 Imperial Lane, explained that this came before the Board in early 2004 and voted on. At the end of 2004 she sold her property on Seagrape Drive, and in March or April, 2006 she bought one of the subject units and then sold it about 15 months later. She reiterated that when voting on this project, she had no interest in the property.

Town Attorney Cherof reminded the public of the rules of decorum for a quasi-judicial proceeding.

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Mayor Parker stated that it was his understanding that the Commission had the discretion to decide if they did not like the project or the proposal being presented even if it fit the requirements of the Overlay District, and that they had the right to deny the request. According to Ms. Delegal's comments that appeared not to be true.

Town Attorney Cherof explained that the Commission had broader discretion than what had been described to them in Petitioner's/Appliant's Exhibit 1. He advised further that Section 3 was the ordinance itself. He called the Commission's attention to page 10, lines 16 through 26, which describes the discretionary authority of the Commission. The language states: "The Town Commission is not bound to grant a maximum amount of modifications for any element in this ordinance if it is found that the development is not consistent with the intent of this ordinance. The amount of modification granted must be based on the extent to which the application provides the enhanced site design and development enhancements required by this ordinance." Town Attorney Cherof stated that line 26 states as follows: "Final approval of the Town Commission is discretionary and when granted final approval must be based on a finding that the site plan is consistent with all of the requirements of the Hospitality Zoning Overlay and that the development as proposed contributes to the design and community character of the Hospitality District." Town Attorney Cherof also directed the Commission's attention to line 3, which states: "The standards and conditions of the Zoning Overlay are voluntary and approval is discretionary." Town Attorney Cherof continued stating that it was clear to him that the Commission had broad discretion within the parameters of what was defined in the paragraphs just read to deal with the issue at hand.

Mayor Parker clarified that they were not being confronted with a situation as in RM-25 where if requirements were met, the developer had the right to approval. Town Attorney Cherof confirmed and stated that Mr. Keller had been the original author of the Overlay District Ordinance and would probably testify with respect to the goals as adopted by the Commission.

Mayor Parker asked if Mr. Coker agreed with the Town Attorney's opinion.

Mr. Coker confirmed and stated that this ordinance was analogous to a PUD Ordinance, which was a give and take ordinance. It was a discretionary application and hence a discretionary approval.

Commissioner McIntee stated that at some point during this proceeding, he would like Town Attorney Cherof to read something from the Town's laws which stated that in order to receive an encroachment one had to come before the Commission.

Town Attorney Cherof asked for a further clarification of the word "encroachment," and asked if the Commissioner was referring to an application for a variance.

Commissioner McIntee re-explained his request.

Mayor Parker announced that it was 8:10 p.m. and the Commission would take a 10-minute recess.

Mayor Parker reconvened the Commission meeting at 8:20 p.m.

Mayor Parker stated that Ms. Delegal completed her opening statement and asked if she wanted to call forward her first witness.

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Ms. Delegal explained that Rex Nichols would demonstrate some of the architectural features and changes in the site plan, which would be done in a narrative manner.

Rex Nichols, architect, 798 S. Federal Highway, Boca Raton, stated he was a Florida licensed and registered architect. He continued stating that when his firm inherited the project in early 2004, it had been presented to the Town several times and had been unpopular because the previous architect had proposed a more modern building, which resembled the trendy South Beach buildings. It did not respond to the Overlay District Ordinance. When they inherited the project, their time for submission to the Town was limited, and therefore, they concentrated on what they felt was the objective of the Town, which was the architectural style. A modern building had to be converted into a romantic Mediterranean building that would be suitable for the Overlay District. Therefore, they focused on the details of the building such as the barrel-type roofs, stone balustrades and columns, aluminum railings, gates and fences, interactive plazas, landscape, and fountains. They received good comments from staff and unanimous approval from the Planning and Zoning Board, along with the Commission. The next step after site plan approval was to proceed with the design development phase, and then on to the construction document phase. They met with all the consultants involved in the project.

Commissioner McIntee asked which Fire Marshall had provided input on this project.

Mr. Nichols stated that he did not have that information with him, but he believed the individual had since retired who they believed had been Luis Piedra, but they were not certain.

Mr. Nichols stated that as part of their research they met with a review official at the Broward County Building Department who suggested that they meet with the Fire Marshall. He did not believe the name of the individual was important once the Commission heard the rest of his presentation. What was important was that he had pointed out which codes dictated the design elements of the building. The 24 items identified in Mr. Keller's report could be characterized through the code requirements. The most significant category was the life safety changes. Other changes made were the result of meetings with the structural engineer and the MEP engineers. Few changes were made for aesthetic reasons. He noticed that the north elevations of the building were more obvious than he had expected, and therefore, some refinements had been made. The color of the awnings had been changed due to the original ones approved no longer being available, and additional decorative balconies had been added to make the building more attractive.

Mr. Nichols explained that the most significant changes were the ones relating to fire safety issues. One of the changes was the circulation core, which occurred twice in the center condominium building, and one on each of the end condominium buildings. He added that a significant change was an additional entrance for emergency service vehicles. The entrance was widened which reduced the width of the balconies, and they had to increase the radius for the emergency vehicles and in doing so the size of the balconies on the east face had been reduced. They also had to provide an ADA route to the swimming pools, along with handicap parking spaces. There was to be one handicap space for every 25 parking spaces provided.

Vice Mayor Yanni asked if any of the rooms were accessible to handicapped individuals.

Mr. Nichols stated that all doorways were widened 2' 10" to allow for wheelchair access, and the bathrooms were made ADA compliant. Mr. Nichols further stated that another significant issue

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was the center circulation core, which was affected by three separate codes. The stairs had to be 36" in width.

Commissioner McIntee stated that he had asked about the name of the Fire Marshall several times and asked if this would be considered hearsay evidence.

Mr. Nichols stated he would commence referring to the Fire Marshall.

Mayor Parker stated that the Town Attorney already stated that hearsay evidence was admissible.

Town Attorney Cherof explained that one could consider hearsay testimony, but obviously it would not have the same weight in the Commission's deliberations as direct testimony would have.

Mr. Nichols stated that it was not important that certain code requirements had been pointed out by one individual, but what was important was that there was a life safety code to follow.

Vice Mayor Yanni asked if the architect of record should have known this.

Mr. Nichols stated there were a vast number of code requirements and each project was different. He added that had he been the original designer of this project, he would not have drawn the stairwell without making sure of all requirements. They did what was expected of them at the time of submission.

Commissioner McIntee stated that he wanted the plans submitted in 2004 to the Planning and Zoning Board and the Commission admitted as evidence. He asked if Mr. Nichols had reviewed these plans.

Mr. Nichols stated that he wanted to move forward with his presentation, but if his name were on the plans he would verify that his firm had done them. He reiterated that he would not testify to anything other than the fact that such plans came from his office. He stated that the plan was consistent with the one submitted with the amendment.

Town Attorney Cherof asked if the entire set of plans was to be submitted into evidence. He asked if the applicant had any objection to designating the plans as Applicant's Exhibit 5 or it could be marked as Town's Exhibit 1.

Ms. Delegal stated she would prefer it be marked in that manner.

Town Attorney Cherof stated that the exhibit was comprised of 14 x 11 sheets of paper with colored renderings of the buildings. The first plan sheet stated: "Residences at Pier Pointe" dated 01/30/04. He explained that it was a composite exhibit.

Ms. Delegal stated that the document had various signatures, but in order for Mr. Nichols to be 100% sure that it was the same document as submitted for site plan approval, he would have to compare it with the copy in his office.

Mr. Nichols confirmed and stated that he could not testify unless he had that document in front of him to make the comparison.

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Commissioner McIntee stated that Mr. Nichols had testified that these were the amended plans, but they were not.

Mr. Nichols admitted to making an error and stated he was feeling intimidated by the question being asked. He reiterated that he would have to compare the plans. He could not testify that this plan was consistent with the one submitted to the Town until they were compared side-by-side. He believed this was a fair assessment.

Mayor Parker stated that this hearing would not be concluded this evening. Therefore, at the next meeting he asked for Mr. Nichols to bring the plans from his office so a comparison could be made with Town's Exhibit 1.

Mr. Nichols agreed to do so.

Commissioner McIntee stated that would be reasonable for Mr. Nichols, but he did not believe it was reasonable for the people of this Town. He asked if Mr. Nichols were drawing the building and submitting the plans to the Town would he have reviewed them before making the submission.

Mr. Nichols stated if he had begun this project from scratch, he would not have drawn it without exploring all code requirements and would have reviewed the plans before submission. Since this had been another architect's work, he did not have the time to use a scale and measure all lines and verify all the codes. His intent was to resubmit the project with the style change and get it approved. He then re-measured every line and reviewed the entire project.

Commissioner McIntee stated that fire doors were a pertinent part of the project.

Mr. Nichols confirmed and stated that he believed the doors had been shown at one time. Before proceeding with the design development construction documents, they made sure that all proper exit doors had been in place. Initially, it appeared they had been left out of the plans.

Mayor Parker asked for clarification of the fire doors on the drawings.

Town Attorney Cherof reassured the Commission that all exhibits would be gathered before leaving the meeting tonight.

Mr. Nichols further proceeded to show on the plans one of the circulator cores and explained that separate code requirements had to be met. Meeting such requirements explained the projection toward the encroachment. The balconies had been extended as well because the Town had approved the previous design and it was an architectural requirement that they be on the same plane. The space between was also expanded for aesthetic purposes. If the balconies had remained further back the façade would have been changed quite a bit and it would have presented an ugly massing along the street. The balconies soften the façade and these changes were by far the most significant ones.

Commissioner Silverstone asked if there had been any discussions during that stage stating approval would have to be obtained for additional changes.

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Mr. Nichols stated the attitude at that time was to make the project work, and there were many refinements that had to be made.

Commissioner Silverstone asked if he had been given any instructions at any phase of the development to withhold any information from the developers or their representatives or the Town.

Mr. Nichols stated he had never received such direction, and it would not be in his nature to do so.

Vice Mayor Yanni asked what was the procedure after the amended plans had been drawn.

Mr. Nichols explained that the plans had been resubmitted as a site plan amendment. When all the changes were made the plans had been submitted to the Town for a building permit.

Vice Mayor Yanni asked why the Commission had been by-passed for approval.

Mr. Nichols stated that by hindsight they knew the change in the stairwell was significant and should have been brought back, but at that time the attitude was that there were many changes, and therefore, they should submit them and then see if there were any issues.

Vice Mayor Yanni clarified that since the Overlay District permitted them to go 15' that was why the change had not been brought before the Commission.

Mr. Nichols confirmed and explained it was still consistent with the Overlay District ordinance.

Commissioner McIntee asked how many buildings Mr. Nichols had designed during his career.

Mr. Nichols stated he designed at least 1,000 buildings and understood encroachment lines.

Commissioner McIntee stated that the plans he submitted had a 20' 8" encroachment.

Mr. Nichols explained they had still not violated the encroachment line, which was 15' from the property line. He realized this was a significant issue with the Town, but at the time the revisions were being made, it did not seem significant since they were still within the requirements of the Overlay District.

Commissioner McIntee clarified that a 5' encroachment that was done without permission was not a serious issue in the eyes of the architectural firm since they believed they were still within the requirements of the Overlay District.

Mr. Nichols reiterated that the Overlay District allowed encroachment and was different from other municipalities. Normally, the codes were exact for setbacks, but this Town's code was flexible and allowed a variation within the code. It was his understanding that as long as the variations were within the Overlay District Ordinance that it was okay. He believed further if there had been questionable issues, staff would have commented on them.

Town Attorney Cherof explained that since they were going out of sequence, the applicant would have the opportunity to cross-examine Mr. Baldwin after his testimony.

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Mr. Nichols further stated that he was not aware which plans had been stamped by the Town and for him to state that he reviewed the stamp on the back of the document was not correct.

Commissioner McIntee stated that Mr. Baldwin had been shown the signatures on the plans.

Town Manager Baldwin replied that he had been directed by the Commission to look into that issue and he saw the signatures, which included a footnote stating that the plans also had to comply with the original site plan.

Commissioner McIntee asked if Mr. Baldwin had questioned those individuals as to whether they had signed-off on other plans.

Mr. Baldwin confirmed and stated that other individuals had also questioned them. He said that Mr. Schlegal and Mr. Deal had stated they signed off on the plan with the footnote. In zoning one of the main things reviewed were the setbacks. Both of the individuals assured him that they had not missed that on the plans.

Mayor Parker asked if those plans were in the possession of staff and the Commission.

Commissioner McIntee stated the point was that the plans that went before Planning and Zoning and this Commission without the stairwell extensions had encroachments, which had been signed off, by Messrs. Schlegal and Deal.

Mayor Parker asked for the plans to be submitted to the Commission.

Development Services Director Jim Bell stated that due to the subpoenas issued, he was not sure if the plans were still in the Town's offices.

Town Manager Baldwin stated that the plans he reviewed had been returned to Development Services, and he believed that the Clerk's office had also made copies due to having received a subpoena.

The Town Clerk advised that there was a copy somewhere in the Town's offices.

Mayor Parker asked that such plans be produced at the next meeting regarding this matter.

Vice Mayor Yanni stated that he wanted to change his vote from "no" to "yes" regarding the question as to whether they had any knowledge and he would refer back to when he reviewed the plans with Mr. Baldwin.

Commissioner McIntee asked if Mr. Nichols was disclaiming the bottom paragraph regarding architects at ABC, and had he at any time talked to Mr. John Schlegal or Mr. Harry Deal.

Mr. Nichols stated he had spoken with Mr. Schlegal a few times, but he was not sure if he had spoken with Mr. Deal.

Commissioner McIntee asked if Mr. Nichols remembered Mr. Schlegal explaining that the encroachment line could not be revised without going before the Commission.

Mr. Nichols stated that he did not recall such a conversation.

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Commissioner McIntee asked if Mr. Nichols recalled seeing the original plans with the note from Messrs. Schlegal and Deal.

Town Manager Baldwin explained it had been a footnote that the plans had to comply with the original site plans, which had been approved by the Town Commission.

Commissioner McIntee asked if the amended plan was equal to the original plan signed off on.

Mr. Nichols confirmed it was the same plan submitted for the building permit. He explained that this plan was not consistent with the original site plan.

Commissioner McIntee clarified that the major issues not consistent with the original site plan were the approximate 4' to 5' encroachments in the stairwells and verandas.

Mr. Nichols confirmed.

Mayor Parker reiterated that had already been established.

Commissioner McIntee stated they were looking at about 1200 sq. ft. additional for each property.

Mr. Nichols explained that no additional living space had been added, and it pertained to the balconies.

Commissioner McIntee asked about the changes on the chimneys.

Mr. Nichols referred to the site plan and stated that the townhouse to the far north had to be shifted west because it was in a different flood zone. They projected the southernmost townhouse slightly west in order to be in the same flood zone with the rest of the building, and in doing so the chimney was shifted. If there were other minor changes done, they were very insignificant.

Town Attorney Cherof clarified that the document referred to by Mr. Nichols was marked as Petitioner's/Applicant's Exhibit 4.

Commissioner McIntee stated that item #22 in Mr. Keller's report referred to an addition of a spa in the pool area.

Mr. Nichols stated he believed there had been a spa, but it had been attached to the swimming pool and it did not meet the requirements of the Health Department because it had to be separate from the pool.

Commissioner McIntee asked if it was reasonable to ask credibility questions.

Town Attorney Cherof confirmed.

Commissioner McIntee asked if Mr. Nichols had ever had any complaints with the Architectural Board.

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Mr. Nichols stated that had probably occurred since he had been an architect for almost 40 years.

Commissioner McIntee asked if there had ever been any malpractice complaints against Mr. Nichols.

Mr. Nichols advised that he had a couple of malpractice complaints, which were never substantial.

Commissioner McIntee asked if Mr. Nichols had been paid to finish work on this project.

Mr. Nichols stated he had been paid through the construction documents and part of during construction fees. He stated there were no outstanding fees at this time.

Commissioner McIntee asked if Mr. Nichols ever had an aggressive argument with the Superintendent at the work site regarding the stairwells.

Mr. Nichols stated that there had not been such a confrontation.

Commissioner McIntee asked if they could direct Ms. Delegal to have Luis Piedra at the next Commission meeting.

Mayor Parker stated that the Commission could not tell her to have him present, but could state that they would like him to attend the meeting.

Mayor Parker stated that according to the timeline provided by Ms. Delegal which was part of Petitioner's/Applicant's Exhibit 1, it stated that in December, 2004, Mr. Nichols completed the construction drawings and then submitted the site plan.

Ms. Delegal proceeded to show Mr. Nichols the document being referred to.

Mayor Parker asked when the revised building plans were submitted to the Town with the revised site plan which had not been approved by the Town did they include a transmittal letter informing Messrs. Schlegal and Deal that changes had been made to the site plan.

Mr. Nichols stated that he did not submit such a letter, and it was not his experience to submit building permit plans with a letter of description. They have always just submitted the plan to a city along with a building permit application. He expected the zoning staff to review the plans and he did not think he would have received a call to pick up the plans if there had not been a careful review.

Mayor Parker stated that there was a shaded area shown on the site plans.

Mr. Nichols explained that was for emergency vehicles and would consist of pavers.

Mayor Parker stated that on the main road at the north end there was only 12' of pavers instead of 22'.

Mr. Nichols stated that the stippling was not defining pavers, but the path of an emergency vehicle and was a graphic indication.

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Commissioner McIntee asked if Mr. Nichols was testifying that Harry Deal and John Schlegal signed off on the amended plans.

Mr. Nichols confirmed they had signed off on the plans.

Ms. Delegal asked for the terminology being used to be further clarified in regard to the sets of plans because it was getting confusing.

Commissioner McIntee clarified his question asking if the two individuals referred to had signed off on the amended plans which showed the encroachment.

Mr. Nichols stated the revised plan was consistent with the encroachment and they had signed off on those plans. He stated that they would not have submitted the plans to DEP or for the condominium documents if they had not been signed off because it would have been opening up the opportunity for lawsuits in the future.

Ms. Delegal asked for Mr. Nichols to explain the process he followed when receiving the call from Mr. Schlegal to pick up the plans. She asked further how they got to the County for the building permits.

Mr. Nichols explained that someone from his office physically picked up the plans from the Town, brought them back to their office. Shortly afterwards, the owner hired a permit expeditor who then took the plans and submitted them to the County. They were then in charge of the plans from that point on in moving them from department to department.

Ms. Delegal asked if any changes had been made to the plans at the time they picked them up from the Town and delivered them to the County.

Mr. Nichols replied that no changes had been made and were the same set of plans.

Commissioner Silverstone asked if the Town Manager if plans would have to reappear before the Commission before signing off on the plans due to the changes.

Town Manager Baldwin explained that if there were substantial changes, the individuals would have been required to reappear before the Commission.

Commissioner Silverstone asked if it was not unusual that such changes were not brought before this Commission.

Mr. Nichols stated that other cities reviewed plans when submitted, a list of comments were published. He did not believe he had ever submitted a set of plans that did not have a list of comments attached. Then, the plans would be changed to reflect the comments and resubmitted to zoning which sometimes produced another list of comments. Then, they would be changed once again and resubmitted.

Commissioner Silverstone said that Item #9 on Mr. Keller's report stated: "Oceanside townhouse balconies were extended." He asked for further clarification regarding such extension.

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Mr. Nichols stated he could not provide the exact dimensions, but he knew it was a couple of feet per balcony. He stated there were 10 balconies in the rear that were affected.

Town Manager Baldwin stated that the normal course of action per Mr. Keller regarding substantial changes being made was that the plans would be disapproved and returned to the architect. Mr. Deal had stated to him that if he had seen that on the drawings, he would have sent them back to the architect and rejected the plans.

Mayor Parker asked if they had changed the side setback to the south.

Mr. Nichols stated he did not believe they had been changed.

Town Planner Keller replied there had not been any changes.

Mayor Parker stated that it should be the rule that if plans were submitted and the site plan changed that a transmittal letter should be provided detailing the changes.

Town Attorney Cherof stated that this project clearly demonstrates that staff would review the site plan approval process, along with other collateral provisions of the code, and make the necessary changes for future development.

Town Manager Baldwin remarked that such review was being done as reported to the Commission.

Town Attorney Cherof stated that staff had brought forward a complete re-write of the land development code, some of which addressed such issues.

Mayor Parker remarked that however this situation happened, he never wanted it to occur again.

Vice Mayor Yanni asked if John Schlegal and Harry Deal had signed a revised plan.

Mr. Nichols stated that the plan submitted for a building permit showed the setback consistent with what had been built was submitted to this Town and signed off by Mr. Schlegal.

Vice Mayor Yanni asked if they might have thought they were right in signing off due to the fact that the Beach Overlay District was involved.

Mayor Parker stated that would not be known until they saw the plans and what was signed off on.

Town Attorney Cherof stated it was not appropriate for one Commissioner to ask another Commissioner a question during a quasi-judicial hearing. He asked that all questions be directed to the witnesses.

Mr. Nichols stated that he would now address each revision. The first one talks about the encroachment of the stairwells, and they determined that the exact dimension was 4'  $\frac{3}{4}$ " in length towards the encroachment line and the width was 1' 10". This occurred four times, once in each building, and the total encroachment was 584 square feet. Mr. Nichols stated the next item was in reference to the balconies and the fact that they had been pulled out to line up with

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the face of the stairwells for aesthetic reasons. Mr. Nichols further stated that Item #3 addressed parking, and they had lost a parking space because of adding the structural columns missed in the previous plans and by adding the handicapped spaces. All required parking was still being met.

Mayor Parker asked if three parking spaces had been lost.

Mr. Nichols stated they originally showed 71 spaces, but now they had 68. He added that they had removed a loading zone at the south end to accommodate a dumpster and pavers were to be added, but they went with a different system by adding refuge rooms in each building. Then the trash containers would be wheeled to the street, and therefore, there was no reason for loading zones. He stated the loading zone was replaced with a pedestrian access way from El Mar Drive to the south end of the property. Mr. Nichols stated that in regard to Item #6, the Management Office was relocated from Building #7 to Building #6. Item #7 referred to balcony columns located adjacent to the driveways, which were reduced by additional turning radius for emergency vehicles. Item #8 was shifted 4' to be consistent with the flood zone. He explained that a line ran through the eastern portion of the project, which defined the flood zone for the property as determined by FEMA. The majority of the project fell within the AO flood zone, but FEMA determined the depth to the bottom of the structure, and therefore, the finish floor. One townhouse fell into the BE-14 flood zone and the structure would have been totally different with the finished floor being higher. Therefore, it had been moved east about 2' and out of the flood zone.

Commissioner Silverstone asked if it was true that the construction of the walls on the first floor had to be break-away.

Mr. Nichols confirmed and stated the garage areas were break-away, along with the garage door, but the stairs leading to the cabana room was on the finished floor level as defined by FEMA, and the entrance way and garages were at the lower level. The construction had to be 5' panels, the steel could not be consistent, and there were construction joints every 5'. Mr. Nichols explained that the oceanside balconies had been extended as requested by the owners. The side doors on the cabana were eliminated because there were French doors opening to the east. The fountain at the south was relocated and he proceeded to show the new location on the drawing. The chimney locations were revised because of the townhouse being shifted to the flood zone and due to structural issues in connection with the roof design. There was no addition to the height of the structure.

Mayor Parker advised he would consult with Town Planner Keller to provide to provide further explanation regarding the chimneys in his presentation.

Mr. Nichols stated that window treatments, awnings and window locations were revised. Subtle changes had been made on the north elevation facing Commercial Boulevard. Architectural details have been enhanced and minor revisions occurred in the rooflines of all buildings. He stated that some electrical rooms had been added for each building. Additional structural columns for the parking floor were to support the building. The walkway was lost between the parking spaces into the courtyard area due to providing handicapped parking and necessary structural columns. ADA requirements were met around the pool area. The middle driveway had been expanded to meet the required width for emergency vehicles. Mailboxes were added at the owner's request, and the spa had been relocated. Landscaping at the north edge of the property was increased but there would be no encroachment. Minor width reductions in buildings #5 and #6 were done due to emergency egress.

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Commissioner McIntee asked if there had been any movement of the actual structures east or west 5' to 6' not shown in the original plans.

Mr. Nichols reiterated that the one townhouse had been shifted due to the flood zone issues as previously explained.

Town Attorney Cherof stated that Mr. Baldwin and Mr. Keller had testified out of order, and therefore, could be cross-examined at this point by the applicant or they could reserve time to recall them at a later date.

Ms. Delegal stated they would reserve time to recall those witnesses.

Mr. Nichols stated the distance from the street was listed as the 4<sup>th</sup> page on Exhibit 4.

Ms. Delegal asked if the entire submission by Mr. Nichols had been made a composite.

Town Attorney Cherof reiterated that it was Exhibit 4, but if they are going to turn to specific pages that they announce the code at the bottom of the page.

Mr. Nichols referred to page A-1 pertaining to the Town's required change of driving lanes, landscape strips, curbs and gutters. He pointed out that presently there was a two-lane drive on El Mar Drive, and there was a 2' curbing gutter, a 5' sidewalk, and immediately adjacent was the Oriana property line. The building as it presently existed was 22' 9" from the edge of the roadway.

Commissioner McIntee explained they did not measure the encroachment from the edge of the roadway.

Mr. Nichols agreed but stated that he wanted to make a valid point. The new roadway section that the Town worked out that the owners were to construct would have, in addition to the center island, a 12' one-way drive adjacent to Oriana, and adjacent to that would be a 4' bike lane, adjacent to that there would be a 2' curbing gutter, adjacent to that would be a 4' landscape strip, and adjacent to that would be an 8' sidewalk and then the property line. Driving down El Mar Drive, they would be 33' 9" from the edge of the roadway once all improvements were done. The perception would be different at that point, and what would help that perception would be four layers of landscaping. On the east side of El Mar Drive there would be a 4' landscape strip and they would project into the sidewalk another 2' with tree grates so canopy trees of significant size could be planted. He added that adjacent to the 8' sidewalk, they would also install canopy and palm trees. He stated that everyone would be proud of the finished product.

Commissioner Silverstone asked what was the width of the street at this time.

Mr. Nichols stated that it was presently 10'.

Commissioner Silverstone asked how far the landscape strip would extend.

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Mr. Nichols explained the owners of the Oriana would landscape the median extending from Commercial Boulevard to Daytura Avenue. The sidewalk in front of the project would be consistent with El Mar Drive.

Commissioner McIntee asked if Ms. Delegal agreed with the representation made by Mr. Nichols.

Ms. Delegal stated that things could be phrased in various ways and the footnote on Exhibit 1 was a summary of a conversation held with Mr. Nichols. She did not believe he was denying that he assumed the plan reflecting the adjustment had been approved by the Town when seeing the stamped date on the back of the plans. She did not believe there was any inconsistency in what he stated and what was stated on the plans.

Commissioner McIntee asked for further clarification regarding the approval stamp for the Town.

Town Planner Keller explained that there were signatures on the back of the drawings and the stamp was there. There was also a handwritten note attached to the approval, which referenced the Town Commission approval and the Town Commission Development Order.

Commissioner McIntee clarified the approvals pertained to the original site plans and not the ones that had been revised.

Mr. Keller stated that he had only seen the drawing with the stamp on it and he did not have a copy in his office. He further testified that he did not know what Mr. Deal and Mr. Schlegal had approved. Knowing their experience and the peculiar notation included with their signature, he did not know what they had been thinking or had seen. He did not believe those individuals with all their experience would have missed the setback issue, but he could not testify to what they actually signed off on.

Mayor Parker further disclosed that he had spoken about this project with Bob Terrien and Ron Piersante and asked that this be submitted in the record.

Mayor Parker stated that it was now 10:00 p.m. and asked Ms. Delegal who was her next witness.

Ms. Delegal announced that their next witness was the landscape architect.

Mayor Parker suggested that a five-minute break be taken.

Mayor Parker recessed the meeting at 10:00 p.m.

Mayor Parker reconvened the meeting at 10:05 p.m.

Mayor Parker stated that the meeting would go until 11:00 p.m., but it was clear the Commission would not conclude with the entire agenda. Mayor Parker suggested continuing with the remainder of the agenda at the next regular Commission meeting between 6:00 p.m. and 7:00 p.m. The Commission should also agree at this time before hearing from the next witness when to reconvene the meeting regarding Agenda Item 14 B.

Commissioner McIntee advised that he would not be available until the 13<sup>th</sup> of February.

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The next Commission meeting was scheduled for February 13, 2007. Mayor Parker suggested reconvening the Commission meeting on February 12, 2007. It was decided by Commission consensus to reconvene the Commission of January 23, 2003 on February 12, 2007 at 6:00 p.m.

Mayor Parker reconvened the Commission of January 23, 2007 on February 12, 2007 at 6:00 p.m. and all stood for the Pledge of Allegiance.

Vice Mayor Yanni, Mayor Pro Tem Clark, Commissioner Jerome McIntee and Commissioner Jim Silverstone were present. Town Manager Robert Baldwin, Town Attorney James Cherof and Deputy Town Clerk Andrea Gerlach were also in attendance.

**Item 14B (Continued)**

Mayor Parker asked if the Commission in making their determination whether to grant the amendment to the site plan or not, they were not to consider any question of possible wrong doing on anyone's part, and they were not to consider any economic impact to the property.

Ms. Delegal confirmed.

Mr. Coker stated that he believed that the Mayor's statement was how the law reads.

Town Attorney Cherof confirmed.

Mayor Parker asked if it would be fair to say that in treating the site plan amendment they were to pretend the building did not exist.

Mr. Coker explained this was a site plan amendment, and whether it was approved or denied it was subject to the provisions of the Code.

Mayor Parker reiterated that the Commission in making their decision was to ignore the fact that a building had been built on the site.

Mr. Coker confirmed.

Mayor Parker further stated the Commission was also to ignore any wrong doing on anyone's part.

Mr. Coker confirmed and explained that was to be done in the context of the quasi-judicial hearing.

Ms. Delegal agreed this was how they were to proceed, however, the Mayor had commented at the last meeting that this could have an impact on how he viewed as to how they got to where they were today.

Town Attorney Cherof stated that was a fair way to treat this situation, but in considering the site plan amendment, they should apply the same standards they apply to the review of any Beach Overlay District project.

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Mayor Parker stated that the Town Attorney suggested that they change one aspect of the proceeding for this matter, and therefore, he wants to know if all three lawyers agree. The suggestion was that each witness give their testimony, have the cross examination, and then the Commission ask any questions they might have for those individuals.

Mr. Coker stated he believed the procedures to be followed were to be determined by the Town Attorney and the Mayor. He had no objection to the suggestion being made.

Ms. Delegal stated that was how she planned to proceed this evening.

Mayor Parker stated that if the Commission had no objections, then they would proceed in that manner.

Town Attorney Cherof reiterated that nothing was being changed, and that this was the procedure he urged the Commission to follow throughout the last meeting.

Commissioner McIntee stated that he did not understand the statement that he should ignore the existing building. He believed the creditability of the people presenting the case in requesting a variance weighs heavily on their performance to date, and that he would have to look at that when making his determination. He asked what form the procedure would take if this Commission decided to have the existing building torn down or a fine imposed.

Mr. Coker stated that this was a site plan application proceeding and such rules had to be followed. He explained that the Commission did not have the right to assess any penalty or do anything other than approve, deny, or approve with conditions this request subject to the criteria in the code.

Commissioner McIntee asked if this amendment were approved, how would they move forward to have the building torn down.

Town Attorney Cherof stated that he would intervene during this questioning because that question was premature. He stated that they needed to move forward with the judicial proceeding, and then depending on the outcome they would be directed as to the next steps to be followed.

Commissioner McIntee asked if the Commission was under any obligation to make a decision this evening or could they return at a later date.

Town Attorney Cherof stated that it was his opinion that the Commission should have their deliberations and then rule on the matter as soon as the testimony was concluded.

Mayor Parker asked if the Commission was to weigh the creditability of the witnesses in this matter.

Mr. Coker confirmed, but explained that they were weighed in the context of the standards and criteria in the code. He further stated that what was being discussed might have a place in a different type of proceeding. He added that the Commission was putting this in the same context as a variance, but this was not the case.

Commissioner McIntee stated that a developer could build whatever he wanted and how were the codes to be enforced.

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Mr. Coker stated that the criteria would be applied to the amendment for the site plan, and then the Commission would make a determination based upon the evidence provided, and then that decision would be enforced.

Mayor Parker stated that if the amendment was approved and they pretend the building was not there, he believed their work was done. He asked what happened if the amendment was not approved, and they required the developer to make the interior space of the units smaller.

Mr. Coker stated that he believed that question had already been asked, and that the Town Attorney asked the Commission to hold off on that aspect until the end.

Mayor Parker reiterated that if a building did not exist at the site, the Commission would be free to state that they did not approve of the encroachment, and that in order to comply with the Fire Marshall's recommendations the units should be made smaller. He stated if the Commission went in that direction would they not have the right to say this was how they would rule if the building did not exist. He stated that a building did exist and they needed to confirm whether or not the equities of the situation demanded the Commission to rule otherwise, and would they be permitted to do so.

Mr. Coker stated that the Commission was to view all evidence, and then filter out what was relevant or not. The evidence would then be applied to the criteria listed in the code and the Commission was to then weigh the evidence.

Mayor Parker restated his question as follows: If a majority of the Commission, after hearing all evidence and pretending that a building did not exist at the site, decided against the site plan amendment, they would still be confronted with the reality that a building existed, and could they then consider that the building existed in order to change their minds.

Mr. Coker stated that no one was asking the Commission to pretend that something did not exist, nor were they attempting to tell the Commission how to vote. The Commission should not create a fiction, but only apply the criteria in the code.

Mayor Parker stated that assuming the Commission voted against the amendment because they were applying the standards and ignoring the fact that the building existed and ignoring allegations of wrong doings, at that point should they not consider the fact that the building existed.

Ms. Delegal stated that the Commission was to consider the totality of the evidence and the criteria of the ordinances, and then it was the applicant's burden to go forward with the evidence.

Mayor Parker stated that a decision could be made to have the building torn down.

Mr. Coker further stated that fairness and equity was always a consideration the Commission had because there were all sorts of latitudes available.

Mayor Parker stated that if they got to the point where they were asking in all equity given the fact the building existed should they vote other than they would have had the building not been

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there, then at that point people asking for equity had to show they had clean hands. He reiterated that at that point wrong doings could be relevant.

Mr. Coker stated that he could not go in that direction and could only restate the comments he had previously made.

Commissioner McIntee asked if the building on El Mar Drive was to be treated as evidence.

Mr. Coker stated that it was to be treated as evidence in that there was setback encroachments, which were the reason for the site, plan amendment. He stated that when a surveyor made an error a variance was applied for, and they would not be able to ignore the fact that the building existed.

Mayor Parker reiterated that a different standard would be involved because in a variance proceeding the question of hardship and whether it was self-imposed played a fact. He added that he had not been told that the issue of hardship applied in this case.

Mr. Coker stated that criteria was not involved in this matter.

Mayor Parker advised that each Commissioner would have to interpret the attorney's advice, as they understood it.

Commissioner McIntee reiterated that they were first told to treat the site as a vacant lot, but now they were being told not to do so.

Mr. Coker stated that a building existed at the site and it could not be ignored. The reason for the site plan amendment was because of the encroachment into the original site plan approval. However, whether they chose to treat the site as vacant land or land with a building, the criteria was the same and their decision should be based upon the criteria in the code and the full body of evidence presented. He added that the Commission was asking for lines to be drawn that did not exist.

Mayor Parker stated that he understood that fact, but they were not here just for a site plan amendment because the building existed and was 4' 9" into the setback. They were here for a site plan amendment because the original plans proposed were vetoed by the Fire Inspector and new plans had to be drawn which could be done in two ways. One way was to move the stairwell inside and make the interior portion of the units smaller. The other way was to preserve the size of the units requiring the stairwells to come out. This hearing was because there were two ways to comply with what the Fire Marshall directed and the applicant wanted to choose one way over the other, and the way they wanted to go required the Commission's permission. He added that this hearing would have taken place whether the building had been built or not.

Mr. Coker confirmed and stated that was the preferred way to handle this matter.

Mayor Parker stated that if there were no objections from the Commission, he wanted Ms. Delegal to continue her presentation, but if any documents were to be referenced he wanted them produced.

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Commissioner McIntee stated that he requested various items and individuals to be presented at tonight's meeting.

Ms. Delegal reiterated that they would be presenting their witnesses.

Town Attorney Cherof reminded all individuals wishing to speak on this matter that if they had not been sworn in previously they would be sworn before giving testimony.

Ms. Delegal stated that in listening to the recent conversation held, she believed they were in a dilemma. and they were aware of a letter by which Mr. Coker was requested to do some investigation and to request the presence of Messrs. Deal and Schlegal. They were also aware of the letter issued based upon the conversations Mr. Coker held with those individuals. The Commission indicated some concern as to whether they could consider certain types of information, particularly what was included in the referenced letter. She felt that such issues could weigh-in on the Commission's decision. She stated that they advocated that this hearing should be about the merits of the amendment weighed against the criteria of the subject ordinances. However, it appeared that the issues of how they got there were weighing on the Commission's mind and they were concerned about such issues. She added that there were several witnesses available that would deal with such issues, and they believed it was important to tell their side of the story and to do it in an orderly way that would elicit the truth and information that the Commission would be interested in. She stated that Mr. Luis Piedra was present this evening as requested. Ms. Delegal explained that Mr. Coker's letter summarized the conversations held with Messrs. Deal and Schlegal. She added that the letter was dated February 6<sup>th</sup> from Mr. Coker to Mr. Baldwin, and they wanted to introduce this document as Applicant's Exhibit 7.

Ms. Delegal continued stating that it was important to note that those gentlemen were not present this evening and this was hearsay evidence and not subject to cross examination. Other witnesses would provide direct testimony and would be subject to cross-examination. She stated that Ms. Melgren provided the video from the last meeting, which would also be discussed.

Ms. Delegal stated that their first witness would be Rex Nichols. She asked Mr. Nichols if he had reviewed the letter sent to Mr. Baldwin by Mr. Coker, which summarized the conversations held with Messrs. Deal and Schlegal regarding the review of the plans.

Mr. Nichols confirmed.

Ms. Delegal asked Mr. Nichols if he remembered the statement in subparagraph (3) that states as follows: "Each of them (Mr. Schlegal and Mr. Deal) confirmed that the site plan that was submitted with the construction drawings and reviewed by them at this time was the site plan that was approved by the Town Commission and consistent with the development order issued by the Town."

Mr. Nichols stated that he remembered such statement.

Ms. Delegal asked if that had been an accurate statement of the submission Mr. Nichols made to the Town.

Mr. Nichols stated that the statement was a contradiction to what he had said to the Town.

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Ms. Delegal asked if any of the sheets of the construction drawings submitted to the Town were substituted, changed, amended, altered, or removed by himself or anyone under his supervision prior to submitting the plans to Broward County for a building permit.

Mr. Nichols stated that no sheets had been substituted. He further stated that there had also been documents from the consultants that were included. He stated unequivocally that he did not, nor did any member of his staff; substitute any sheets after they had been submitted to the Town for permits or before they had been submitted to the County.

Ms. Delegal further stated that a site plan admitted as Town's Exhibit 1 purported the site plan bearing the date of January 30, 2004, and Mr. Nichols had been asked if he could substantiate whether that document had been the one he submitted to the Town. She asked if Mr. Nichols had brought along those documents this evening.

Mr. Nichols stated that those plans were part of a group of documents.

Ms. Delegal proceeded to show the site plan submitted to the Town for approval on March 18, 2004.

Mr. Nichols explained that plan had been the original submittal for developmental approval.

Ms. Delegal asked if these were the plans approved by the Town Commission and upon which the development order had been issued.

Mr. Nichols confirmed.

Ms. Delegal advised that they wanted to submit these documents as Applicant's Exhibit 8.

Mayor Parker asked if these plans materially differed from those shown and marked as Town's Exhibit 1.

Ms. Delegal confirmed and stated that Mr. Nichols could look at those documents and make a comparison if the Commission so desired. She further stated they had produced the site plan approved by the Town Commission on March 23, 2004.

Town Attorney Cherof stated that violated the procedure to be followed and goes to the substance of the exhibit, and not to the manner in which it was being offered. He stated that it could be offered, and at the appropriate time they would have the opportunity to make the comparison, along with Mr. Coker and Town staff. Then cross-examination could occur at the proper time. He added that a recess could be taken at that point so the Commission would be able to review the documents.

Ms. Delegal reiterated that they wanted to show the course of events that had occurred. She advised that the architect's version of the site plan was labeled as Exhibit 8.

Mr. Nichols explained that these were plans reproduced by the Town and were the source of the drawings.

Ms. Delegal asked how many pages were in this document and what was included in the site plan.

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Mr. Nichols advised there were 18 pages that included a civil engineering site plan, a landscape architect's site plan, along with some other architectural drawings, an architectural site plan, building plans, floor plans, and building elevations.

Ms. Delegal asked if Mr. Nichols could recognize the construction drawings submitted to Mr. Schlegal in order to obtain zoning approval for a building permit.

Mr. Nichols confirmed and stated such documents were available at tonight's meeting.

Ms. Delegal stated that this evening they brought two complete sets of original plans that had to be placed back at the site after this meeting. She advised that copies had been made of each of these sets of plans. The plans brought were for building #6 which was in the middle and building #7 which was located at the southern end of the site. Both of those buildings fronted El Mar Drive. All documents had been stamped and could be reviewed by the Commission. She advised that building #6 would be labeled as Exhibit 9, and building #7 would be marked as Exhibit 10.

Mayor Parker clarified that there was an original and one copy of each document.

Ms. Delegal confirmed.

Mayor Parker stated that if Attorney Coker and Town Planner Keller could verify that the original and copies were the same, the Commission would accept the submission of the copies so the originals could be returned to the site.

Ms. Delegal asked Mr. Nichols whether the construction plans represented in Exhibits 9 and 10 were drawn consistent with the site plan just submitted into evidence as Exhibit 7 which is the original March 2004 site plan and approved by the Commission.

Mr. Nichols stated they were absolutely not consistent, but consistent with the amended site plan being reviewed at this hearing. These documents held the 24 changes as outlined by Mr. Keller.

Ms. Delegal asked if Mr. Nichols could explain some of the primary discrepancies and for him to use building #7 as an example.

Mr. Nichols stated that they had already reviewed the 24 changes listed, and therefore, he would only address the changes that jumped out as one reviewed the drawings. Mr. Nichols stated that one item that was very obvious was that the original site plan submitted for site plan approval had three curb cuts. There was an entrance drive and emergency vehicle, an exit for an emergency vehicle, and a loading zone at the south end. These construction drawings have only two curb cuts, eliminating the curb cut at the southern end of the site. He further stated that immediately adjacent to the curb cut for the loading zone, the fountain had been moved to the north. One item that was very apparent was that in the original submission the stairwells were not symmetrical. Another item was that the original plan did not have a route going to the swimming pool.

Ms. Delegal asked if there was more than one page that would reflect a site plan consistent with the revisions made, as opposed to the original site plan.

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Mr. Nichols stated that many sheets responded to that drawing, and what was obvious was the landscape plan and the civil engineering plan. Those had to have the same layout as the architectural plan.

Ms. Delegal asked if there were documents prepared by other professionals or disciplines other than himself.

Mr. Nichols confirmed and stated that MEP engineers, structural engineers, civil engineers, and the landscape architect had prepared documents.

Ms. Delegal asked if Mr. Nichols provided any instructions to the consultants submitting plans to prepare a construction document based on any document other than the revised site plan that had the stairs extending further to the road.

Mr. Nichols stated that he had not done so, and proceeded to explain how the consultants obtained the plans.

Ms. Delegal stated they had a contract with the owner of the project to provide architectural services and various phases were involved in that process.

Mr. Nichols confirmed.

Ms. Delegal asked Mr. Nichols to explain the phases, along with the document, which was the end product.

Mr. Nichols explained that the first agreement with the owners was a letter of agreement for site plan approval documents, and once that was submitted to the Town the agreement was completed. This portion took a few weeks and involved him responding to Mr. Keller's letter, which consisted of a list of comments and concerns from the previous submission. He was also directed to change the architectural style of the project to a Mediterranean one which would be in keeping with the Overlay District.

Ms. Delegal asked if the result of that was the original site plan entered into evidence as Exhibit A.

Mr. Nichols stated the result was the site plan submitted to the Town on March 18, 2004. Once the Town granted approval, they provided to the owner an AIA agreement, which was a standard agreement, provided by architects. The agreement was for the three remaining phases of the project, including design development, construction documents, and during construction phase.

Ms. Delegal asked if Exhibits 9 and 10 were the result of the construction document phase. Mr. Nichols stated they were the result of the design development phase, which led to the construction document phase.

Ms. Delegal asked Mr. Nichols to open the original Exhibit 9 which was the construction documents for Building #6. Ms. Delegal referred Mr. Nichols to the last page of Exhibit 9 and asked him to identify the sign-offs and notations listed.

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Mr. Nichols explained there were several stamps shown which were the approval stamps received from the Town consisting of the initials of the reviewers along with the date. A note was also included which stated: "Subject to the Pier Pointe Beach Village Overlay District and site plan approval, development order dated April 27, 2004 and recorded as Instrument Number 103933385, pages 1166 to 1170 recorded April 28, 2004 at 11:26 a.m."

Ms. Delegal advised that part of the writing had been ensconced in the metal rod on the document.

Mr. Nichols further read: "Broward County Commission Deputy Clerk 104." Mr. Nichols continued stating that a second state read as follows: "Approval and permits from the Town Engineer and Municipal Services Director are required."

Ms. Delegal asked Mr. Nichols to identify for the Commission the notation that appears to be the sign-off by the Town Zoning Administrator.

Mr. Nichols read as follows: "Town of Lauderdale-By-The-Sea, Zoning Plan Review approved by \_\_\_\_\_." Mr. Nichols stated that there were two initials. One was obviously a JS, and the other must be an HD, dated December 13, 2004. Then it listed the conditions below that notation.

Ms. Delegal asked if that was the document Mr. Nichols retrieved from the Town's Zoning Department once they had been submitted for approval in connection with building #6.

Mr. Nichols confirmed it was the construction documents he retrieved from the Town.

Ms. Delegal asked how Mr. Nichols interpreted that notation regarding approval by the Town.

Mr. Nichols stated that he assumed the plans had been reviewed by the Town Zoning officials, approved, and were ready to be submitted to Broward County. Therefore, he then submitted the plans to the County.

Ms. Delegal asked if the County had questioned the notation made on the plans.

Mr. Nichols stated they did not question that notation and had accepted the plans for the building permit.

Ms. Delegal stated that Mr. Nichols was now going to review information listed on the reverse side of the original sheet for building #6 containing the original stamp of the Town. She referred Mr. Nichols to the upper left-hand corner of the document.

Mr. Nicholas advised that the drawing was labeled Sheet F-3 and was prepared by Hall Fountains who were designers and engineers for fountains and did the specific drawings for piping layouts, etc. At the top left-hand corner, they showed a partial site plan, which was in keeping with the amended site plan submitted. He added that it showed two curb cuts, no loading area, and stairs that were symmetrical. These items told him that this plan was consistent with the amended and revised site plan submitted for the building permit.

Ms. Delegal asked if that site plan on the upper left-hand corner was consistent with the original site plan approved.

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Mr. Nichols replied it was not consistent with the original, but with the revised site plan.

Ms. Delegal asked if Mr. Nichols had been the architect on the Villa Caprice project.

Mr. Nichols confirmed.

Ms. Delegal stated they wanted to proffer this project.

Mayor Parker asked what was the relevance to that project.

Ms. Delegal stated that the Villa Caprice project was approved under the Beach Overlay District Ordinance and located on the east side of El Mar Drive, and the stairways had been approved to intrude up to 15' 1" from the right-of-way line. Originally, they had been approved at 15'.

Mayor Parker stated that he felt they were totally distinct site plans.

Ms. Delegal stated that the Commission could consider and weigh whatever relevance they felt it might have during their deliberations, but she wanted to demonstrate that a project similar in nature had been approved in a similar manner with up to a 15' setback for the stairwells.

Town Attorney Cherof stated that it would be appropriate for the Commission to listen to this testimony.

Mayor Parker stated they wanted to have an opportunity to review those plans before proceeding with their cross examination.

Ms. Delegal agreed.

Ms. Delegal asked Mr. Nichols if the documents shown were the approved site plan for the Villa Caprice Project for which he had been the architect.

Mr. Nichols confirmed.

Ms. Delegal stated she wanted this document entered into the record as exhibit 11.

Ms. Delegal advised she had concluded her direct to Mr. Nichols.

Mr. Coker asked Mr. Nichols how many personnel was in Mr. Nichols office.

Mr. Nichols responded 6 and they all have degrees. Some are architectural interns with degrees, but not yet registered.

Mr. Coker asked how a set of plans was put together in his office.

Mr. Nichols replied that everyone in the office put together plans. He reminded everyone that they had inherited the plans and this project, and things would be done differently if they began originally with a project. Due to the time constraints involved when they received the project, they took the disk provided and began to make the necessary revisions in order to meet their

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deadline. He added that a printing service was also used. He stated that drawings had to be signed before being submitted.

Mr. Coker asked if Mr. Nichols had prepared the drawing that was considered part of the construction set.

Mr. Nichols confirmed.

Mr. Coker affirmed that Mr. Nichols had not solely put together the drawings, and could not testify that they were exactly what he thought they were, and had not been submitted to the Town by Mr. Nichols.

Mr. Nichols stated that he had submitted the plans to the Town, and they had been put together under his direction.

Mr. Coker further stated that the stamp referred to was in connection with zoning approval by Messrs. Schlegal and Deal on behalf of the Town.

Mr. Nichols confirmed.

Mr. Coker stated that setbacks, height, impervious areas, and parking were part of that review.

Mr. Nichols stated that it should have been everything approved in the developmental order.

Mr. Coker asked if they were expected to review the architectural drawings that had been submitted for the building permit.

Mr. Nichols explained that such drawings were reviewed in connection with the height of the project.

Mr. Coker asked how the original set of drawings had been submitted to the Town.

Mr. Nichols explained that they were bound with heavy-duty binders and folded.

Mr. Coker asked if there had been more than one volume of documents.

Mr. Nichols stated that if they were not all one volume, there could be the tendency for documents and drawings to get lost.

Mr. Coker advised that the copy made for the record was in two volumes, and the site plan was in a completely different volume than the sheet signed on the last page.

Mr. Nichols explained that the architectural drawings come from the printer with one binder, and all the consultant's drawings were delivered to his office many times with an additional binder. Many times they were then stapled together. Originally, there could be separate multiple binders within the set.

Mr. Coker stated that traditionally all disciplines signed the last sheet.

Mr. Nichols confirmed that was what occurred in this case.

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Mr. Coker asked if the signed sheet could be in a separate volume from the site plan.

Mr. Nichols stated the drawings for each building were bound together and had not been submitted separately.

Mr. Coker stated that he noticed that the site plan was the only drawing that would be reviewed by the Zoning Administrator and signed off on, except for things relative to the buildings. He stated the setbacks were clearly marked on the site plan he reviewed, but he did not see them on any other sheets of the set.

Mr. Nichols stated that it was obvious when looking at the curb cuts. He added there were other ways for one to realize instantly what site plan one was looking at.

Mr. Coker stated they were talking about the Town's function in this instance, which was to review the site plan to make sure that it was consistent with the development order.

Mr. Nichols stated that he would not agree with that statement because that was not their only function. He continued stating that the Town reviewed the architectural plans, the hardscaping, the landscaping, and the civil engineering drawings. Therefore, why would they only review the site plan when that was a part of the development order?

Mr. Coker stated that the setbacks were only shown on the site plan.

Mr. Nichols explained that the dimension was shown on the site plan, and they did not only need to see the dimension in order to see that the landscape and civil engineering plans were consistent or not.

Mr. Coker stated that the landscape plan did not contain any of the site plan criteria.

Mr. Nichols stated that graphically it did contain all the criteria.

Mr. Coker asked if it contained the dimensions of the setbacks.

Mr. Nichols stated that it showed stairwells and curb cuts. He added that it was part of zoning's job to check the setbacks.

Mr. Coker added that height would be checked on the elevation drawings.

Mr. Nichols further stated that they would check the hardscape design, the landscape design, fountains and other items approved in accordance with the elevations.

Mr. Coker further stated that Mr. Nichols had referred to a location map of the site plan on the document entitled "Fountain Mechanical Electrical Plan."

Mr. Nichols confirmed and stated that had been signed.

Mr. Coker asked if the Zoning Administrator would have reviewed such a plan.

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Mr. Nichols stated they would not review such plans, but their point was that even though the pool engineer had the revised site plan, there was no attempt by anyone to cover up anything or make any substitutions. This was a strong example that the sheet stamped by the Town had the revised partial site plan on it. He emphasized that had been his point.

Mr. Coker stated that the Zoning Administrator should have noticed on those plans that there was a small dimensional site plan.

Mr. Nichols stated that was not the point, but the point was to show that this plan, as well as all the other plans, were consistent with the revised site plan.

Mr. Coker stated that the detail of the stairwells in the construction drawings were not important for the Zoning Administrator to review.

Mr. Nichols stated that on the original site plan the stairs and the elevator on each side of the lobby were obviously different. On the revised site plan they were symmetrical.

Mr. Coker stated that there was nothing in the construction set of drawings that had been reviewed by Messrs. Schlegal and Deal telling them without measuring that the setbacks were different from what had been approved by the Commission.

Mr. Nichols stated that without measuring they may not have known, but it should have been obvious to them that the stairs were different. He added that this showed up time and again throughout the set of drawings.

Attorney Coker advised he had completed his questioning of Mr. Nichols.

Mayor Parker asked Town Attorney Cherof to explain who had the right to cross-examine.

Town Attorney Cherof explained that anyone who was an affected party which was a defined term under the quasi-judicial proceeding as any party, natural or corporate, who owned property within 300' of the subject site.

Mayor Parker asked if anyone in the audience had any questions for the witness.

There being no one to ask questions, Mayor Parker advised that the Commission would take a short break to review the plans.

Mayor Parker recessed the meeting to review plans.

Mayor Parker reconvened the meeting.

Mayor Parker advised that Attorney Coker had further questions for Mr. Nichols.

Mr. Coker confirmed that the date the Town signed off on the construction drawings appeared to be December 13, 2004.

Mr. Nichols confirmed and stated that was the date of the stamped. He also confirmed the sheet numbers for building numbers six and seven.

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Mr. Coker stated that two sheets were marked A-6.0. Exhibit 9, building 6 was marked A-6.0 and Exhibit 10, building 7 was marked A-1.0. The first sheet had a date of October 21, 2004, which he assumed was the last date of revision.

Mr. Nichols confirmed.

Mr. Coker asked why they had separate numbers.

Mr. Nichols stated he did not know why they had different sheet numbers, but they occur in the same sequence.

Mr. Coker stated that on the back of that sheet someone had written, "void" in black ink.

Mr. Nichols stated that once the sheets went to the County and building department, they were not allowed to remove any sheets because they had already been stamped. They have to void the sheet for any changes being made, and then put the new sheet adjacent to the old one.

Mr. Coker stated that on the second sheet of A-6.0 was the site plan that showed a revision date of October 21, 2004, and revision dates of February 8, 2005, June 20, 2005 and October 17, 2005. All of the 2005 revision changes were after the date that the Town had signed off on the construction drawings.

Mr. Nichols confirmed and stated the County did this during permanent review. Once revisions were made new sheets had been substituted and the old sheets had been marked void.

Mr. Coker asked what revisions were made on the site plan that had been approved by the Town.

Mr. Nichols explained that it had been primarily fire suppression, along with pipes and leads to the townhouses. They found out that sprinklers had to be added to all buildings, and therefore, piping had to be provided.

Mr. Coker asked Mr. Nichols to review the 2005 revisions and explain what changes had been made.

Mr. Nichols reiterated that the primary revisions dealt with the sprinkler system and fire suppression. No changes had been made in connection with curb cuts or setbacks.

Mr. Coker asked if there had been any zoning changes made.

Mr. Nichols responded no.

Attorney Coker asked if the plans had been brought back to the Town after such changes were made.

Mr. Nichols stated they had not come back to the Town.

Mr. Coker stated that the site plan for building 7 showed a revision date of October 21, 2004 and October 17, 2005, but it did not have the revision dates of February 8, 2005 or June 20, 2005.

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Mr. Nichols stated that he did not know the answer to that question.

Mr. Coker asked why the same site plan had not been used in all seven sets.

Mr. Nichols replied that the site plan was permitted with one of the buildings. He reiterated that no substitutions had been made to the sheets from the time they had been submitted to the Town until the time they went to the County.

Attorney Coker advised he had nothing further.

Mayor Parker clarified that Mr. Nichols reiterated that from the time the Town's Planning Department approved the building plans in December, 2004 until he took the plans to the Broward County Building Department in Fort Lauderdale that no substitutions had been made.

Mr. Nichols confirmed.

Mayor Parker stated that some of the sheets had some sort of Braille on them, which appeared to be an approval stamp from the County dated January 11, 2006.

Mr. Nichols confirmed and stated that was when the plans had been approved by the County for the building permit. He added that the plans had been approved as a group for each building.

Mayor Parker stated that the County's stamp punched a hole in the plans, which would show whether any pages had been substituted.

Mr. Nichols confirmed, but stated that did not mean it had been part of the original submission because many sheets had been substituted. He added that the Braille was on the voided sheets, as well as the replacement sheets.

Mayor Parker stated that he noticed two things. One was that when one went to the revision sheet A-6.0 there was a County Braille stamp, but the page beforehand which was supposed to have been the original sheet, it did not contain that stamp.

Mr. Nichols clarified that the sheet was marked void, but there was no County stamp and he did not know why.

Mayor Parker stated that the revision to sheet A-6.0 for building 6 on Exhibit 9, the last revision was October 17, 2005.

Mr. Nichols confirmed.

Mayor Parker stated that the Town approved the plans in December 2004. Therefore, when the Town approved the plans, this amended site plan was not part of what had been approved.

Mr. Nichols stated this was a revised site plan and not the original plans approved. He added that the revised site plan was not consistent with the development order.

Mayor Parker reiterated that because this was dated October 17, 2005 and the plans had been approved by the Planning Department on December 13, 2004, this revised site plan had not been part of the submission to the Planning Department for their approval.

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Mr. Nichols stated it was a newly created document in the design development phase, and was not consistent with the submitted plans for the original approval, but it was consistent with what had been submitted for the building permit.

Mayor Parker further stated that approval by the Town Zoning Plan Review stated: "Subject to the Pier Pointe Beach Village Overlay District and site plan approved development order dated April 27, 2004 and recorded in and it gave the instrument number which was recorded on April 28, 2004 in the Public Records of Broward County." Therefore, those plans approved by the Zoning Review stated that they had to conform to the site plan approved April 27, 2004.

Mr. Nichols confirmed.

Mayor Parker stated further that the plans approved by the Building Department with the site plan were not consistent.

Mr. Nichols confirmed they were not consistent with the original plans.

Mayor Parker asked if they had the Town's copy of what had been approved by the Planning Department.

Town Manager Baldwin informed Mayor Parker these plans were somehow transmitted to Broward County and the Town did not keep a copy. Mayor Parker stated that it was suggested that the site plan for the Villa Capri was comparable to this one.

Mr. Nichols confirmed and explained that the Villa Capri was a 3 over 1 design much like Oriana. The Villa Caprice property is 300' long, and the subject property is 400'.

Mayor Parker asked how many stairwell extensions were there in the setbacks at the Villa Capri.

Mr. Nichols explained for the Villa Capri project there were two buildings, and therefore, two cores. In this case there were three buildings having four cores.

Mayor Parker stated that the stairwells encroached into the setbacks.

Mr. Nichols stated that there was about 100' between the cores of the stairwells.

Mayor Parker stated that the area between the stairwells at the Villa Capri were about 150'. Therefore, he asked if the projects were really comparable.

Mr. Nichols explained that the Villa Capri had two long buildings, and this project had two short buildings and one long building. He added that one project did not have more impact than another on pedestrians.

Commissioner McIntee stated that Mr. Keller indicated there had been 24 changes to the plans. He asked if anyone came before the Commission at any time regarding any of the changes.

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Mr. Nichols replied they had not come back before the Commission regarding changes, but the changes were made on the plans and resubmitted to the Town for their review as part of the building permit process. Commissioner McIntee asked why there was not a stamp from the Fire Marshall on all the documents. Mr. Nichols explained that had been a courtesy review and was not part of a formal submission and no application had been made, nor had the Fire Marshall submitted any papers. He stated that the Fire Marshall's name was not known for sure and had since retired.

Commissioner McIntee asked if Mr. Nichols had created the original site plan.

Mr. Nichols replied he had not, because the original plans had been created by the original architectural firm.

Commissioner McIntee asked what Mr. Nichols called the documents that had been submitted to the Town's Planning and Zoning Department.

Mr. Nichols referred to the submission as the site plan approval documents, but the correct term was developmental approval. He explained that what had been originally submitted to staff had been revised. He added a refined version of what had been approved by Planning and Zoning had been presented to the Town Commission.

Commissioner McIntee asked if the refined version clearly showed the encroachment.

Mr. Nichols stated the stairwells had always been in the encroachment area.

Commissioner McIntee reiterated that they had been approved for 20' 8".

Mr. Nichols confirmed and explained that the required setback was 25'.

Commissioner McIntee stated that they could only go into the encroachment beyond the 25' to a maximum of 50' with the permission of the Commission as was done with the Villa Capri. He asked if anyone came to the Commission for the additional footage.

Mr. Nichols stated that no one came before the Commission with such a request until they had applied for the building permit.

Commissioner McIntee stated that the encroachment was clearly shown on the diagrams that had not been approved by the Commission.

Mr. Nichols agreed.

Commissioner McIntee stated that the documents that went to Planning and Zoning did not show any fire doors on the first floor. He asked if it was fair to say that Messrs. Schlegal and Deal reviewed such documents and signed off on them.

Mr. Nichols stated he knew staff reviewed them, but he did not know when the signatures were placed on the documents.

Commissioner McIntee stated that Ms. Delegal read a portion of a letter labeled as subparagraph 3 which stated: "Each of them (referring to Schlegal and Deal) confirmed that the

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site plan submitted with the construction drawings and reviewed by them at this time was the site plan approved by the Town Commission and consistent with the development order issued by the Town,” and asked Mr. Nichols if he agreed with that statement.

Mr. Nichols stated he disagreed and did not feel individuals could remember after all this time exactly when documents had been signed and reviewed.

Commissioner McIntee stated further that Ms. Delegal had not read the second part of subparagraph 3 which stated as follows: “That each recall that they checked the site plan against the development order and specifically recall checking the setbacks to ensure conformance with the development order.”

Mr. Nichols stated they would have to have a much better memory than he did to remember all that information. He further stated that he had spoken in the past with Mr. Schlegal and had met with him on occasion. He added that Mr. Schlegal was a very nice man and anxious to please.

Commissioner McIntee stated that the encroachments were shown in Exhibits 9 and 10.

Mr. Nichols stated that the encroachments that reflect the amended site plan were consistent with the construction documents.

Commissioner McIntee further stated that Mr. Nichols had not mentioned the fact that there was a 5’ encroachment.

Mr. Nichols stated that as an architect such an encroachment did not jump out at him. The stairs were similar and the percentage of a further encroachment over what the other encroachment was relative to the massing of the building would not jump out at him, and therefore, that could be why Messrs. Schlegal and Deal missed it. He added that one would notice that the loading zone was missing the change of the location for the fountain, but one would not immediately perceive the change in the stairwells. He stated that one could perceive that the stairwells were not symmetrical.

Commissioner McIntee disagreed and stated that he noticed the stairwells were in the encroachment and that fire doors were missing. Commissioner McIntee asked if Mr. Nichols had created the plans that lacked the fire doors.

Mr. Nichols stated that he had not created those plans and should have noticed the lack of those doors.

Commissioner McIntee asked if the stairwells could have been redesigned with the 20’ 8” when preparing them to submit to the County.

Mr. Nichols explained that Mr. Townsend explaining that this item was an issue had contacted him. At that time the building was being constructed and he believed they were up to the second floor. He attempted to see if something could be done, and when the original site plan was laid out the previous architect knew that the vehicular circulation determined the layout of the site. In this case the condominium building was based on a parking space and driving aisle. There was a space between the building and then a two-car garage, a space and then the

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seawall. Therefore, the vehicular circulation predetermined the layout of the buildings and that was the case 98% of the time. He advised that there was no easy solution to this problem.

Commissioner McIntee further stated that Oriana had hired a surveyor about June, and he asked if Mr. Nichols or any of the principals had attempted to notify the Town that this was a major problem, and ask what could be done.

Mr. Nichols stated he had received a letter stating there would be an investigation as to the cause of the problem. He explained they immediately began to address the issue.

Commissioner McIntee remarked that the Commission had never received notification about the survey.

Commissioner McIntee stated they had a situation whereby a Planning and Zoning Board and a Town Commission had accepted plans for how they thought a project was to be built. There was a major problem with the fire doors and stairwells.

Mr. Nichols agreed.

Commissioner McIntee further stated that two people in the government told Mr. Coker, Mr. Cherof and Mr. Baldwin that they had at no time under any circumstances signed off on the plans to change the encroachment. He added that Mr. Coker confirmed that statement in a letter, and Messrs. Schlegal and Deal made such a statement to three different individuals, and those individuals were two officers of the Court and the Town Manager. Now, the architect was telling him that was wrong. He reiterated that was where a credibility gap began to develop and where they began to lose confidence in what was happening. He asked how did the County get a site plan or construction order without the original approved site plan.

Mr. Nichols stated that when the plans were folded the stamp was exposed on the back sheet, and the expeditor took them to the County.

Commissioner McIntee reiterated that plans had been generated to the Town and to the County, and he asked how many times would Messrs. Schlegal and Deal have to sign those plans for approval.

Mr. Nichols explained that the plans had been kept two weeks after submission. He further stated that those individuals only signed off on the construction document permit plans once. He added that these were the same plans submitted to the County.

Commissioner McIntee stated that was the problem because they were not the same plans.

Mr. Nichols stated they had done a good job and the plans had not been substituted.

Mayor Parker reminded the Commissioners they were to ask questions and not testify, nor argue with the witnesses.

Commissioner McIntee restated his question as follows: How many times did Messrs. Deal and Schlegal sign off on the plans for approval?

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Mr. Nichols stated that he believed that throughout the process the only time they signed off was on the construction documents because the approval from site plan submission had been done through a development order.

Commissioner McIntee asked at what stage had they signed off on the plans that went to the County.

Mr. Nichols stated they had signed the stamp on the back of the plans on December 13, 2004.

Commissioner McIntee asked if that stamp had been for the wiring and relocation of the fountain.

Mr. Nichols stated that was not the case because it was the stamp of approval, which happened to be the back sheet of the construction drawings.

Commissioner McIntee stated that they had also signed off on the Planning and Zoning Site Plan.

Mr. Nichols stated he did not believe that had been the case and did not remember seeing another signature, but that their approval had been in the form of a letter.

Mayor Parker stated that the Commissioner was "beating a dead horse," and that Messrs. Schlegal and Deal had not signed off on the development order, but that it had been the Town Manager and Walter Keller.

Commissioner McIntee stated that the bottom line was that there was one set of signatures from Messrs. Deal and Schlegal.

Mr. Nichols confirmed.

Commissioner McIntee further stated that they claimed they had not approved anything else.

Mr. Nichols stated that he believed those individuals had been under a lot of pressure to say what they said, and he was amazed that without having a site plan in front of them, which had been a complicated one, that they could remember the facts so clearly.

Commissioner McIntee asked about the Villa Capri project. Mr. Nichols explained that it followed the same Overlay District requirements. Commissioner McIntee asked if Mr. Nichols requested 15' 1" from this Commission for that project.

Mr. Nichols confirmed. He further stated that in hindsight many individuals on both sides should have been more careful regarding this project. He continued stating that allegations had been made that sheets had been substituted or that there was some sort of cover up plan that involved the submission of two sets of documents. He reiterated that people made mistakes and the error was that changes were made and not resubmitted to the Town. At that same time, all the changes made were good ones and for everyone's protection. He stated that the building had been built properly in accordance with the right ordinances, the stairs were wide enough, a sprinkler system was included, and the fire lanes were sufficient in width, but the process was not done properly. He added that he believed everyone learned a valuable lesson in this matter, and would make sure that things were done before the Commission on the next

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project. The circumstances were exceptional in this case, but they have an exceptional building, which was designed in accordance with all codes. The Town would be very proud of this building because by far it would be the nicest one. Mr. Nichols stated that life was not always about the journey, and this journey has been extremely painful, but more about results. He stated further they would have wonderful positive results with the buildings and everyone would be happy. He reiterated that everyone did learn from this journey.

Commissioner McIntee asked if Mr. Nichols should sustain any type of penalty since he had violated the process.

Mayor Parker asked for this question to be struck from the record because they had already established that was not one of the considerations for the Commission.  
Town Attorney Cherof stated that was not a proper question to ask.

Commissioner McIntee stated that he would withdraw the question.

Mayor Pro Tem Clark stated that Mr. Nichols had been questioned earlier regarding the name of the Fire Marshall, and in the Commission's back-up information the name of Captain Robert Nast had been listed.

Mr. Nichols stated that name sounded familiar, and his office called and questioned who the individual might be, and they were informed that it probably had been Captain Nast who had recently retired.

Mayor Pro Tem Clark further stated that in looking at the originally approved site plan, there had been a date of October 13, 2004, and then there was another site plan that listed revision dates and five dates had been listed. He stated that in looking at the different dates, he wanted to know what revisions had been made in connection with each date.

Mr. Nichols explained that there was supposed to be a little triangle with a number that was to appear for each change.

Mayor Pro Tem Clark stated he had not seen anything to identify the changes, and that could be a huge problem in future cases. He wanted to make sure that things would be identified as they occurred from now on.

Mr. Nichols stated that the triangles were very small, but were indicated on the site plan. He added that there was also a cloud around the triangle. He stated that one change showed where the water main entered the site; another change was the fire sprinkler electronic gate opener, and various other changes.

Commissioner Silverstone asked what date Mr. Nichols had been given the project.

Mr. Nichols stated that he did not recall the exact date, but they had submitted plans for the site plan approval in December 2003. Therefore, he believed he might have received the project in November 2003.

Commissioner Silverstone stated that November 2003 to March 2004, Mr. Nichols analyzed the plans and knew there could be a problem. He reiterated that the Town had approved the plans in March 2004.

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Mr. Nichols stated that in all fairness the time they submitted for site plan approval was spent addressing various issues with Mr. Keller. He added that the site plan submitted had been drawn on a computer by the previous architect who had been electronically transmitted to his office. Then, alterations had been made to the plan.

Commissioner Silverstone asked when Mr. Nichols first became aware of the problem with the stairwells, and when had he redone the drawings.

Mr. Nichols explained that when they received the development order from the Town, the project was assigned to a project manager and all issues were assessed that had to be resolved. They also had to review the codes and submit the plans to all the engineers for their assessment.

Commissioner Silverstone stated that everyone had seen the original site plans.

Mr. Nichols stated the civil engineers and the landscape architects had a copy of the original documents.

Commissioner Silverstone asked when the new site plans, including the changes, had been delivered to the concerned parties.

Mr. Nichols explained they had been transmitted electronically several months after they had made all the revisions to the site plan, and corresponding revisions to the building plans, floor plans, and the elevations. Once the design was intact at the end of the development phase, they transmitted the base plan to the others. He believed other plans were submitted so those individuals could provide some preliminary input.

Commissioner Silverstone asked when they submitted the changed site plans to the Town was there any documentation attached listing the issues.

Mr. Nichols stated that only the plans had been submitted and from his previous experience a list had never been included, but now he believed a list of changes would be a good idea.

Commissioner Silverstone asked if any discussions had taken place after submitting the plans.

Mr. Nichols further stated that an application and fee were submitted with the plans.

Commissioner Silverstone asked if anyone had a copy of that application.

Mr. Nichols replied that it should be on file with the Town, and he probably also had a copy in his files.

Vice Mayor Yanni stated he believed it was a waste of times looking at all these documents and plans. The bottom line was that somebody altered the plans and went ahead with the project before coming before the Commission. He added that no one knew who changed the plans, but someone did and how they changed them was unknown. The only thing wrong with the plans was that they encroached into the 50' setback.

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Mayor Parker reminded the Commission that they were only to ask questions and not provide any testimony or make any speeches.

Vice Mayor Yanni stated that he was only providing his opinion. Mayor Parker reiterated that no opinions were to be made until all evidence had been heard.

Vice Mayor Yanni stated that this matter keeps being dragged out and it was up to the Commission to make a decision.

Mayor Parker reiterated that this was a quasi-judicial proceeding and the rules had to be followed.

Town Attorney Cherof referred Mr. Nichols to page A-01 of the original site plan approved by the Commission and asked if this document bore the title "site plan."

Mr. Nichols stated the title was "overall site plan."

Town Attorney Cherof asked if there was a date as to when it had been prepared.

Mr. Nichols stated the date of preparation was February 4, 2004 and the date of his seal was March 18, 2004.

Town Attorney Cherof asked if that was right before the Town Commission had approved the plans.

Mr. Nichols agreed.

Town Attorney Cherof then proceeded to refer to the binder marked Deposit Exhibit #1, Tab 4, page 4 of 5, which was entitled "Conditions of Approval." He then asked Mr. Nichols to read under "Other Conditions," paragraph #4.

Mr. Nichols read as follows: "This approval is based upon the plans prepared by Rex Nichols, Architect, P.A. containing 18 sheets sealed on March 18, 2004, and 6 sheets of colored renderings 11" x 17".

Town Attorney Cherof stated that at least one of those sheets was the site plan identified, and he asked if it bore the same date of approval.

Mr. Nichols confirmed.

Town Attorney Cherof then referred Mr. Nichols to the plans, which had been approved by Messrs. Schlegal and Deal, along with the handwritten notation. He stated there was a stamp half-way down the page that said: "Town of Lauderdale-By-The-Sea, zoning plan review." and then it stated: "Approved By" followed by two sets of initials which had previously been identified as John Schlegal and Harry Deal and dated December 13, 2004.

Mr. Nichols confirmed.

Town Attorney Cherof continued stating that it also stated on the stamp "Conditions Below" which consisted of two.

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Mr. Nichols confirmed. Town Attorney Cherof asked Mr. Nichols to read the first condition. Mr. Nichols read as follows: "Subject to the Pier Pointe Beach Village Overlay District Site Plan Approval Development Order dated April 24, 2004, and recorded as Instrument No. 103533385, Pages 1166 through 1170, recorded April 28, 2004 at 11:00 a.m., Broward County Commission Deputy Clerk 104, Note #2."

Town Attorney Cherof stated that notwithstanding what site plan version was contained in the set that was hand carried to Mr. Deal, that this condition of approval referred him back to the original site plan approved by the Town Commission.

Mr. Nichols confirmed.

Town Attorney Cherof asked if after Messrs. Schlegal and Deal approved the plans had Mr. Nichols ever seen an amendment to the site plan from the Town Commission.

Mr. Nichols reiterated that they were just now applying for the amendment, but he had not seen one previously.

Mayor Parker stated that this concluded the cross-examination.

Mr. Coker stated that the back sheet on the original set of plans for Building #6 had torn off due to all the handling, and therefore, he would tape it to the other sheets. Mr. Coker asked that this be made a permanent part of the record so that everyone would know the sheet had been taped by him.

Mayor Parker advised that Ms. Delegal wanted to conduct some re-examination.

Ms. Delegal referred Mr. Nichols to Exhibit 4 which was the Development Order dated April 27, 2004. She stated that he had read Section 4 on page 4 of 5 from the document that the approval was based on his plans dated March 18, 2004. She asked if there were other conditions contained in that same development order.

Mr. Nichols confirmed.

Ms. Delegal asked what other conditions this development order subject to.

Mr. Nichols stated they involved the public right-of-way which had to be dedicated to the Town through an easement, the owners of the project were to develop the street and redo El Mar Drive, there would be no prevention of the renting of dwelling units, including short-term rentals, developers were to reconstruct the alley along the northern property line to an improved 22' wide roadway with 5' sidewalks and curbing and landscaping along the west for 128', a 12' wide paver walkway with landscaping was to be constructed to the beach, and the owner was to provide an easement on the beach for a future walkway. Other conditions were that the developers had to provide drainage improvements on the alley which had been reconstructed at their expense, developers were to bear the expense of undergrounding the overhead lines along El Mar Drive, and the applicant was to provide to the Town prior to the issuance of a building permit a copy of a recorded 8' wide easement to the Town for a pedestrian path located 15' to 23' east of the sea wall and along the entire length of the property. Ms. Delegal asked if the development approval was subject to these conditions, which were not necessarily reflected

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on the site plan. Mr. Nichols confirmed and added that they were not reflected on their site plan, but were spelled out in the development order.

Ms. Delegal asked if in preparing the construction plans for the project, was it necessary to obtain an amendment to the site plan previously approved by the Town Commission in order to make the adjustments to the stairways.

Mr. Nichols stated that it was his understanding that since they had met the requirements of the Overlay District ordinance, they were well under the 30% encroachment and they would be fine with the changes that were made, and upon submittal to the Town whatever issues existed would be spelled out to them.

Ms. Delegal asked if they thought an amendment was necessary would they have requested their client to do so.

Mr. Nichols confirmed and stated that since the Planning and Zoning Board and Town Commission had approved the project, he believed there would not have been a problem in them granting such an amendment.

Mayor Parker questioned Ms. Delegal's previous question and Mr. Nichols' answer.

Town Attorney Cherof stated that no opinions should be expressed regarding the Commission's competence.

Mr. Nichols stated that he would withdraw his comment.

Ms. Delegal asked when the plans had been presented for zoning sign-off to the Town, and when the plans were received back was it his expectation that the sign-off was an exclusive determination of the Town that the zoning was appropriate, the site plan had been complied with, and that they were ready for building permit application by Broward County.

Mr. Nichols confirmed.

Ms. Delegal asked if the County had questioned the validity of the statements on the site plan.

Mr. Nichols replied they had not questioned any of the conditions because there had been an approval stamp on the documents.

Ms. Delegal asked if Mr. Schlegal had ever indicated that a further review would have to be made for the adjustments prior to the effectiveness of the zoning approval.

Mr. Nichols stated that he had a good relationship with Mr. Schlegal who had phoned him and stated that the plans were ready to be picked up. Therefore, he assumed if there had been any problems he would have been told.

Ms. Delegal further stated that one of the Commissioners had alleged that alterations had been made to the plans. Therefore, she asked when the site plan was approved in March 2004 that showed the stairwells 20' from the right-of-way line, when had they first made revisions to the documents in regard to revising the setback.

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Mr. Nichols explained the changes had been made in the following months, which were apparent in the plans sent to the Department of Environmental Protection (EPA) and Tallahassee. He believed that provided clear evidence that such revisions were made, and then the documents had been submitted to the necessary agencies.

Ms. Delegal reiterated that revisions were made subsequent to the site plan approval by the Town Commission. Ms. Delgal asked Mr. Nichols if any revisions were made subsequent to the time the building constructions plans were provided to the Town for its sign off around November 2004.

Mr. Nichols testified that there were no changes or substitutions to the constructions documents.

Ms. Delegal advised this concluded her questioning.

Mr. Coker asked if Mr. Nichols was familiar with the requirements of the Overlay District.

Mr. Nichols explained that he was extremely familiar with such requirements, and stated that this was the first time he worked in a municipality where there was discretion. In the past the setbacks had always been exact and heights were set.

Mr. Coker asked if definite setbacks of 25' had been provided, and if one wanted to vary from the 25' they had to apply the provisions and standards of the Overlay District.

Mr. Nichols confirmed.

Mr. Coker stated the Overlay District permitted an application to be made to encroach upon the 25' setback up to 15'. Mr. Nichols confirmed, but stated it still had to be within the 30%. Mr. Coker reiterated that it was a continuum between 25' and 15'.

Mr. Nichols confirmed and stated the Town Commission made the final decision.

Mr. Coker stated that one of the provisions of the ordinance stated: "That the standards and conditions of the Zoning Overlay were voluntary, and approval was discretionary. These provisions may be granted through the site plan review and approval process."

Mr. Nichols stated that he was aware of such language, but he had worked in towns where certain variables could be made by staff, and therefore, individuals were not always required to go before the Commission. He added that he had assumed, which he would not do the next time that the variables with the revised site plan had been within the scope and realm of the planning staff of the Town. He assumed that if they had not been within the scope that he would have received a phone call or a published list of comments, and he had received neither.

Mr. Coker stated that there was nothing in the applicable zoning ordinances of this Town that gave staff the discretion to approve modifications to a setback under this Overlay District.

Mr. Nichols agreed. He stated that he had expected that if this had been beyond staff's realm that he would have received comments, and then the plans could have been revised and resubmitted to the Town or they could have amended the site plans and resubmitted them for site plan approval.

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Mr. Coker asked if Mr. Nichols had read in this ordinance or the other ordinances of this Town anything that gave anyone but the Town Commission the right to approve a modification to a setback. There was nothing in writing.

Mr. Nichols stated that he had not seen anything in writing.

Before moving on to the next witness, Mayor Parker asked for disclosures from the Commission. He disclosed that since the last meeting he had spoken with his wife, Dave and Nancy Nixon, Ron Persante, Cindy Geesey, Bob Terrian, Mike Arker, Walter Keller, Bob Baldwin, Jim Cherof.

Mayor Pro Tem Clark stated that since the last meeting he had spoken with Walter Keller, Bob Terrian, Bernie Eckhardt, Jim Cherof, Susan Delegal, Michael Arthur, and Cindy Geesey.

Town Attorney Cherof explained that if the Commissioners had previously disclosed names of individuals, they did not have to do it again.

Commissioner McIntee disclosed that he had spoken with Mr. Coker.

The next witness called upon by Ms. Delegal was Ms. Susan Holland.

Attorney Cherof swore Ms. Holland.

Ms. Delegal asked Ms. Holland to describe her occupation.

Ms. Holland stated that she was a civil engineer and owned her own business.

Ms. Delegal asked if Ms. Holland had been engaged by the principals of the Oriana project to provide services.

Ms. Holland explained Rex Nichols had engaged her in late 2003.

Ms. Delegal asked what services had Ms. Holland provided in regard to this project.

Ms. Holland explained that she had done the preparation of the conceptual civil plan for the site plan submittal.

Ms. Delegal asked Ms. Holland to review the site plan, which had been approved and marked as Exhibit #8.

Mayor Parker clarified that there were two site plans. The official site plan was marked as Town's Exhibit #1, and Ms. Delegal's Exhibit #8 was only the architect's copy of the site plan.

Ms. Delegal explained they were going to testify regarding that because she was going to ask Ms. Holland whether she contributed to the composition of such site plan.

Mayor Parker explained that at some point Ms. Holland would have to make a comparison with the Town's plan.

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Ms. Delegal reiterated that she was not sure they had established that was the official site plan, but that they established through Mr. Nichols' testimony that it was the site plan he had prepared and presented.

Mr. Coker stated his memory was that Mr. Nichols had stated that the site plan marked as Exhibit #8 was a copy he had received from the Town.

Mayor Parker reiterated that a comparison would have to be made at some point.

Ms. Delegal stated that could be done possibly during a break in the proceedings.

Mayor Parker agreed.

Ms. Delegal asked Ms. Holland to review the documents and state whether she had prepared any of them.

Ms. Holland confirmed and explained she had prepared the conceptual plan, which was marked as Sheet C-1.

Ms. Delegal referred Ms. Holland to Exhibit #9, the building construction documents for building #6, and asked if she had prepared any of the sheets in connection with that document. She asked for Ms. Holland to identify her civil engineering plans in that document.

Ms. Holland stated that she had prepared sheets C-1 through C-9.

Ms. Delegal asked for a brief description of each page.

Ms. Holland explained that C-1 was the paving, grading and drainage plan; C-2 was the water and sewer plan; C-3 was signage and dimensions; C-4 was civil sections; C-5 was paving and grading details; C-6 was drainage details; C-7 was water and sewer details one; C-8 was water and sewer details 2; and C-9 was water and sewer details 3.

Ms. Delegal stated that in regard to C-1 Ms. Holland indicated that there were two such documents, and asked why that had occurred.

Ms. Holland explained that as the plans went through the building permit process, reviewers often requested revisions, and therefore, a revised plan had to be submitted that was inserted into the original set.

Ms. Delegal asked if that was a common occurrence.

Ms. Holland confirmed.

Ms. Delegal referred Ms. Holland to C-1 again and asked her to compare it with the site plan approved, and asked whether or not the construction drawings contained in Exhibit 9 were based on the site plan conceptual documents that she was comparing.

Ms. Holland explained that the plans were different, and that the loading area on the southern end of the site had been deleted from the construction plans, and the fountains had been moved.

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Ms. Delegal asked Ms. Holland if she noticed a drive aisle in the construction plans consistent with the site plan.

Ms. Holland asked for a further clarification of "drive aisle."

Ms. Delegal stated the drive aisle located on the southern end of the property.

Ms. Holland explained that had been designated as a loading zone and was not on the construction plans.

Ms. Delegal asked after Ms. Holland had prepared Exhibit C-1 included in the site plan had she been provided a further site plan in order to prepare her construction documents.

Ms. Holland confirmed and believed they had been provided to her in the middle of 2004.

Ms. Delegal asked what type of format had she received the revised site plan.

Ms. Holland stated that it was sent to her electronically via e-mail from Mr. Nichols' office.

Ms. Delegal asked if this had been the only set of drawings that she had prepared in connection with this project.

Ms. Holland confirmed.

Ms. Delegal asked if she had been requested to create another set of documents consistent with the originally approved site plan as depicted on C-1, Exhibit 8.

Ms. Holland stated she had not received such a request.

Mr. Coker stated that in looking through the documents marked C-1 through C-9, there was nothing in them that indicated the setbacks for the buildings.

Ms. Holland agreed.

Mr. Coker further stated that there was no site data sheet included either that showed the number of parking spaces and square footage of the building.

Ms. Holland confirmed.

Mr. Coker asked if a zoning reviewer would use these plans to check for zoning criteria.

Ms. Holland believed they would not have used these plans.

Commissioner McIntee asked how long Ms. Holland worked for Rex Nichols.

Ms. Holland stated that she had done about 5-6 jobs with Mr. Nichols spanning over 4-5 years.

Commissioner McIntee asked in regard to this project, when had Ms. Holland become aware of the fact that there was a major problem with the stairwells.

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Ms. Holland stated that it was about one week ago.

Commissioner McIntee further asked if the word encroachment was used would that be a flag for the Town that there could be some zoning problems.

Ms. Holland stated that she rarely dealt with site plan issues, and therefore, she had not been aware of the setbacks.

Mayor Parker asked if there was anyone in the audience qualified to cross-examine and wanted to do so. There were no individuals wishing to do so.

Ms. Delegal stated that she had entered Ms. Holland's credentials into the record, and asked if she had any experience working with municipal governments.

Ms. Holland advised that she had previously worked for the City of Hollywood and the City of Fort Lauderdale where she had been the City Engineer.

Ms. Delegal asked if Ms. Holland could be released as a witness for the evening.

Mayor Parker agreed.

Ms. Delegal's next witness was Mark Jacobson and reminded him that he was still under oath.

Mr. Jacobson confirmed.

Ms. Delegal asked if Mr. Jacobson had prepared any documents for inclusion in the site plan submitted and approved in March 2004 by the Town Commission. She then referred him to Applicant's Exhibit #8.

Mr. Jacobson stated that he had prepared four sheets marked as L-1 through L-4. He explained that the first one was the illustrated site plan, the second was a landscape plan, the third one was a tree disposition plan, and the fourth was plantless notes and details.

Ms. Delegal referred Mr. Jacobson to the construction plans for building #7 which was introduced as Applicant's Exhibit #10. She asked which plans had he prepared in regard to these documents.

Mr. Jacobson stated that he prepared sheets LP-1, 2, 3, LH-1, 2, 3, and F-1, 2 and 3 and were planting and lighting plans, plantless notes and details, artscape and layout plans, and fountain plans.

Ms. Delegal asked for Mr. Jacobson to review document LP-1 and compare it with the landscaping he prepared, and make a determination as to whether or not his plans were based on the same site plan contained in the March, 2004 site plan.

Mr. Jacobson stated the plan currently in front of him was a different site plan than had originally been submitted because originally they added all plant material by hand which was generally done during the permit process, and when the final plan was done information was entered into the computer. Another difference was that on the original plan they showed the old site plan

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reflecting the maintenance access and the swimming pool with access to it. He added that the fountain had also been relocated. He reiterated that in the current plan they had relocated the fountain, eliminated the maintenance drive, and they modified the pool area, which included handicapped ramps and also some stairs.

Ms. Delegal asked if in regard to LP-2 were the plans different from the site plan documents.

Mr. Jacobson stated that this sheet was only added during the construction phase because it had been a lighting plan and was not required as part of the initial site plan, but it was consistent with the sheet before it showing the revised base. He added that it was inconsistent with the original site plan.

Ms. Delegal stated that subsequent to the approval of the site plan in March 2004, had he received any instructions or documents upon which to prepare his construction drawings.

Mr. Jacobson stated he had not received anything until he had been told they were going to apply for the building permit, and then he was issued a new background and the drawings were updated.

Ms. Delegal asked what the background consisted of and who had provided it to him.

Mr. Jacobson explained that they received the background from the architect who sent them e-mail, and then they included through Autocat their information on his base.

Ms. Delegal clarified that Mr. Jacobson's testimony was that he prepared the plans referred to as LP-1 through F-3 on the construction drawings for this project, and she asked if he had received instructions or had occasion to prepare a second set of construction drawings consistent with the original site plan approved in March 2004.

Mr. Jacobson stated he did not.

Ms. Delegal reiterated that he had only prepared one set of construction documents, which were consistent with the revised site plan.

Mr. Jacobson confirmed.

Ms. Delegal stated that during his testimony last week regarding the revised landscape plan, he had stated that possibly one more hedge could have been added.

Mr. Jacobson confirmed.

Ms. Delegal asked if he believed not having that one additional hedge affected the aesthetic design done in connection with the revised landscape plan.

Mr. Jacobson stated that it did not affect it.

Ms. Delegal asked if any revisions would have been made to the landscape plan had there not been an amendment submitted in connection with the revised stairwells.

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Mr. Jacobson stated there would not have been any revisions unless there was availability of plant material.

Mr. Coker stated that he did not have any cross-examination at this time.

Commissioner McIntee asked when Mr. Jacobson had received notification regarding the new building permit.

Mr. Jacobson stated that according to his original date on the plan, it was July 30, 2004.

Commissioner McIntee reiterated that on July 30, 2004 the principals of Oriana knew that the stairwells were being changed, and he had been directed to install some greenery in connection with the change.

Mr. Jacobson stated he never had any conversations with the principals at Oriana, and he had responded to the architect who had sent him a base plan asking him to update the drawings because they were going to make a submission for the building permit.

Commissioner McIntee asked if the July 30<sup>th</sup> base plan showed the new stairwells.

Mr. Jacobson stated he believed it did, but he would check to make sure. After re-checking, he confirmed.

Commissioner McIntee asked how many big trees could there be for a certain amount of square footage.

Mr. Jacobson stated that it depended on what types of trees were used.

Commissioner McIntee asked if the amount of trees shown for that area were a reasonable amount. Mr. Jacobson confirmed.

Mayor Parker stated that if he reviewed the documents correctly, the original site plan had a vegetation plan.

Mr. Jacobson confirmed.

Mayor Parker asked if there was such a plan with the submitted revised plan.

Mr. Jacobson again confirmed.

Mayor Parker stated that it appeared they were taking the same amount of vegetation that appeared in the original plan and using it in a smaller space as reflected in the revised site plan.

Mr. Jacobson stated that was partially correct because they changed some specie types, which were denser. He further explained that there had been a 4' to 5' strip of sod in the original plan that had been between the sidewalk and the beginning of the shrubs, and basically when they moved the building forward the sod left and it was now all shrubs. He further stated they had also added some additional canopy trees as well.

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Mayor Parker stated there were four areas where the plans jutted out into the 25' setback involving the entrance to the buildings, the elevators and the stairwells. He asked what was the width of each encroachment from north to south parallel to El Mar Drive.

Mr. Jacobson stated if they were making a guess based on a drive lane being 22', he would say about 30' for a total of 120'.

Mayor Parker stated that it was his understanding of the ordinance that they were allowed to invade the setback for up to 30% of the width of the property, and therefore, these drawings maxed out the setbacks.

Mr. Jacobson explained they were talking about 120 lineal feet.

Mayor Parker referred Mr. Jacobson to Exhibit 11, which were the plans for Villa Capri, and asked what were the widths of those encroachments.

Mr. Jacobson stated they appeared approximately the same.

Mayor Parker stated that it appeared the encroachment had only been 20% of the setback and not 30%.

Mr. Jacobson agreed.

Ms. Delegal asked if Mr. Jacobson was basing his acquiescence regarding their statements of the percentages with his review of the Mayor's characterization or had he reviewed the code as to how one calculated the encroachment into the setback.

Mr. Jacobson stated he answered the Mayor's questions, and technically the linear footage had nothing to do with the encroachment of the square foot calculations.

Ms. Delegal asked if he had been able to make a calculation or was he even qualified to do so as to whether or not the square footage calculation into the setback area was 30% or otherwise.

Mr. Jacobson stated that was not part of his job description for this project.

Ms. Delegal asked if any other enhancements had been made to the site in connection with the amended site plan other than what Mr. Jacobson had discussed.

Mr. Jacobson stated that there were none on the site itself, but they had proposed landscaping for the median on El Mar Drive going from Commercial Boulevard to Daytura Avenue which had not been included in the original site plan application.

Ms. Delegal asked if anything had been proposed for the rear of the project.

Mr. Jacobson stated that one of the conditions from planning and zoning was for them to see if additional landscaping could be planted along the beach. Other than that there were no other enhancements.

Ms. Delegal asked if there was an increase in the amount of vegetation at the front of the site, which might not be related to the encroachment of the stairwells.

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Mr. Jacobson explained there were several layers of landscaping, and one occurred between the actual bike lane and the back of the curb. He stated there was a row of street trees 30' on center. He stated they also had their own row of canopy trees on their site between the sidewalk and the building, in addition to several groups of palms.

Ms. Delegal asked if they had replaced any of the original specimens with any other types.

Mr. Jacobson confirmed and explained that originally they had depicted on the plan with the original submission date palms that had been replaced with canopy trees to enhance the pedestrian access along El Mar Drive.

Mr. Coker did not have any cross-examination at this time.

Mayor Parker stated that this witness would be excused but not yet released.

Ms. Delegal announced that her next witness was Luis Piedra.

Town Attorney Cherof swore Mr. Luis Piedra.

Ms. Delegal asked for Mr. Piedra to provide information regarding his educational background to the Commission.

Mr. Piedra explained that he had a degree in architecture and was licensed to practice and worked with Mr. Nichols for the last five years.

Ms. Delegal asked if Mr. Piedra was familiar with the site and construction plans of the Oriana project.

Mr. Piedra confirmed.

Ms. Delegal explained that Mr. Piedra was brought forward because of the discussions regarding his role in the preparation of the documents, especially regarding the fire issues. Ms. Delegal asked if he had met with any representatives of this Town regarding the site plan.

Mr. Piedra stated he had met some time in February 2004 with Mr. Schlegal and Mr. Keller. The purpose of that meeting was to clarify the comments Mr. Keller had submitted in a letter.

Ms. Delegal further asked as a result of such meetings had he prepared revisions to the work in connection with the site plan prior to the plans being approved by the Town Commission.

Mr. Piedra confirmed.

Ms. Delegal asked subsequent to the approval of the Town Commission on March 23, 2004 had he any further involvement in this project.

Mr. Piedra stated the next stage of the project was design development, and as with any project they do total research regarding codes and the project.

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Ms. Delegal asked if they had any questions regarding the application of the codes to this project.

Mr. Piedra confirmed and stated that codes were sometimes open to various interpretations, and therefore, courtesy reviews were held with officials regarding the project. In this case, he met with the Broward County Building Department at 955 South Federal Highway, Fort Lauderdale to review the construction documents. He explained that he had several concerns regarding the project that were addressed at that time.

Ms. Delegal asked if the Building Official provided any written documentations or recommendations regarding the project.

Mr. Piedra explained that a written comment was not required since it was a courtesy review.

Ms. Delegal asked if any notations had been made on the plans.

Mr. Piedra stated no notations had been made. He then went to the Fire Department at the Sheriff's Office at 2601 West Broward Boulevard to discuss this project in connection with concerns regarding egress from the site and a recommendation was made that he should follow the NFPA 101, which stated the width of the stairs could be designed to accommodate the occupancy load.

Ms. Delegal asked if any of the recommendations had been put in writing.

Mr. Piedra stated that written comments were only provided at the time of submission of the drawings, and there were no notations made on the plans. Afterwards adjustments had been made on the plans, which was about May or June of 2004.

Mr. Coker asked for further clarification regarding the recommendation made in connection with the stairwells.

Mr. Piedra explained that depending on the occupancy load certain dimensions had to be followed.

Mr. Coker asked how they had been designed originally.

Mr. Piedra stated that it was for less than needed.

Mr. Coker clarified that the stairwells had to be expanded in size in order to meet the requirements of NFPA 101.

Mr. Piedra confirmed. He added this was the only change made by the Fire Marshall, but that it had an effect on other items requiring further changes such as the fire door.

Mr. Coker asked if other alternatives were available to follow the recommendations of the Fire Marshall such as enlarging the stairwells while still staying within the same building envelope.

Mr. Piedra stated that was not necessarily the case because it depended on the relationship of the stairwells to exits, travel distances, and elevators.

Mr. Coker asked if one alternative was to adjust the size of the units.

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Mr. Piedra stated that by adjusting the size of a unit, it would not completely help them accomplish what had to be done, and they would have had to redesign the project, the parking spaces, traffic circulation, and access for emergency vehicles.

Mr. Coker stated that after their office reviewed all the alternatives, they had decided to expand the stairwells outward of the building envelope.

Mr. Piedra confirmed.

Commissioner Silverstone asked if Mr. Piedra had ever been instructed not to say anything regarding this project.

Mr. Piedra stated that he was present to explain his involvement in this project. He reiterated that no one told him what to say or not to say regarding this matter.

Commissioner Silverstone asked who all was involved in the decision regarding the changes to be made to the stairwells.

Mr. Piedra explained that the consideration came from the design team and how they would accommodate the building to reflect code issues.

Commissioner Silverstone asked when the developers became aware of the problems and that changes would have to be made to the design.

Mr. Piedra believed it could have been about 3-4 months ago, but he was not sure of the exact time.

Commissioner McIntee stated he had requested his presence at this meeting and stated that Mr. Piedra was licensed to practice in the State of Florida or anywhere in the United States.

Mr. Piedra confirmed.

Commissioner McIntee reiterated that two site plans were being discussed at this time.

Mr. Piedra confirmed and stated he had seen both plans and had been reviewing such plans for over 20 years totaling about 500 sets of plans. Commissioner McIntee asked if Oriana could be considered a residential or commercial structure.

Mr. Piedra explained that Oriana was a commercial structure. Mr. Piedra stated the Town required architectural site plan, civil and landscape studies.

Commissioner McIntee asked if a commercial structure required fire exists.

Mr. Piedra confirmed.

Commissioner McIntee asked if anything was obvious on the original site plans.

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Mr. Piedra stated that at the time of the submittal nothing actually jumped out at him, but he did not believe the Town was expecting to see stairwells without doors, which was an oversight by everyone.

Commissioner McIntee stated that each fire stairwell had fire doors at all floors except at the bottom.

Mr. Piedra further stated that was a simple mistake and no one should fault the design team for it because it would be expected to see such a door.

Commissioner McIntee asked if Mr. Piedra had been on the original design team.

Mr. Piedra stated he was not and they had inherited the drawings from another architect.

Commissioner McIntee stated this Town had an Overlay District and he asked if Mr. Piedra had discussed this district with the individuals he met with regarding the project.

Mr. Piedra stated he had not.

Commissioner McIntee asked if he had ever discussed the issue of encroachments with anyone.

Mr. Piedra stated he remembered discussing such issues in February with Mr. Schlegal and Mr. Keller.

Commissioner McIntee asked if at that time everyone had been aware that the fire stairwells had been moved into the encroachment.

Mr. Piedra confirmed.

Commissioner McIntee asked if Mr. Schlegal and Mr. Keller commented that the stairwells could not be in the encroachment.

Mr. Piedra stated they did not, but everyone should remember that such meeting occurred approximately three years ago. He continued stating that he remembered that the percentage of the encroachment had been considered, and he believed at that time that Mr. Keller provided an explanation. He explained that the ordinance provided that there could be an encroachment of 10' into the 25' setback.

Commissioner McIntee clarified that no one told him that to go into the encroachment, he would have to return before the Commission for such permission.

Mr. Piedra stated he had not asked about that, and no one provided such information to him. During that meeting, he explained that he was not aware he would be encroaching more into the setback and the plans already reflected an encroachment of 4' into the setback.

Commissioner McIntee asked if he had been advised at any time that this was a major problem and they did not have permission to go into the encroachment.

Mr. Piedra stated he had not been informed of this until recently.

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Commissioner McIntee stated the two stairwells went out approximately 4' 9" at four different locations.

Mr. Piedra confirmed.

Commissioner McIntee explained that between the stairwells there was a veranda/patio in 12 units, and asked if that additional living space was a direct result of installing the stairwells.

Mr. Piedra confirmed and stated the only reason was to keep with the intent of the design.

Commissioner McIntee clarified that 12 condos in the structure received a bonus of additional living space with no additional charge to them.

Mr. Piedra asked if the Commissioner was considering the balcony as additional living space. He explained that it was an open space and it had not been considered who would get more space. In this case the structure showed an increase in those areas.

Commissioner McIntee asked if the encroachment had been discussed during his meeting with Mr. Schlegal and Mr. Keller.

Mr. Coker stated that he did not believe the Commissioner and the witness were referring to the same dates. The meeting occurred with Mr. Schlegal and Mr. Keller, according to Mr. Piedra's testimony, in February 2004 as a prelude to the initial site plan application submittal. Adjustments were made and then the plans went before the Planning and Zoning Board and the Commission. He stated that they were not discussing the encroachments that occurred later.

Commissioner McIntee stated if Mr. Piedra had showed Mr. Keller and Mr. Schlegal in 2004 a preliminary situation where the stairwells were not sufficient and were being corrected, then why between 2004 and going before the Planning and Zoning Board and the Commission had they not come back to them.

Mr. Coker apologized and stated he had misunderstood the line of questioning.

Commissioner McIntee asked when this project was presented to the Planning and Zoning Board.

Ms. Delegal stated that was in 2003 and Mr. Piedra was not yet involved in the project. These architects came into the process after several hearings had been held with the Planning and Zoning Board. Around January 2004, the Nichols firm had been engaged by the property owner to redesign the project so it would be more acceptable to the Planning and Zoning Board. She believed the Planning and Zoning Board then approved the new design in January 2004. In the next couple of months, the project was presented to the Commission, but during that time, work was still being done on the project.

Ms. Delegal clarified that in January 2004 the Planning and Zoning Board continued this matter, and in February they approved the site plan. The next month the project was presented to the Commission. Before the February Planning and Zoning Board meeting, Mr. Piedra had met with Messrs. Schlegal and Keller.

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Commissioner McIntee asked if the problem with the stairwells had been discussed with those individuals in early 2004.

Mr. Piedra stated they had not discussed that issue. He clarified that the meeting with those gentlemen involved discussing the comments in Mr. Keller's letter regarding the 24 changes. He emphasized that the fire issues had not been discussed. He further clarified that he had not been told about the problem with the stairwells by anyone. Research was done regarding the codes and questions arose which he had clarified by the various agencies. Then conclusions were made that the stairwells needed to be increased in size.

Commissioner McIntee asked if the fire officials had never stated the problem regarding the stairwells.

Mr. Piedra clarified that when he met with the Fire Marshall, they went through various issues.

Commissioner McIntee asked if the Fire Marshall's first complaint was in connection with the lack of sprinklers in the building.

Mr. Piedra stated that was not the case. He further clarified that he questioned the Fire Marshall about the design of the stairwells and whether he had to follow the Florida Building Code or NFPA 101.

Commissioner McIntee asked that a copy of Mr. Keller's letter to Mr. Piedra be provided to the Commission because he felt such an issue had to have been included.

Mayor Parker asked if Ms. Delegal had any redirect questions.

Ms. Delegal stated she wanted Mr. Piedra to walk through the issues one more time.

Ms. Delegal asked when Mr. Piedra met with Messrs. Keller and Schlegal in early February 2004, what had been the substance of their conversation.

Mr. Piedra stated they received the letter from Mr. Keller regarding revisions to be made to the plan and he wanted some clarifications concerning what actually had to be done to obtain site plan approval.

Ms. Delegal asked if any of the conversations revolved around fire or life safety issues in connection with the stairwells.

Mr. Piedra replied they had not discussed those issues.

Ms. Delegal asked Mr. Piedra if he was aware of issues regarding the size and location of the stairwells.

Mr. Piedra stated he was not aware of such issues until after March 2004 after they had conducted their analysis.

Mayor Parker stated that he felt Ms. Delegal was leading the witness.

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Mr. Coker believed there was some confusion regarding Mr. Piedra's testimony reflecting discussions with the Fire Marshall. It was his understanding that the Fire Marshall had reviewed the plans and stated that the stairwells needed to be increased in size, but he had not testified to that. He stated that Mr. Piedra testified that he met with the Fire Marshall and one of the questions asked was in regard to applying the Florida Building Code or the NFPA 101. Based upon the answer provided by the Fire Marshall, he then redesigned the project.

Mr. Piedra confirmed and stated that once such information was obtained, the stairwells had been increased in size.

Mr. Coker stated their understanding prior to this testimony was that the Fire Marshall had reviewed the plans and he informed Mr. Piedra that the stairwells had to be increased in size in order to meet the Fire Codes. Now, Mr. Piedra stated that the Fire Marshall answered his question regarding the code to be applied and then he redesigned the stairwells.

Mr. Piedra stated specific instructions were not given as to what should be changed. The Fire Marshall instructs what code to be applied, along with the circumstances. At that time they did not physically ask what was wrong with the plans, but that specific questions were asked regarding specific issues.

Mr. Coker asked if Mr. Piedra was the representative of the firm who decided what questions were to be asked.

Mr. Piedra stated that was not the case and that the research process was a team effort. He reiterated that he had met with the representatives of the Town and the officials at the other agencies.

Mr. Coker asked if there had been any other meetings with representatives at the Town regarding the modifications to be made to the site plan.

Mr. Piedra stated he had not had any further meetings with the Town.

Mayor Parker stated that it was his understanding from previous testimony that the Petitioner had asked the Fire Marshall to give a preliminary review, and the Fire Marshall had stated the stairwells were to be widened. Now, he believed he was being told that the Petitioner asked the Fire Marshall what standards were to be followed, instructions were given as to the code to be followed, but no recommendation was made as to the widening of the stairwells. The architectural firm made a determination, that if such code was to be followed, the stairwells had to be widened.

Mr. Coker stated that was the testimony he had just heard.

Mr. Piedra stated that once the Fire Marshall/Inspector reviewed the plans such a question had been raised, and by applying the appropriate code they reviewed the regulations and consent was made to widen the stairwells. He further stated that by specifying what code was to be followed, there was the understanding that the stairwells had to be widened.

Mr. Coker asked Mr. Piedra if he was involved in the Villa Capri project.

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Mr. Piedra confirmed and stated that NFPA 101 was followed for that project also. He believed that those staircases were wider.

Ms. Delegal announced that her next witness would be Michelle Melgren who had been sworn and spoke at the previous meeting.

Ms. Delegal stated Ms. Melgren showed a video at the last meeting.

Mayor Parker asked Mr. John MacMillan to return to his seat. He asked for the Sheriff's Deputy to assist Mr. MacMillan back to his seat.

Commissioner Silverstone motioned to overrule the instructions of the Mayor to have Mr. McMillan return to his seat. Commissioner McIntee seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark voted yes. Mayor Parker voted no. Motion carried 4-1.

Ms. Delegal explained that Ms. Melgren was instructed to review the video regarding accuracy and then point out any discrepancies.

Michelle Melgren explained that questions had been raised at the last meeting as to whether the sidewalk was the proper dimension. After reviewing the video, the sidewalk was 8' in width, but there was an error in dimension and both buildings in the video had been pulled 4' closer to the front than what they should have been.

Ms. Delegal asked if Ms. Melgren was to compare any additional videography and provide testimony at tonight's meeting.

Ms. Melgren stated they prepared two other videos to be shown. The videos were shown at this time. Ms. Melgren explained that in the first one, they adjusted the location of the buildings with respect to the front property line and trimmed back the plantings. She further stated that in her previous testimony she indicated this was a graphic program and certain templates were used for certain shrubbery. Therefore, they attempted to replicate as close as possible the types of species being used.

Ms. Delegal stated that this video would be marked as Applicant's Exhibit 12. She added that the previous video from the last meeting was marked as Applicant's Exhibit 6.

Mayor Parker asked for Exhibit 6 to be shown. He added that it appeared the vegetation had been changed.

Ms. Melgren explained that the size and growth of the vegetation had been changed, but the location and number of plantings were the same except that in Exhibit 12 there was a palm tree where a canopy tree had been shown previously in order to better show the building. She explained further that the purpose of these videos was to assist her in determining whether or not the proposed further reduction of the front setback was consistent with the purpose and intent of the Overlay District.

Ms. Delegal stated that the video showing dimensions would be marked as Exhibit 13.

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Mayor Parker advised that copies of the videos were to be provided to the Commissioners and one for the record.

Ms. Melgren agreed.

Ms. Delegal asked Ms. Melgren to show the video depicting the buildings without landscaping. She stated this would be marked as Exhibit 14.

Ms. Melgren stated that in this video the landscaping was eliminated so as to show the buildings in their relationship to the street.

Mayor Parker stated that the approved landscape plan did not call for skeleton trees. Ms. Melgren reiterated this was a graphic tool so as to show the building with the landscaping. This was to determine whether the building placement had a negative effect on the pedestrian environment.

Commissioner McIntee asked if there was to be any growth at the end of the alley.

Ms. Melgren stated they prepared this graphic to focus on the setbacks of the two buildings relative to the street, and these questions would have to be directed to the landscape architect.

Ms. Delegal stated that based on the preparation of the videos in evaluating the scope of the intrusion of the stairs had her judgment changed in connection with her earlier testimony that there was an imperceptible difference in the perception of a pedestrian walking by.

Ms. Melgren stated her professional opinion had not changed. She stated that she prepared these videos so they could further evaluate the reduction of setbacks and what affect it had on the pedestrian environment. It was her opinion that this was important because the ordinance of the Beach Overlay District stated the Commission had discretion to reduce the setback from 25' to 15' if the development had a sufficient quality of design. Her opinion was that given the placement of the buildings, the landscaping, and the architectural features, there was a pleasant pedestrian environment, and the reduction in the setback did not have a negative impact.

Ms. Delegal asked Ms. Melgren her profession opinion in connection with the satisfaction of the amendment and enhancements provided and applied to the criteria of the ordinance.

Ms. Melgren stated it was her opinion that the proposed amendment met the criteria of the ordinance.

Ms. Delegal asked if Ms. Melgren had reviewed the notation placed on the back of the construction drawings and initialed by representatives of this Town.

Ms. Melgren stated she had and it was her opinion that was the approval of the plans. She further clarified that the notation stated: "It's approved by the Town of Lauderdale-By-The-Sea Zoning Plan Review and subject to the Pier Pointe Beach Village Overlay District Development Order and approval and permits from the Town Engineer." She stated that to her the placement of that note indicated that a full review had been conducted by the Zoning Department, and if there had been any issues they would have been listed and pointed out to the applicant, which was normally done at the time of submission.

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Ms. Delegal stated there had been discussion previously as to whether it was reasonable to expect a reviewer of the plans from a zoning perspective to scrutinize them in connection with mechanical, engineering, or structural issues. The implication was that things could easily be missed because that would not be something in the purview of the zoning reviewer. She asked Ms. Melgren's opinion as to what type of review she would do on a set of construction drawings presented to her for zoning approval and what types of things would be relevant. She added that Ms. Melgren had been qualified as an expert witness.

Town Attorney Cherof confirmed.

Ms. Melgren stated her office provided building permit review for the Town of Southwest Ranches and it was typical for them to look at the site plan, along with the elevations and floor plans in order to verify height and the number of units for the project. The site plan and the building permit plan would be compared to make sure they matched.

Ms. Delegal asked if they reviewed mechanical drawings included in the construction plans.

Ms. Melgren stated it would depend on the type of development being reviewed. In some situations they could be reviewed, especially if there could be additional units later on or a guesthouse that was not normally permitted. She stated it was not unusual for zoning review to look at other sheets outside of the site plan to ensure that all of the elements of the permit application met with the broadest zoning requirements. Since this was in an Overlay District and architectural treatments had been approved as part of the site plan, Ms. Delegal asked if it would be reasonable to assume that architectural drawings would also be reviewed.

Ms. Melgren confirmed and stated the landscape plans would also be reviewed.

Mr. Coker asked if Ms. Melgren was suggesting that with or without the notation on the plans that an architect could decide to change setbacks if approved by a development order from 20' to 15'.

Ms. Melgren stated that she was not making that suggestion.

Mr. Coker stated she was suggesting that someone could misconstrue that a full review had taken place no matter what the caveat stated.

Ms. Melgren stated her testimony was that if she saw such a note on plans that she would be of the opinion that a full review had occurred, and that it was not just a note stating that someone else should make sure it complied with the codes. She would assume that staff had reviewed them carefully.

Mr. Coker asked her if she was saying that this note absolved the architect, planner or anyone else from compliance with the Town codes.

Ms. Melgren stated she was not implying that.

Mr. Coker stated it was the responsibility of the site planner to comply with the Town's regulations.

Ms. Melgren confirmed.

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Mr. Coker stated that Town officials make mistakes all the time.

Ms. Melgren stated that architects also made mistakes.

Mr. Coker reiterated that even if this was a mistake, it did not absolve the professional from their duty to comply with the code.

Ms. Melgren stated she believed that question required a legal opinion and she would defer to the attorney. She added that she did this for a living but could not speak to any legal liability that the Town may or may not have, but the public was required to follow the code. If incorrect information was provided or there was a lack of information being provided, she could not speak as to who was liable or not.

Mr. Coker asked if Ms. Melgren wrote development orders for Southwest Ranches.

Ms. Melgren confirmed and explained that they were also double-checked for compliance.

Mr. Coker stated that Ms. Melgren testified that other drawings were also reviewed at times. He asked if architectural drawings or elevations indicated setbacks.

Ms. Melgren stated she had not reviewed the plans, and therefore, could not speak to that.

Commissioner McIntee asked if anyone in Southwest Ranches wanted to go between 25' and 15' would have to go before the Commission.

Ms. Melgren confirmed.

Mayor Parker stated if Southwest Ranches gave permission for someone to go to 20' and a building plan was submitted, but then they were told by the building department to make changes would they be expected to change those plans on their own to 15' before building, or would they have to receive permission from the Commission prior to building.

Ms. Melgren stated she would expect them to call it to staff's attention and then policy should be followed. She added that she would also require a spot survey once the slab or foundation was poured.

Commissioner Silverstone asked if there were any computer animations as to what the site looked like at this time.

Ms. Melgren stated there were not.

Ms. Delegal asked if Ms. Melgren had signed off on a note as the one she read from the Town and did not mean it to convey that it was ready for consideration by the permitting agency to ascertain the proposed plans were in compliance with the zoning code, would she have made any additional notation or sent out something to reflect such wording.

Ms. Melgren stated that she would have added an additional note. The Broward Building Department would not accept plans unless there was a final zoning approval on it. She added that had she signed off in that way, it would have been her intent that the plans were ready for submission.

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Mr. Coker stated that note in no way permitted anyone to build anything inconsistent with either the code or development order approved by this Commission.

Ms. Melgren confirmed.

Mayor Parker excused the witness. He then asked Ms. Delegal if she was ready to rest her case.

Ms. Delegal advised that she had no further witnesses, but retained the right to call a witness back for rebuttal.

Mr. Coker stated that his case was related to staff's report; the analysis and some background and believes it would take about 15 minutes.

Mayor Parker asked for staff to compare Applicant's Exhibit 8 with Town's Exhibit 1 in order to make sure they were the same.

Ms. Delegal reiterated that it was important that this matter move forward and be resolved.

Commissioner Silverstone motioned to recess this portion of the meeting until Monday February 19 from 7:00 p.m. to 10:00 p.m. Mayor Pro Tem Clark seconded the motion. The motion carried 5-0.

It was decided by Commission consensus to meet at 6:00 p.m., prior to the regularly scheduled meeting of February 13, 2007 for the purpose of hearing all other business on the Agenda of January 23, 2007.

Mayor Parker called the meeting of January 23, 2007 at 6:00 p.m. Vice Mayor John Yanni, Mayor Pro Tem Chuck Clark and Commissioner McIntee were present. Municipal Services Director Bill Mason, Town Attorney James Cherof and Deputy Clerk Andrea Gerlach were also in attendance. It is noted as part of this record that Town Manager Robert Baldwin was absent from this meeting and Municipal Services Director Bill Mason was present on his behalf. Commissioner Silverstone arrived after the meeting had reconvened.

All stood for the Pledge of Allegiance.

Mayor Parker stated that they would proceed with the Consent Agenda.

## **7. CONSENT AGENDA**

A. Transfer of Agreement for Special Magistrate Services of Alan Gabriel, Esq. From Katz Barron Squitiero Faust to Weiss Serota Helfman Pastroiza Cole and Boniske, P.A. (Town Manager Robert Baldwin)

Vice Mayor Yanni motioned to approve the Consent Agenda Item. Mayor Pro Tem Clark seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark, and Mayor Parker voted yes. No one voted against the motion. Motion carried 4-0.

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Commissioner McIntee asked if there were any items for Commissioner Silverstone that they return to them upon his arrival.

**12. RESOLUTION**

None.

**13. OLD BUSINESS**

- A. Discussion and/or action regarding the cost per foot to bury overhead utility lines for individual properties being constructed (*Town Engineer Kevin Hart*) (*Tabled from October 24, 2006*)

Municipal Services Director Mason stated that Mr. Hart had no further information on this matter and the presentation would have been brief. Mayor Parker advised that the presentation would be made upon Mr. Hart's arrival at the meeting.

- B. Selection of members for a committee to make recommendations to the Commission for consideration of a grand marshal for the 2007 Fourth of July Celebrations (*Continued from November 28, 2006*)

Mayor Parker advised that Mayor Pro Tem Clark was the Chairman for the Parade, and he thought they had instructed him to select his own committee and then make recommendations to the Commission.

Mayor Pro Tem Clark stated that he did not remember such instructions, but would prefer that procedure.

Commissioner McIntee motioned to appoint Mayor Pro Tem Clark to form a committee for the purpose of selecting individuals as the grand marshal of the 2007 Fourth of July Celebrations. Mayor Parker seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark and Mayor Parker voted yes. No one voted against the motion. Motion carried 4-0.

Mayor Pro Tem Clark advised that recommendations would be made to the Commission at their next regular meeting. He stated that the Commission could submit names for consideration.

- C. Discussion and/or action regarding the possibility of installing covered bus stops within the Town's municipal boundaries (*Vice Mayor John Yanni*) (*Tabled from November 28, 2006*)

Vice Mayor Yanni stated that Municipal Services Director Mason had researched the cost and deferred to him.

Municipal Services Director Mason stated the cost of such a shelter would run about \$5,000. Staff met with Broward County Mass Transit and was told there are 33 bus tops, and they were willing to make 21 of the stops ADA compliant. There could be match money available for such shelters, and free shelters could be obtained if they permit advertising on them. He further stated that since the Town had outlawed bench advertising, it probably would not be considered by the Commission. It was stated that shelters would probably not be needed at all the stops.

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Mayor Parker asked for a report to be provided to the Commission within six weeks.

Mayor Pro Tem Clark asked what type of funding was available.

Vice Mayor Yanni explained that it was a 50/50 match and they could contribute in-kind expenses.

- D. Discussion and/or action regarding the requirements for green space so as to not allow beach areas to be included in the total percentage (*Commissioner Jerry McIntee*) (*Tabled from November 28, 2006*)

Commissioner McIntee stated that developers had informed him that they were allowed to use the beach as green space. He stated that the code in the Overlay District needed to be changed to eliminate the use of beach frontage of structures as green space. He asked how this could be done.

Town Attorney Cherof explained that there would have to be an amendment to the Land Development Regulations to redefine which areas could be counted for density purposes. He further stated that the Commission could advise staff to meet and see what provisions of the code this would apply to and then bring forth recommendations for an ordinance.

Commissioner McIntee motioned that staff was to meet and generate a draft ordinance which would disallow the use of the beach for green space in future developments. Vice Mayor Yanni seconded the motion.

Mayor Pro Tem Clark asked Mr. Keller to think about what impact this would have on potential development and current owners.

Mr. Keller explained there would be a significant impact on all the beachfront properties. He stated that what this Town did in creating ordinances was the same as every town up and down the coast. Most property owners have rights that extend either to the erosion control line or the high water line. He explained that there were restrictions for part of the area covered by the beach. These properties were the most expensive and had a difficult time being economically viable. He further explained that he had reviewed three sites, which went through the Overlay District, and whether the properties were in the Overlay District or RM-25 they were treated the same. Owners can count the land for density purposes and as an impervious area, but it could not be built on. He stated that most properties along the beach area count for about 14% of the site. He explained that he had checked this for three projects, which were Villa Capri, Oriana, and Villas-By-The-Sea. He stated there would be a financial impact if they could not count the beach area, and there would also be an impact on the site design.

Mayor Pro Tem Clark stated that it would impact density.

Mr. Keller confirmed.

Mayor Pro Tem Clark stated that he had no objection to the study, but wanted to make his point.

Mayor Parker asked if the density requirements were changed, then they would no longer count the beach and would that cause a problem.

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Town Attorney Cherof stated that it could constitute a regulatory taking of property.

Mayor Parker asked if there was a green space requirement in the code that was separate from a pervious area requirement.

Mr. Keller stated that he was not aware of such a requirement. He further stated that when developers say they want 25% of green space that normally meant a pervious area. The difference was that 75% of a site in RM-25 could be hardscape, but then 25% had to be pervious so water could eventually filtrate into the soil.

Mayor Parker asked if landscape requirements could be changed.

Mr. Keller stated that for the most part codes normally did not differentiate between landscaping and pervious.

Commissioner McIntee clarified that he did not want this to affect Villas, Oriana or Villa Capri because they were in operation and under due process. He was referring to any new site plans so there would not be a piece of land covered in concrete structures and the only pervious area being some hedges along the edge of the project.

Mayor Parker clarified that Commissioner McIntee did not want the rules regarding density changed, but that he was concerned about the pervious area in the buildable space.

Commissioner McIntee stated that if it meant changing the density rules in order to protect the beach and the new structures, then so be it.

Mayor Parker stated that he believed the Commissioner was saying that for sites on the ocean, there should be a percentage of the land west of the building setback or sea wall.

Mr. Keller stated on the ocean there was a setback line, which was the sea wall.

Mayor Parker further clarified that the Commissioner was asking for a certain percentage of the property west of the sea wall be pervious area.

Commissioner McIntee stated that was not what he was recommending. Commissioner McIntee stated that developers constructing on the beach should not be allowed to use the beach and refer to it as green space.

Mayor Parker further clarified that the Commissioner wanted 25% of the area west of the sea wall as pervious area.

Commissioner McIntee confirmed. Commissioner McIntee stated that he wanted the Town Attorney to generate a study and the ordinance.

Vice Mayor Yanni asked for a further clarification of green space in relation to the beach.

Mr. Keller remarked that this had nothing to do with the Overlay District. The State only permits sea oats to be planted on the beach.

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Vice Mayor Yanni asked if they were permitted to have less pervious area on the property since they owned part of the beach.

Mr. Keller stated that it could be possible if someone was maximizing the site.

Commissioner McIntee explained that he was attempting to avoid having the developers use the beach for green space.

Mr. Keller stated that possibly some controls should be created for those types of properties.

Vice Mayor Yanni asked if this passed how would that affect a developer wanting to build on the beach.

Mr. Keller explained that no one was permitted to build east of the sea wall, but for density purposes and pervious area requirements, they could count the area which could mean they would have less than a 25% landscaped pervious area within the net area.

It was stated that it would limit the footprint of the building.

Mayor Parker asked if the footprints were limited would that lower density. It was stated that the size of the units could be affected. Mayor Parker asked if they enacted an ordinance regarding the green space on the beach would that be a zoning amendment.

Town Attorney Cherof stated that they would have to check the Charter provision, and without getting to the point of drafting the ordinance, it was hard to know whether the ordinance would require a referendum vote.

Mayor Parker asked if an ordinance changing density would require a referendum vote.

Town Attorney Cherof confirmed.

Mayor Parker amended the original motion to direct the Town Attorney to draft the ordinance but not to include any change in density requirements, and to prepare a report of the affect this might have in connection with the Burt J. Harris Law. Mayor Pro Tem Clark seconded the motion. Vice Mayor Yanni, Mayor Pro Tem Clark, and Mayor Parker voted yes. Commissioner McIntee and Commissioner Silverstone voted no. The amendment passed 3-2.

Mayor Parker asked for the Town Clerk to call the roll on the motion as amended. Vice Mayor Yanni, Commissioner McIntee, Mayor Pro Tem Clark, and Mayor Parker voted yes. Commissioner Silverstone voted no. Motion as amended carried 4-1.

This would be brought before the Commission at their second meeting in March.

- E. Discussion and/or action on clarifying and correcting the Charter updates previously submitted to the State to include Section 4 of the height limit petition as approved by the voters in March in order to implement the will of the people. *(Commissioner Jerry McIntee) (Tabled from November 28, 2006)*

Mayor Parker stated that he believed this issue had been discussed twice previously.

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Commissioner McIntee stated that would withdraw this item from the agenda.

- F. Discussion and/or action regarding the scheduling of a presentation of the Executive Summary Evaluation of Fire Assessment Program by Christopher B. Roe, Esquire, of Bryant Miller Olive P.A. (*Town Manager Robert Baldwin*)

Municipal Services Director Bill Mason stated he was not aware of this item.

Town Attorney Cherof explained that the attorneys hired to provide a second opinion were to provide a detailed written opinion. They were to come and explain their opinions, but Mr. Baldwin was reluctant to have them do so without the Commission's approval. This has already cost over \$30,000 for the second opinion, and if they come and make a presentation they would bill the Town according to their hourly rate.

Mayor Parker asked if presentations were necessary.

Town Attorney Cherof stated a memo was sent to the Commission and if they understood it as he did, the answer would be no.

Commissioner Silverstone stated that the cost would be an additional \$3,000 to \$4,000 for these presentations. He stated that in reading the material one thing he noticed was the definition regarding emergency medical services. The definition was taken from the State Statutes and defined it as transportation services, but it was not. He further stated that part 3 provided another definition as follows: "It includes transportation and non-transportation services." He believed the definitions were conflicting. He further stated that it was to be a third-party opinion and the contract, he believed, stated they were to work with the Town's attorney.

Town Attorney Cherof stated it was a third-party opinion, and the only contact with his office was to request information regarding the preparation of the underlying ordinance authorizing the fire assessment and the resolutions done on a year-to-year basis in addition to the notices provided. He stated his office intentionally distanced themselves from any analysis being done.

Commissioner Silverstone stated that there had been caution in preparing for a meeting with Mr. Davis and Mr. Cirillo in connection with liabilities that could arise from the study.

Town Attorney Cherof stated that people appeared before the Commission stating they disagreed with the legal basis for the fire assessment, and some comments led to anticipation for probable litigation. The purpose of monitoring the first meeting was to make certain that safeguards were built in so the information provided by the attorneys as a third opinion would not be shared with third parties who could be plaintiffs and sue the Town.

Commissioner Silverstone believed the position taken had a definite impact on their decision.

Town Attorney Cherof explained the attorneys stated the law as they understood it, but the fire assessment was legal and defensible.

Commissioner Silverstone stated that he wanted the attorneys to come forward and make their presentations. He believed this was a perfect example of why a forensic audit was necessary. He added that he was not satisfied with the material he received on the matter.

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Commissioner McIntee motioned to table this matter until the second Commission meeting in March. Commissioner Silverstone seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. No one voted against the motion. Motion carried 5-0.

- G. Discussion regarding letter to Vice Mayor Yanni from State Ethics Commission  
(*Vice Mayor John Yanni*)

Vice Mayor Yanni motioned to remove this item from tonight's agenda. With no objection, the item was removed from the agenda.

Commissioner McIntee stated that a list was to have been compiled showing all the tabled items.

Town Attorney Cherof stated that he had sent an e-mail to the Commission regarding future agenda items. He explained that he was going to bring this up under his report this evening.

- H. Discussion and/or action regarding the scheduling of a workshop meeting to discuss the Unified Land Development Regulations (*Development Services Director Jim Bell*)

Jim Bell, Development Services Director stated that he would defer to the Town Attorney because this predated his coming to the Town.

Town Attorney Cherof reminded everyone that staff prepared a major renovation to the Land Development Regulation so there would be a Unified Land Development Code between the Town as it existed before annexation of the areas brought in under the County regulation. The goal was to minimize the need for variances and minimize the conflict between the two codes. The master ordinance implementing all the changes made it through first reading, but on second reading it had been tabled indefinitely because the Commission wanted to review each section, rather than adopt it as a whole and then amend it by exception. The Commission indicated they would schedule a workshop meeting to begin the process, but so far none had been scheduled. He reiterated that this was an important project and the regulations should be reviewed.

Mayor Parker suggested that they discuss the date for the workshop after their next meeting.

Commissioner Silverstone motioned to table this item until the first Commission meeting in April. Commissioner McIntee seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. No one voted against the motion. Motion carried 5-0.

#### **14. NEW BUSINESS**

- A. **PUBLIC HEARING – SITE PLAN** Commerce Bank, located at Southwest Corner of A1A and Commercial Boulevard

Town Planner Walter Keller stated that this item should not be on tonight's agenda because staff did not have any information on this matter and were waiting to hear from them. The

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matter would be re-advertised. Therefore, this item should be removed this item from the agenda.

Mayor Parker stated that since there was no objection, this item would be removed from tonight's agenda.

**B. PUBLIC HEARING – SITE PLAN Pier Pointe Resort located at 4316-4344 El Mar Drive.**

Mayor Parker advised that the Commission was in the process of this public hearing and would continue the matter this coming Monday.

**C. Discussion and/or action regarding a request for extension on the site plan for Bougainvilla Townhouse, located at 4417 Bougainvilla Drive.**

Town Planner Walter Keller stated that the applicant requested to have this item tabled until the next scheduled Commission meeting, and there would be additional properties connected to this item. When the applicant submitted his request for the extension, there were three other parcels with this item, which he had not included in his letter. Therefore, a new letter had to be submitted and the matter should be tabled until that time.

Mayor Parker advised that since there was no objection, this matter would be tabled until the second meeting in February 2007.

**D. Discussion and/or action regarding Section 3.6 of the Town Charter  
(Commissioner Jerry McIntee)**

Commissioner McIntee asked for the Town Attorney to read the subject section.

Town Attorney Cherof read as follows: "3.6 – Non-Interference in Town Administration: "The Town Commission or its members shall not give orders to any Town officer or employees who are subject to the direction and supervision of the Town Manager either publicly or privately. Nothing in the foregoing is to be construed to prohibit individual members of the Town Commission from examining by question and personal observation all aspects of Town Government operations so as to obtain independent information to assist the members in the formulation of policies to be considered by the Town Commission and assure that the implementation of such policies has been adopted. It is the express intent of this provision, however, that such inquiries shall not interfere directly with the regular municipal operations of the Town and that recommendations for change or improvements to the Town Government operation be made to and through the Town Manager."

Commissioner McIntee asked if he was to interpret this language to specifically say that none of the Commissioners could give any direction orders to anyone who works for the Town Manager or Mr. Baldwin.

Town Attorney Cherof confirmed and stated they would need his consent or he would have to direct his employees to acquiesce to such requests.

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- E. Discussion and/or action regarding the possibility of amending the ordinance concerning the hook-up to the sewer system by changing the final date of hook-up to April 1, 2007 (*Mayor Pro Tem Chuck Clark*)

Mayor Parker stated that it was his impression that this matter had been discussed previously.

Mayor Pro Tem Clark stated that this matter had been addressed at the last meeting.

Mayor Pro Tem Clark motioned that the hook-up date for the sewers on Terra Mar Island be changed to April 1, 2007, which would require an amendment to the Town's ordinance. Mayor Parker seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. No one voted against the motion. Motion carried 5-0.

Mayor Parker stated that if the minutes of the previous Commission meeting show that this matter had been addressed, he was having the matter re-addressed this evening just to make sure. Therefore, if it had been addressed at the prior meeting, then they should move forward with the prior motion, and this motion would be stricken from the meeting.

The Town Clerk confirmed.

- F. Discussion and/or action regarding the Florida Conflict Resolution Consortium (*Town Manager Robert Baldwin*)

Mayor Parker asked if this item should be continued until the second meeting in February.

On behalf of Town Manager Baldwin, Municipal Services Director Mason stated that he would prefer that this matter be continued.

Mayor Parker stated that since there were no objections to tabling this matter until the second meeting in February, it is so ordered.

- G. Discussion and/or action regarding Town Commission meeting and minutes preparation (*Town Manager Robert Baldwin*)

Mayor Parker asked if this item should be moved until the second meeting in February.

Municipal Services Director Mason confirmed.

Commissioner McIntee stated it was his understanding that Mr. Baldwin was to provide a report regarding the hiring of a company to transcribe their meetings.

Town Attorney Cherof stated that he believed the Town Manager had implemented an outside service to prepare the Commission minutes, but he was not aware of any details at this time.

Deputy Town Clerk Gerlach stated the matter would be on the Commission's next agenda.

Municipal Services Director Mason clarified that an outside firm would be used to prepare the Commission minutes.

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Commissioner McIntee reiterated that this matter was settled.

- H. Discussion and/or action regarding Commission inquiries (*Town Manager Robert Baldwin*)

Mayor Parker asked if this matter should also be tabled.

Municipal Services Director Mason stated that the matter should be tabled.

Mayor Parker advised that this matter would be tabled until the second meeting in February if there were no objections.

## **15. TOWN MANAGER REPORT**

No report was given.

## **16. TOWN ATTORNEY REPORT**

Town Attorney Cherof stated that he would provide a report at the Commission's second meeting.

## **17. ADJOURNMENT**

Mayor Parker asked if there were any objections to adjourn. There were no objections and the meeting was adjourned.

Mayor Parker reconvened the meeting of January 23, 2007 concerning New Business Item 14B on Monday February 19, 2007.

Vice Mayor Yanni, Mayor Pro Tem Clark, Commissioner Jerome McIntee and Commissioner Jim Silverstone were present. Town Manager Robert Baldwin, Town Attorney James Cherof and Deputy Town Clerk Andrea Gerlach were also in attendance.

Mayor Parker stated in order to expedite the second reading of Ordinance 2007-B he was asking the Town Attorney to read Ordinance 2007-B for first reading. Ordinance 2007 would be renumbered prior to the second reading.

**ORDINANCE NO. 2007-B:** An ordinance of the Town of Lauderdale-By-The-Sea, Florida amending Chapter 14 of the Town of Lauderdale-By-The-Sea Code of Ordinances by adding a new Article 3 entitled "Residency Restrictions on Sexual Offender and Sexual Predator," providing for penalties, prohibiting the renting of real property to certain sexual offenders and sexual predators; penalties provided for definition of sexual offender and sexual predator that are consistent with Section 943.0435 Florida Statutes and Section 775.21 Florida Statutes; providing for law enforcement guidelines; providing a timeframe in which a sexual offender or sexual predator must vacate the premises after being notified of the violation; providing for conflicts, codification and severability and providing an effective date.

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Town Attorney Cherof read Ordinance 2007-B by title only.

Mayor Parker asked for a motion to adopt Ordinance 2007-B on first reading.

Mayor Pro Tem Clark motioned to adopt Ordinance 2007-B. Commissioner Silverstone seconded the motion. Vice Mayor Yanni, Commissioner McIntee, Commissioner Silverstone, Mayor Pro Tem Clark, and Mayor Parker voted yes. No one voted against the motion. Motion carried 5-0.

Mayor Parker announced that Ordinance 2007-B would be renumbered for the second reading and passed on first reading. He advised that the second reading of this ordinance would be at the first meeting on March 13, 2007.

**CONTINUATION OF ITEM 14 B (SITE PLAN Pier Pointe Resort)**

Mayor Parker stated that the Town would now present their case.

Mr. Coker stated that he was representing the Town's Planning and Zoning staff and advised that Mr. Keller had prepared a detailed memorandum and had reviewed all aspects of the site plan. He stated that Mr. Keller had listed all changes from the original site plan and the site plan presently before the Commission.

Mayor Parker stated that Commissioner McIntee had requested that Mr. Keller provide certain documents to the Commission. He asked if Mr. Keller could distribute those documents and identify them at this time.

Walter Keller, Town Planner, stated that he was still under oath and wanted to distribute two items at this time to the Commission. One was the staff report which he prepared on January 14, 2004 which was the review of the Oriana Pier Pointe Site Plan application of plans dated January 5, 2004. He believed that this was the memorandum referred to by previous witnesses. He explained this was the staff review of the January 5, 2004 site plan package. The second document was the three additional development conditions that should be considered in addition to the development conditions listed in his January 17<sup>th</sup> memorandum that was included in the Commission's agenda package for this item. He explained that one of these documents was the one requested by Commissioner McIntee and was the January 2004 memorandum.

Commissioner McIntee explained that this was the communication generated by Mr. Keller to Rex Nichols in regard to a meeting held in early February.

Mr. Keller explained that in reality it was his staff review of the January 2004 submission of the architect (Robert Frankel), which was scheduled to go before the Planning and Zoning Board in January. It was not a memorandum that was prepared for Mr. Nichols, but staff had prepared the memorandum for the Planning and Zoning Board meeting of January regarding the Oriana Site Plan. In that memorandum several concerns had been raised regarding the Oriana Site Plan, and he believed that memorandum had been used as part of the discussion held with Mr. Nichols and Mr. Piedra after they had been hired to replace the previous architect.

Mr. Keller further stated that he wanted to provide the Commission with his credentials. He stated that he had been providing services to this Town since 1978 and was a Registered Professional Engineer in the State of Florida, and a member of the American Institute of

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Certified Planners. He explained that he had been President of his own firm for 24 years for which they do consulting services for various state and governmental agencies and private developers.

Mr. Keller stated that tonight he wanted to provide some background on the Oriana project as to how the Town had originally reviewed the project and what process was used. He believed there was some confusion as to how the original development was approved.

Town Attorney Cherof stated that the two documents just distributed would be marked as Town's Exhibit 2, which would be the memorandum, dated January 14, 2004, and Town's Exhibit 3 would be the memorandum dated February 12, 2007.

Mr. Keller explained that the Oriana development was formerly known as the Pier Pointe, and somewhere around November 2003 an application was submitted for site plan approval under the Overlay District for the Pier Pointe development. Staff reviewed the initial submission and a DRC meeting was held with the applicant in November 2003. In December, the application went before the Planning and Zoning Board and at which time staff and the Board had significant concerns about the building architecture and its compatibility with the proposed Beach Overlay District. Other items of concern were view corridors to the beach, building height, encroachments, and the use of the rooftop for passive recreational uses on a 3/1 building. Therefore, the Planning and Zoning Board continued this item to their January meeting. The architect submitted a revised packet and some concerns had been addressed, but many concerns still were raised regarding the architecture of the project and its compatibility in that District. At the Board's January meeting the application was again continued because they were still not satisfied with the project.

Mr. Keller further stated that some time after that the applicant changed architects and a new site plan packet was submitted in February 2004, and the submission significantly revised the architectural features of the project. The project was then supported by the Planning and Zoning Board with minor comments and then forwarded to the Town Commission for their consideration. In March 2004 the Town Commission approved the site plan application for the Overlay District for the Pier Pointe development, and his office prepared a development order.

Mr. Keller stated the summary of such findings was contained in a memorandum dated October 11, 2006 to Mr. Baldwin. Around that time staff became aware that the current project under construction might not be consistent with the site plan approval. A meeting was held with the applicant and the architect to review a possible resubmission of a site plan package requesting amended site plan approval. On October 5, 2006 a meeting was held to consider what staff wanted to see in the amendment for the project. The architect submitted a full site plan package and staff prepared a review of such application, and that project went before the Planning and Zoning Board. Initial discussions with the applicant indicated that the building encroachment was the main site plan revision, there were also to be some minor revisions in the area of awnings or something of that nature. Upon staff's review of the project, he found 15 revisions in the site plan package. At that time he made a recommendation to the Planning and Zoning Board that the item be continued so the applicant could provide a detailed drawing indicating all revisions on the site plan. He believed that was at their November meeting, thereby continuing the item until December.

Mr. Keller continued stating that the applicant submitted new information reflecting all the changes of the site plan. At that time there were 24 revisions noted. However, the 24 revisions

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in some instances occurred several times throughout the development. He stated that his memorandum dated January 17, 2007 detailed the 24 revisions to the site plan, and a site plan review was initiated with a letter to the Planning and Zoning Board.

Mayor Parker announced that the Commission package for this item did contain such memorandum.

Mr. Keller further explained that staff prepared an analysis of the application and believed that the site plan amendment was still within the general criteria provided in the Overlay District. They also believed it was a positive project and an active one which would improve the Town's tax base. Therefore, staff worked with the developer and had them submit landscape plans that would minimize the additional encroachment into the setback area allowed under the overlay district. The applicant also submitted a landscape plan for the El Mar Drive median. Staff recommends approval of the site plan subject to the following recommendations and additions, which are listed, on page 5 of the January 17, 2007 memorandum. He explained there were four standard conditions for all developmental approvals, along with seven additional conditions numbered 5 through 8 which included incorporating the revised landscape plan and landscape improvements to El Mar Drive median between Commercial Boulevard and Daytura Avenue. He stated that item 6 was to provide improved public visibility through the development's view corridors by reducing the size and mass of the entry gates or other actions. Item 7 was to locate the southern fountain back to the area approved on the site plan. He stated that item 8 was the reconstruction of the eastern portion of El Mar Drive and the entire median between Commercial Boulevard and Daytura Avenue consistent with the approved section.

Mr. Keller explained that at the Planning and Zoning Board meeting of December 20, 2006, they added the following three conditions: (9) Prohibiting any future exposure of the balconies associated with the additional encroachment setback area that was created by the revision of the stairwells adjacent to El Mar Drive, (10) provision of additional landscape on the beach area of the development and (11) burying of the overhead utility lines along the east side of El Mar Drive south to Daytura Avenue.

Mr. Keller stated that in addition to the above conditions, his memorandum of February 12, 2007 recommended that three additional conditions be added which would be Town's Exhibit 3: (12) The applicant was to provide a cost estimate from a professional engineer within 75 days of the Town's approval identifying the construction costs for all landscape, sidewalks, drainage, curb and gutter, roadway and other improvements proposed for the public right-of-way of El Mar Drive, said cost estimate was to be reviewed and approved by the Town Manager, (13) applicant was to provide a letter of credit or other security within 30 days of the Town's approval providing funding for the full construction costs of all landscape, sidewalks, drainage, curb and gutter, roadway and other improvements proposed for the public right-of-way of El Mar Drive, in the event the applicant does not complete said instructions said letter of credit and other security to be in a form reviewed and approved by the Town Attorney, (14) applicant was to obtain an engineering permit from the Town for any work within the public right-of-way of El Mar Drive or in a dedicated utility easement.

Mr. Keller stated that staff felt the last three conditions should be added and had not been presented to the Planning and Zoning Board. He explained that he had not reviewed each change in the site plan and believed the most significant changes were the balcony encroachment and addition of balcony area for 12 units. The condition by the Planning and

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Zoning Board prohibiting these units from being enclosed would keep the space out of living area.

Mayor Parker asked the Town Attorney to read the criteria for the definition regarding who was permitted to cross-examine the witnesses.

Town Attorney Cherof read as follows: "An individual referred to as an affected person meaning a person or persons, natural or corporate, who is the owner of the subject property or who owns property within 300' of the subject property as listed in the records of the County Property Appraiser who resides in or operates a business within 300' of the subject property."

Commissioner McIntee asked if letters had been sent to the property owners within 300' of the site.

Mr. Keller explained that staff did a public notice request and sent notices regarding the hearing to surrounding property owners. He advised this had been done some time in October and prior to the public hearing held before the Planning and Zoning Board.

Commissioner McIntee asked if the public had to be noticed regarding this evening's meeting.

Town Attorney Cherof explained the process followed constitutes that notice be given regarding the Planning and Zoning Board meeting, and at the same time notice of the Commission meeting that followed.

Mayor Parker reiterated that proper procedure regarding notice had been followed.

Town Attorney Cherof explained further that the continuation of the meeting had no affect on the publication, nor did it require additional publication.

Mayor Parker asked if anyone met those qualifications for cross-examination.

Diane Boutin, General Manager of Windjammer Resort, 4244 El Mar Drive stated that she did not fully understand the definition provided regarding individuals being eligible to cross examine witnesses.

Town Attorney Cherof explained that Ms. Boutin could cross-examine Mr. Keller with respect to what he had just testified to.

Ms. Boutin stated that she had no questions at this time.

Mayor Parker stated that no cross-examination would occur at this time. He clarified that when Mr. Coker rests his case, he would open up the floor for individuals to ask questions or make statements. After that, Ms. Delegal will rebut, and then Mr. Coker could do a cross rebuttal. At that time, hopefully the Commission would be able to take a vote regarding this matter.

Mayor Parker asked if this Commission was bound by the recommendation of staff.

Town Attorney Cherof explained this was a quasi-judicial proceeding, and the Commission was to weigh the testimony given and then render their opinion. He further stated that staff's

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recommendation was testimony to be weighed by the Commission collectively as they saw fit and were not bound to follow it.

Mr. Coker stated that he agreed with the statement provided by the Town Attorney.

Ms. Delegal also stated that the Commission was not bound to follow the recommendation of staff, but that they were bound to base their decision upon substantial competent evidence.

Commissioner Silverstone asked how many of the 24 revisions would have to come back before the Commission.

Town Planner Keller stated that this was the first Overlay project that had come back with changes. He believed that some of the changes were minor and there was an ordinance adopted regarding such changes whereby staff could address on their own. However, it was his understanding that staff had never utilized that ordinance. He believed for the most part the Commission should consider the changes even though they might be minor at this point until the process was outlined better and used more often.

Mr. Keller stated that on page 4 of his memorandum, it stated that many of the changes were not external to the project and were things that occurred during the refinement of the drawings and were listed as items 6 through 7, and 12 through 16, and 19 through 24. Staff considered these changes minor and recommended approval. Site plan revisions included items 1 through 5, 8 through 9, 11, and 17 and were the ones that normally would have been presented to the Commission for their approval. He explained that some of those more significant items were the encroachment into the setbacks, the enlargement of the stairwell into the setback, change to the loading zone, 5' wide paver sidewalks added, movement of the southern townhouse 4' to keep it outside of the flood zone, balconies along the ocean were extended, and a ground-mounted column was added to support them. Other changes included the addition of structural columns in the parking garage, movement of the fountain at the southern end, and the changes listed for the parking garage and pedestrian walkway.

Commissioner Silverstone asked why Mr. Keller was recommending item #12.

Mr. Keller explained that 12 was recommended so they could then do item #13. The applicant understood they were responsible for improving El Mar Drive along the frontage. This should have been handled better in the first application, and therefore, to make sure things were done right this time these items were added. Item #13 was added so that in case construction would not be completed money would be given to the Town to do so. He stated that staff did not do the best job in enforcing this in the first package so they were making everything clear this time.

Commissioner McIntee asked when Mr. Keller first saw the site plan presented to Planning and Zoning.

Mr. Keller stated that based on his earlier testimony, there was a DRC meeting in November 2003.

Commissioner McIntee asked if that site plan was similar to the one presented to the Planning and Zoning Board in February or March 2004.

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Mr. Keller stated it was not and the initial submission was for 36 units, and the final approved site plan was for 34 units. The architectural features had significantly changed. He added that the site plan approved by Planning and Zoning was submitted in February 2004 and he had reviewed it.

Commissioner McIntee stated that site plan had a 20' 8" encroachment and fire exits were missing on the first floor.

Mr. Keller confirmed. Mr. Keller stated that in the conceptual drawings some of the features might not have been finalized.

Commissioner McIntee stated the plans approved in February were the same as marked Town's Exhibit 1.

Town Attorney Cherof confirmed.

Commissioner McIntee clarified that site plan did not show the fire doors.

Mr. Keller confirmed.

Commissioner McIntee asked after the site plan was approved in March which then went to the Town Commission, when were they first aware of the fact that the site plan had changed.

Mr. Keller stated he was first aware of any change some time in late September of last year. He believed there was a staff meeting and Mr. Brad Townsend commented that the site plan was not consistent with what had been approved.

Commissioner McIntee asked if it would be fair to assume that when Mr. Keller looked at the inconsistent site plan that he observed the encroachment was 4.5'.

Mr. Keller confirmed.

Commissioner McIntee stated that eventually Mr. Keller spoke with Messrs. Deal and Schlegal.

Mr. Keller advised that he had talked with Mr. Schlegal, but he was not sure what their exact words had been. He had talked about what had been reviewed when they did the zoning review, and Mr. Schlegal stated he had reviewed the setbacks.

Commissioner McIntee asked what that note should have inferred to the builders of the Oriana project.

Mr. Keller explained that the note meant they had to make this consistent with the site plan approval. Although his experience would tell him that the note was bizarre because normally when this type of development was approved, it was approved or rejected and such type of notes were not placed on the drawing. Mr. Keller stated that he asked Mr. Schlegal why that note was placed on the drawings, and Mr. Schlegal told him they wanted to make sure it was clear as to what was necessary and to make sure it was right.

Commissioner McIntee asked for further clarification of what was to be right.

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Mr. Keller continued stating that the note said it had to be consistent with the developmental order and the site plan approval by the Town Commission.

Commissioner McIntee asked if Mr. Schlegal could have been referring to the 20' 8" encroachment.

Mr. Keller stated that could have been, along with anything else that had been approved by the Commission at that time. He further stated that they had not really discussed the encroachment issue.

Commissioner McIntee asked how the developers responded when Mr. Keller raised the issue of the encroachment.

Mr. Keller stated he had not gone back to the developer. What occurred was that he prepared a couple of memorandums at the request of Mr. Baldwin to attempt to discover what happened and what his involvement might be. At some point a meeting was scheduled with the architect regarding the submission of a site plan amendment, which occurred in October 2006.

Commissioner McIntee stated a surveyor had gone to the site and provided copies showing a major encroachment problem.

Mr. Keller confirmed, but stated he had not received a copy of that document.

Ms. Delegal stated that her client advised her that the Town had a copy of the survey.

Mayor Parker stated that without objection he would like the survey to be marked as Town's Exhibit 5.

Commissioner McIntee stated they were clear that Brad Townsend in conjunction with the Oriana people had a spot survey generated and the Town had a copy.

Mr. Keller stated he believed that had occurred and that Developmental Services had a copy of the survey.

Commissioner McIntee asked who had paid for the survey.

Mr. Keller stated that he did not know specifically, but would assume the developer had paid it for. Commissioner McIntee further stated that the survey had never been provided to the Commission.

Mr. Keller confirmed.

Commissioner McIntee asked if a developer received a copy of a survey clearly showing major encroachments or violation of a work order, what would be the response he might expect.

Mr. Keller stated the response would vary depending on circumstances. In this case, he could not speak for the developer.

Commissioner McIntee asked what was the proper action to be taken in Mr. Keller's opinion based on his years of experience.

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Mr. Keller explained that if he had such a survey showing those items, he would be concerned because he would be doing an expensive project not consistent with the site plan approved.

Commissioner McIntee asked if in early 2005 there were rumors that a complaint was made by a citizen regarding an encroachment, but nothing was being done.

Mr. Keller stated a resident who thought there could be a problem with the building had approached him. He advised the resident to go to Development Services and have them review the file. He stated that he was not sure of the time period.

Commissioner McIntee asked whom the developers blamed for changing the stairwell.

Mr. Coker stated that Mr. Keller was being asked questions that were well beyond his role in this proceeding and his services that he provides to the Town.

Commissioner McIntee asked if the Fire Marshall could have directed a complete change in the site plan.

Mr. Keller stated that his initial meeting with the applicant suggested that the Fire Marshall's review had a lot to do with the encroachment in the setback. The architect had verbally recommended this to him.

Commissioner McIntee asked if the Fire Marshall normally "went out on a limb" in these matters.

Mr. Keller stated he was not sure what the Commissioner meant, but if he was referring to the fact that they could cause changes in drawings, then the answer was yes.

Commissioner McIntee asked what was the vote of the Planning and Zoning Board to approve this project.

Mr. Keller explained the vote was unanimous to recommend the project to the Town Commission, and the Town Commission's approval was also unanimous.

Commissioner McIntee stated it would be fair to say that a body of government was in support of the project.

Mr. Keller confirmed.

Commissioner McIntee asked when Mr. Keller believed the changes to the site plan occurred regarding the stairwells.

Town Planner Keller responded that he could not answer that question, but stated that the site plan that was approved by the Commission in March 2004 and the set of building plans that was in Development Services had a change. Mr. Keller said he has not had access to the drawings and did not know when the change occurred.

Commissioner McIntee asked when the foundations were begun.

Mr. Keller stated he did not know. He stated the changes could have occurred before the start of construction.

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Commissioner McIntee asked if Mr. Keller believed that had this development come before the Town Commission early on with the issues of the encroachment, would it have been approved.

Mr. Keller stated if the developer came forward early on with a site plan amendment, it would have been reviewed and considered and all options would have been evaluated. He believed something would have been approved.

Commissioner McIntee asked if it was normal for a major development such as this one not to come back before the Commission for permission to make necessary changes.

Mr. Keller stated that some of the minor changes might not have been brought forward and would have been handled administratively. He further stated that the setbacks should have been brought forward.

Commissioner McIntee asked if the developers knew the rules of the Town in Mr. Keller's opinion.

Mr. Keller stated he could not testify as to what the applicant knew or did not know, but they should have known the rules.

Commissioner McIntee asked if Mr. Keller ever asked anyone from the Oriana project why they had not brought the changes back to the Commission.

Mr. Keller stated that he believed such a question was asked during the development meeting before the site plan amendment had been submitted. He believed their response was to the effect that they were not aware they had to go before the Commission regarding the changes.

Commissioner McIntee asked if there was any doubt in Mr. Keller's mind that the Oriana developers had believed Messrs. Deal and Schlegal had granted the developer permission to make the changes.

Mr. Keller stated that he did not know what they believed, but certainly their approval, along with the attached note, indicated they had to be consistent with the site plan approval and the development order. Therefore, he did not know how this could be interpreted differently.

Commissioner McIntee asked if the site plan containing the note clearly indicated a 20' 8" encroachment line that was violated during the construction process.

Mr. Keller explained that note applied to another document that said what had to be done. The site plan approved by the Commission in March 2004 had a setback encroachment of approximately less than 5'.

Town Attorney Cherof stated that the term Overlay District had been used and asked if that was the same set of land development regulations or were there different ones.

Mr. Keller stated the original approval of the Pier Pointe Oriana development occurred under the Beach Village Overlay District. The current application for a site plan amendment fell under what was now known as the Hospitality Zoning Overlay District, which was amended by the Town Commission in February of last year.

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Town Attorney Cherof asked if the amendment dealt with the issue of front setbacks.

Mr. Keller explained that the setbacks remained the same.

Town Attorney Cherof asked what role Mr. Keller played in the drafting of the Beach Overlay District. Regulations.

Mr. Keller replied that he had drafted the ordinance for the Commission, which he believed the Town Attorney's office refined.

Town Attorney Cherof asked what Mr. Keller's intent was when drafting the provisions for the setbacks.

Mr. Keller explained that the Overlay District was created to help encourage the redevelopment of parcels within the Town so advantages would be provided. Therefore, the encroachment in the front setback area was a way to help people develop and obtain innovative and attractive projects. This also allowed people to do 3/1 buildings.

Town Attorney Cherof asked if the amendment is passed would it be consistent with the setback requirements.

Mr. Keller confirmed.

Town Attorney Cherof further stated that the Beach Overlay District gave the Commission discretionary approval in approving plans.

Mr. Keller confirmed.

Town Attorney Cherof asked what Mr. Keller's intent was in drafting the said ordinance.

Mr. Keller explained that the Overlay District did not provide any set rights to applicants, rather the applicant had to come before the Town and demonstrate that the criteria were met and that the project provided attractive benefits for the Town. The Town Commission continued this matter several times, and each time changes had been made to the site plan. Discretionary means that the Commission could deny the project if the applicant was not meeting the intent of the district.

Town Attorney Cherof asked how discretion could apply on the part of the Commission in regard to the front setbacks.

Mr. Keller explained that the Overlay District allowed an applicant, depending on the number of lots assembled, to encroach by a certain percentage into the front setback area. The maximum encroachment could be 10' in place of the normal 25' setback under RM-25. In this project the maximum percent encroachment of the entire area was limited to 30%. He believed the Commission had to weigh whether the encroachment into the front setback allowed for within the district, along with the merits of the project, would justify their approval.

Town Attorney Cherof asked how the conditions being recommended would relate to the discretion on the part of the Commission.

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Mr. Keller stated that staff recommended additional landscaping enhancements as additional conditions of approval to offset the additional encroachment. He believed those conditions would minimize the encroachment and allow it to still meet the merits of the District.

Town Attorney Cherof asked if the additional conditions were eliminated would it be appropriate for the Town Commission to exercise its discretion.

Mr. Keller stated that he believed the conditions for approval as provided and supported by the Planning and Zoning Board were necessary in regard to approval of the project.

Mayor Pro Tem Clark asked who was the resident who had approached Mr. Keller with their complaint in connection with this project.

Mr. Keller advised that it was Nancy Nixon.

Mayor Pro Tem Clark asked Mr. Keller if he believed Messrs. Schlegal and Deal knew about the encroachments when signing off on the plans.

Mr. Keller stated he believed they were not aware of it.

Mayor Pro Tem Clark asked what prompted the additional note on the plans.

Mr. Keller stated that he had asked that question and was informed that there were many sheets in the drawing packet and many changes had occurred, and therefore, they wanted to make sure that what got approved would be consistent with the plans approved by the Town Commission and the conditions of the development order. The note protects the Town, but he believes it was difficult for other agencies to know the meaning of such a note. He believed if Messrs. Schlegal or Deal felt the setbacks were not consistent with the site plan approval, they would not have signed off on the plans.

Vice Mayor Yanni asked how many developers worked on this project.

Mr. Keller stated it was his understanding that there was only one developer. He added that there had been two lead architects on the project, which were Robert Frankel and Rex Nichols. He stated that Mr. Frankel had been let off from the project some time in February 2004. He further explained that Rex Nichols was the architect when the project had been approved and the building permit issued.

Vice Mayor Yanni stated that could the developer have possibly not been aware that they needed to bring further changes back to the Commission.

Mr. Keller stated that he did not believe that anyone who understood the regulations of the Overlay District would believe that was the case. Town Commission approval was discretionary and certainly staff would not believe that setbacks could be changed without coming before the Commission.

Vice Mayor Yanni asked what process was followed when changes were made to the site plan.

Mr. Keller explained that he could not testify when the site plan was changed, but he believed it was some time in September that he had heard the building being constructed was not

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consistent with the approved site plan. In late September, he saw information showing the setbacks were closer to 15'. The project was already under construction and the building permit had been issued when such information became known. He reiterated that he could not testify as to when the site plan had been changed. He was not aware if the building permit included the change or not.

Vice Mayor Yanni asked where the plans went after Messrs. Schlegal and Deal had signed off on them.

Mr. Keller reiterated that they had signed off on the zoning review of the building permit set of plans. He stated that the building was built into the setback. He further stated that at some point Mr. Townsend was aware that the building was being constructed in the setback that was different from what had been previously approved. He believed that was somewhere around June 2006. He reiterated that he was not sure when Mr. Townsend had become aware of the change for sure. On the original approval there was to be two stairwells and between them was a fountain, and there were three buildings along El Mar Drive. The original length of the stairwells was 31' and it encroached less than 5' into the setback area. Under the amendment or change made, it increased from 31' to 33' encroaching an additional 4' or so.

Vice Mayor Yanni asked if Mr. Keller approved how this building had been constructed.

Mr. Keller stated he believed this was a good project for the Town even with the additional encroachment.

Mayor Parker clarified that El Mar Drive had some single and double lots.

Mr. Keller stated that it had some properties, but did not know the exact number.

Mayor Parker stated it was his impression that the Overlay District was created was to encourage people to assemble lots for development.

Mr. Keller stated that prior to the creation of the Overlay District there was no redevelopment. He also believed that the criteria in the RM-25 District did not provide an attraction economically to redevelop properties. He added that this district was also created to encourage a design that would be pedestrian friendly and enhance the environment.

Mayor Parker further stated that El Mar Drive was being redeveloped so it would be more pedestrian friendly.

Mr. Keller confirmed and added that the street was being upgraded.

Mayor Parker further stated that the more lots that were assembled, the developer could invade further into the setback.

Mr. Keller confirmed.

Mayor Parker clarified that the Oriana project had not assembled lots.

Mr. Keller once again confirmed.

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Mayor Parker asked if it would be reasonable for the Commission to hold back their discretion if they believed the amendment would make El Mar Drive less pedestrian friendly.

Mr. Keller reiterated that the Commission needed to weigh the testimony that was provided, and if they feel the project as amended did not provide the benefits originally approved, then that would be the Commission's discretion.

Mayor Parker reiterated that he had approved a site plan that he thought would improve the Town and make El Mar Drive more pedestrian friendly and improve the appearance of that area.

Mr. Keller stated if the Mayor believed the amendment would make El Mar Drive less pedestrian friendly, then he believed the project as amended did not meet the overall criteria for that district.

Mayor Parker stated that Mr. Coker had questioned the architect whether the units could be made smaller and the stairwells left within the footprint of the building.

Mr. Keller explained that the architect believed that would have an impact on the project. If the stairwell were moved in, it would impact the number of parking spaces.

Mayor Parker asked if the building did not already exist should this site plan amendment be approved or should the Town require the developer to move the stairwells inside and make the units smaller.

Mr. Keller stated his staffs report dated January 17<sup>th</sup> recommended approval of the project subject to certain conditions. He further advised that he had reviewed the site plan and believed it met the criteria for the Overlay District. Therefore, he reiterated that he recommended approval of the project subject to certain conditions.

Mayor Parker further clarified that he was to base his decision on the testimony and the evidence provided.

Mr. Keller confirmed.

Mayor Parker further asked if his decision could be based on consideration of the original site plan, as well as the amended site plan.

Mr. Keller confirmed.

Mayor Parker stated that some comparison had been made between the Villa Capri and Oriana, and asked if the Oriana had four setbacks while the Villa Capri only had two.

Mr. Keller stated he believed that was correct.

Mayor Parker further clarified that the average width between encroachments on the Oriana was around 65', while the average width on the Villa Capri was roughly 125'.

Mr. Keller stated that he did not remember the width regarding the Villa Capri, but the same architect had done both projects. He believed they were similar. He added that the Oriana encroachment of the stairwells was 33.5' approximately which occurred four times.

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Mr. Coker stated that the Villa Capri project was in evidence and was in the Clerk's office.

Mayor Parker asked if the difference on the width of the projects was significant.

Mr. Keller stated he did not see much of a difference only from the standpoint that it was a different type of project. Both had stairwells that encroached at a certain point and then went back.

Mayor Parker referred to #9 on the amendment which stated: "Oceanside balconies on the townhouse units have been extended, a ground-mount column has been added to the first floor to support this element." He stated that he did not understand this change and asked for some further clarification.

Mr. Keller explained that the original balconies were approximately 5' going towards the ocean and were cantilevered which means they were supported from the building and not from the ground. The amendment made the balconies go an extra 5' and had columns going to the ground to support them. He advised that they did not encroach into the setback and were set back away from the setback because oceanside buildings could go up to the sea wall.

Mayor Parker asked what was the width of the setback on the south side of the property.

Mr. Keller stated there were two dimensions since there were two buildings. The oceanside building was three stories with a 10' setback, and he believed the 3/1 building had a 12' setback.

Mayor Parker asked what if they were willing to grant the amendment with items 3 through 10 and 12 through 24, but not willing to grant items 1 and 2, and would that change any of the additional conditions to be imposed.

Mr. Keller stated he would have to review this because the site plan was reviewed in connection with the proposed amendments.

Mayor Parker asked if the changes were for the purpose of mitigating the Town from any adverse affects of further encroachments into the setback.

Mr. Keller stated that some of the conditions relative to landscaping would be different because the applicant had agreed to plant additional landscaping in order to provide additional buffering of the encroachment. Based upon staff's review with DRC and at the initial meeting of the Planning and Zoning Board, the applicant revised the landscape plan and presented an amendment. The landscaping along the west side of the building and along the median had been changed.

Mayor Parker asked if any of those changes had been part of staff's conditions as numbered 9 through 12.

Mr. Keller explained that condition #5 was the revised landscape plan and was directly in relation to the additional setback encroachment. If the setback encroachment was not approved that item would not be relevant.

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Mayor Parker asked if Item #5 would be eliminated and they would go with the initial landscape plan.

Mr. Keller confirmed.

Mayor Parker asked if Item #9 would be eliminated.

Mr. Keller stated that #9 related to the encroachment also and provided that the balcony would not become a living area.

Mayor Parker asked about #10.

Mr. Keller stated that additional beach side landscaping would benefit the project.

Mayor Parker asked about #11.

Mr. Keller further stated that it was an extension of the undergrounding of the overhead electric and was a condition of the Planning and Zoning Board. It was primarily oriented as a benefit for the project. He continued stating that if the Commission did not approve conditions #1 and 2 much of this could disappear.

Mr. Keller stated he did not like to do site plan review from the dais when they had spent about 3 months doing exactly that. He advised that staff would want time to review the matter as being proposed, especially regarding Items #1 and 2. He explained that those items were significant changes and staff's review had been oriented to such changes.

Mayor Parker asked for further clarification of the codes referred to earlier by Mr. Coker.

Mr. Coker replied that he was not clear as to which codes the Mayor was referring. He added that he had referred to bonding requirements, which were normal in such projects.

Mayor Parker asked the Town Clerk to place on the Commission's agenda for the first meeting in March discussion and/or action regarding the amendment of the Town's development code. He explained that it was to include bonding requirements as standard procedure for projects.

Mayor Parker asked if Mr. Coker wanted to re-direct.

Mr. Coker replied that he had no questions at this time.

Mayor Parker asked if Ms. Delegal wanted to re-direct.

Ms. Delegal stated she had no questions at this time.

Mayor Parker proceeded to excuse the witness.

Mr. Coker stated that Mr. Keller had followed the procedure in regard to this project and had reviewed the site plan and the code, and made his recommendations as stated.

Mayor Parker asked if anyone wanted to support the presentation.

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Diane Boutin, General Manager of the Windjammer Resort, 4244 El Mar Drive was sworn and stated they were the closest commercial neighbors to the subject property. She stated that they had not yet addressed the “before and after” picture. There were many changes made from what was originally known as Pier Pointe, which consisted of 10 buildings in various stages of disrepair and had the worst reputation. There were 109 units and they had a substantial advertising budget. The turn over was great and even with a conservative occupancy rate of 55%, this would mean about 20,000 people at the resort in a year causing a demand on services and an increase of activity in a small area.

Ms. Boutin stated that Oriana consisted of 34 luxury units within the same area. Since most of the residents at this project would use these units as summer homes, residency would probably be sporadic. Therefore, the impact on the area would be greatly diminished. The modern construction would be less intrusive than the property it was replacing. This was also the first project to begin installing the new roadway improvements that had been discussed over the last several years. In referring to quality of life, one had to not only look at the design and uses at the property, but the overall impact on the community. She urged the Commission to grant Oriana the amendment to the site plan because she believed that was the appropriate thing to do.

Bob Terrien, 5100 South Ocean Boulevard was sworn and stated this was the first project of its kind for the Town. Possibly the Overlay District requirements needed “tweaking” and possibly the fourth floor could have been set back slightly further. He believed things would be learned from this project. He stated this was a good project and he hoped the Commission would vote in favor of the amendment.

John MacMillan, 223 Commercial Boulevard was sworn and provided some background information regarding this site and commented about the extreme change in design from an Egyptian style to a Tuscan style. Mr. MacMillan said the architect should have been fully aware of what was going on concerning this project. Mr. MacMillan stated that no one should ever be permitted to steal an asset from the Town and that’s what happened here in regard to the setbacks.

Mayor Parker invited all individuals wishing to speak neutral to the project to do so at this time.

Town Attorney Cherof administered the Oath to all those individuals wishing to speak on this matter.

Ron Persante, 227 Lake Court stated he had been a member of the Planning and Zoning Board when the project was approved. At the initial presentation, the project was denied, and at the second presentation a recommendation was made for the hiring of a new architect, which did occur. He believed the project as it exists was a benefit to the Town. He stated that a 4’ encroachment was not a big deal and additional landscaping had been added making this a beautiful project and an asset to the Town. He reiterated that everyone should learn from this situation, but it was now time to make a decision. He urged the Commission to vote in favor of the requested amendment.

Lawrence “Peanuts” Wick, 4900 N. Ocean Boulevard stated that his background was in connection with industrial cutting tools. He referred the Commission to page 8 of the documents, which stated: “Mr. Nichols said that they had reviewed the emergency vehicle access widths with the Lauderdale-By-The-Sea Fire Department and was led to believe

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everything was fine.” However, when the plans went to the County they required the additional width. Mr. Wick could not understand by his testimony whether that was the Broward Sheriff’s Office or it was the Lauderdale-By-The-Sea Volunteer Fire Department. He then referred the Commission to page 7 which stated in the 4<sup>th</sup> paragraph: “Town Planner Walter Keller stated that what is under construction was not the site plan approved by the Town Commission. However, had the applicant come forward then with the changes that were submitted now, it could have been approved by the Town Commission as the site was within the range that the Town Commission had to approve.” He asked for further clarification of the term “had to approve. Further on down the page it stated: “Mr. Keller said it would be hard to say that the Board would have approved the amended site plan with the additional encroachment. Mr. Keller believed it would have been approved.” He added that he did not understand that statement either.

Mr. Wick then referred the Commission to page 10 which stated: “Mr. Wick amended the motion to read as follows: ‘The balconies could not ever be enclosed, that the fountain be added (which was the fountain at the south end), that landscaping to the beach be included, and also that the applicant put the power lines under ground all the way to Daytura Avenue.’” He explained that this was passed on a 4-1 vote and a 3-2 vote passed it on to the Commission.

Mr. Wick further stated that what is bothering everyone is that this should have been taken care of 9 months ago. He believed using logic such as the undergrounding of the powerlines could gate the economic value taken from the Town. He also mentioned the issue of contributions. He believed this project looked nice, but something should be given to the Town for all the headaches that were caused.

Town Attorney Cherof pointed out that the draft minutes of the December 20, 2006 Planning and Zoning Board meeting was contained in applicant’s composite Exhibit #1 as a verbatim transcript of the proceeding.

Mayor Parker invited individuals wishing to speak contrary to the project to do so at this time.

John Thompson, 671 Lakeside Circle, Pompano Beach stated he had been a member of the Charter Board when revisions were made, and he called the Commission’s attention to Section 4.7 which was passed as a result of objections raised by the Mayor and the Town Attorney that the previous provisions of the Town’s Charter were no longer applicable due to certain State Statutes. The Attorney General issued an opinion stating that there was nothing in State law that affected the Charter and this dealt with initiated ordinances passed by referendum. The Town Attorney disagreed and the voters no longer had the right to initiate ordinances or pass them by referendum unless they were to re-establish that right through a Charter amendment. In March 2004 the Charter was amended and the language then read as follows: “An ordinance passed as a result of a vote of the registered voters of the Town whether prior to or subsequent to the effective date of this article may be repealed or amended only by a similar vote of the registered voters of the Town.” Mr. Thompson stated the words “whether prior to or subsequent to the effective date” had been added. He believed there had only been one ordinance passed by referendum, which was the height ordinance in 1973. Mr. Thompson further stated that such ordinance was relevant because it addressed various issues such as setbacks and the difference between the buildings. He added that open area had been addressed and described as a landscape area consisting of various types of vegetation. He explained that they were talking about permeable areas. He believed various items in that ordinance were still valid today, which was contrary to what had been passed in the Overlay District. He believed in the

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subject case there were setbacks not permitted under the ordinance passed in 1973. Therefore, this gave the Commission reason not to approve the site plan.

Barbara Cole, 221 Washington Avenue and 5000 North Ocean Boulevard stated she was not going to speak this evening due to the counts pending against her at this time.

Stuart Dodd, 232 Imperial Lane stated the Town allowed two monstrosity projects to be built which were totally out of character with the area. The Mayor had previously stated he doubted this development would have been granted permission to be built with the new increased setbacks had the developer brought these forward during the planning stage. In 1973 the Town established control over height and setbacks. Overlay Districts allowed the relaxation of rules and regulations, but were not to be used as a tool to circumvent the Town's Charter. Any additional encroachment granted this evening could be within the Overlay District's parameters, but it was up to the voters and not the Commission to control the setbacks. The perfect solution was that the Commission could decide it would not be legal to grant the additional setbacks because it was not in their power to do so. According to the Town's Charter, additional changes could only be granted by an electoral referendum.

Mr. Dodd stated that Ms. Delegal explained why the developer decided to ignore the Town and move forward with the project, and withstand whatever consequences was bestowed on them. Since this appeared to be the new building technique, he wanted to point out the following to the Commission. This was the developer who chose to attempt to silence the residents with a slap lawsuit. Ms. Delegal was accused of a Sunshine violation was expected to know the spirit of the law, but chose to use it to disrupt the Planning and Zoning Board. She stated that the developer believed the encroachment was not a problem and they could move forward with the plans that had been approved and blamed staff that was no longer present. It was pointed out that the blame should not be on the Fire Marshall, but was the decision of their own design team to change the plans.

Mr. Dodd further stated they "built now and would pay later." They deliberately chose to ignore the regulations. Ms. Delegal further insulted everyone's intelligence by reiterated that living space had not been increased as a result of the encroachment. He urged the Commission to reject this application, and then the developer would have to calculate what space would have to be forfeited to fit the stairs inside the building footprint. He believed the demonstration of the building was flawed because two of the buildings were too far apart. He believed the Town needed to send a message once and for all that developers had to build within the Town's rules or else they would have to tear down the building and start once again.

Mayor Parker proceeded to close the public discussion portion of this meeting.

Commissioner McIntee requested a five-minute break.

Mayor Parker indicated he wished to keep going.

Commissioner McIntee motioned to overrule the Mayor. Commissioner Silverstone seconded the motion.

Mayor Parker cautioned Ms. Delegal regarding her rebuttal and stated that it did not consist of another 10 hours of testimony being given.

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Mayor Parker recessed the meeting at 9:00 p.m.

Mayor Parker reconvened the meeting at 9:35 p.m.

Parker Parker said that earlier Mr. John Thompson had made reference to a 1973 referendum and asked Town Attorney Cherof to provide a report at the second Commission meeting in March.

Commissioner Silverstone stated he believed that report could be paramount to any decision the Commission might make.

Commissioner McIntee requested the Town Attorney's report be escalated.

Town Attorney Cherof stated he would provide the report to the Commission and then summarize it later on in more detail. He continued stating that he did not agree with Mr. Thompson and believed the provisions of the 1973 referendum were not binding on the Town.

Commissioner Silverstone asked what would happen if the amendment were approved and the ordinance applied.

Town Attorney Cherof stated that there was an ordinance on the books regarding the Beach Overlay District, which was, renamed the Hospitality District that was valid and enforceable until established otherwise. It would be improper for the Commission to attack its own ordinance in an attempt to resolve this issue.

Mayor Parker asked for a further report to be provided on the ordinance at the Commission's second meeting in March.

Commissioner McIntee directed the Town Clerk to place on the Commission's agenda for the second meeting in March discussion and/or action regarding the applicability of the ordinance.

Town Attorney Cherof stated he would supply the report at the request of the Commission.

Town Attorney Cherof explained that at this time during the proceeding the petitioner would be given the opportunity to make their final presentation followed by staff. After that the Commission would deliberate on the application. No further testimony would be provided at that point, and no further questions could be asked of the witnesses or the applicant.

Commissioner McIntee stated it was his opinion that deliberation meant he could express his opinion at the end of the presentation.

Town Attorney Cherof stated there would be no deliberation if discussion was not held.

Town Attorney Cherof read the following language from the code: "The Board or the Town Commission shall deliberate on the petition. No further testimony shall be taken and the members of the Board or the Town Commission shall not ask further questions of persons presenting testimony. The Board or Town Commission shall discuss the evidence as was presented at the proceeding and vote on the petition."

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It was asked if a motion could be made at this point and then the Commission would deliberate on the evidence.

Town Attorney Cherof stated that could not be done unless both the applicant and the Town waived their opportunity to present closing statements.

Mayor Parker stated that Mr. Coker had informed him that the Town did not have the spot survey. Mr. Coker stated he had been told it was no longer in the Town's file.

Mayor Parker stated it was his understanding that the petitioner was willing to stipulate as to what the survey indicated.

Mr. Coker confirmed.

Ms. Delegal stated they were prepared to stipulate that the spot survey showed the location of the stairwells approximately 4' closer to the property line than what had been approved in the site plan. She added that it was also shown as being 1' wider. She advised that Catafulmo had paid for the survey who was the contractor on the site.

Mayor Parker asked if Ms. Delegal had any further rebuttal.

Ms. Delegal stated she did not, but had some closing remarks.

Ms. Delegal asked her Co-Counsel Glen Goldstein to make some remarks.

Glen Goldstein, attorney of Greenberg, Traug, 401 East Las Olas Boulevard, Fort Lauderdale stated he would provide the legal summation of Pier Pointe and Ms. Delegal would provide the summation of the evidence. He stated that Pier Pointe's legal position was set forth in his letter dated November 9, 2006 to Mr. Cherof which would be incorporated into his statement by reference. He stated this Commission had discretion in adjudicating whether or not to approve this site plan amendment application, and that discretion was in adjudicating whether or not the standards set forth in the Overlay District Ordinance, now the Hospital District Ordinance, have or have not been satisfied. Courts repeatedly held that it would be unconstitutional for local government to give itself unbridled standard discretion to determine whether or not to limit the ability of a property owner to use its property in the manner proposed. One court stated: "An ordinance whereby the City Council delegates to itself the arbitrary and unfettered authority to decide whether, where and how a particular structure shall be built or where located without at the same time setting up reasonable standards would be applicable or like to all property owners similarly conditioned cannot be permitted to stand as a valid municipal enactment", North Bay Village vs. Blackwell, 887 2d 524, 1956 Florida Supreme Court.

Mr. Goldstein continued stating that earlier in the case Mr. Coker suggested to the Commission that the discretion they enjoyed should be equivalent to discretion granted in considering PUD applications. However, not only are PUD applications still subject to standards, but the courts have distinguished between applications for PUD zoning and applications to modify site plans in a previously approved PUD which was more to where they were in this case. Basically, dealing with a modified site plan in a previously approved PUD was deemed as a quasi-judicial determination subject to the requirement that there must be substantial competent evidence that the criteria set forth in the PUD had not been satisfied by the applicant. One such case not

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previously cited to in his letter was ABG Real Estate Development Company of Florida vs. St. John's County, 6087 2d '59, a 1992 5<sup>th</sup> District 1992 Decision.

Mr. Goldstein stated that in regard to the Town's standards for site plan approval, Pier Pointe believes the Overlay District ordinance was constitutional because it contained standards for approval of a 15' maximum front setback which must be uniformly administered by the Town as required by the Court in the North Bay Village previously cited. The Overlay District ordinance contains at most two criteria for approval of a proposed site plan setback up to the 15' maximum standard. One, if there was not a finding that the development is "not consistent with the intent of this ordinance," then the Town Commission is "bound to grant the maximum amount of modification for any element provided in this ordinance," including the 15' setback. Second, the extent to which the application provides the "enhanced site design and development enhancements" required by the ordinance governs the amount of the modification granted. He stated that on March 23, 2004 the Town Commission approved Pier Pointe's site plan with the requested modification to the Town's 25' front setback requirement expressly finding "the development as proposed contributes to the design and character of the Beach Overlay District." The Town's April 28, 2004 development order recognized Oriana "satisfied eligibility requirements of the Beach Overlay District," and "provides a significant upgrade in the quality of development." The Town is equitably estopped from revoking or altering those prior determinations in the absence of substantial and competent evidence that the 24 identified changes that Mr. Keller listed incrementally changed the circumstance, which led to the determinations of 2004. Otherwise, this Town was equitably estopped.

Mr. Goldstein further stated that the first criteria for approval of the site plan amendment application was governed by the ordinance's intent "to permit quality redevelopment in the Beach Village District to be planned and developed for residential purposes with a greater amount of site design and flexibility." The prior finding in the development order stated: "That Oriana 'provides a significant upgrade in the quality of development.'" He further stated it would constitute an abuse of discretion for this Commission to determine that the 24 identified changes in the site plan amendment somehow altered the prior finding. He explained there was no evidence before the Commission, which precludes them from exercising discretion to deny the site plan amendment application. The result was not altered by the language in the ordinance that the amount of setback modification was granted as governed by the extent to which application provides "enhanced site design and development enhancements" required by the ordinance. Under this proposed amendment, Pier Pointe would be contributing at their own expense over \$70,000 of off-site improvements, including landscaping in the median and contributing to the undergrounding of utility lines and paying over \$46,000 for additional on-site design landscaping and developing enhancements as requested by staff.

Mr. Goldstein stated that this application was not the first time the Town had been requested to approve an Overlay District site plan reflecting the maximum 15' setback standard permitted in the ordinance since that had been done in conjunction with the Villa Capri project. He stated they believed they have satisfied their burden showing that the Town's standards in the Overlay District ordinance had been satisfied, and the Town had not rebutted that Pier Pointe met such burden. The Town Attorney and Mr. Coker emphasized to the Commission that as a matter of law any dispute of how they got here today had no effect on the matter before the Commission today.

Mr. Goldstein further stated that the only competent evidence as to what really occurred was the testimony of Mr. Nichols. They objected to Mr. Coker's letter as evidence regarding Messrs.

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Schlegal and Deal because it was hearsay and unsworn evidence. Mr. Nichols' testimony was un rebutted, and they had no opportunity to cross-examine either Mr. Schlegal or Mr. Deal. He urged the Commission to follow the law and staff's advice and grant the site plan amendment application based on the evidence before the Commission.

Ms. Delegal stated the evidence supporting the alleged switch of plans or whatever the allegations were as to how the plans changed from the time originally submitted to the time they were submitted to the County was summarized in the letter as read by Mr. Coker containing statements from Messrs. Deal and Schlegal. According to Mr. Coker these two individuals stated that the site plan submitted with the construction drawings was the Town Commission's approved site plan, which was checked against the development order. Four witnesses had been brought forward who had a role in the preparation of the construction plans for this project.

Ms. Delegal continued stating that Rex Nichols testified that he inherited this project from the prior architect, and his charge was to revise the architectural presentation of the buildings to a style more compatible with the existing architecture. Also, he was to respond to the issues raised in Mr. Keller's letter dated January 14<sup>th</sup> as presented to the Commission. Mr. Nichols presented the site plan as revised to the Planning and Zoning Board in February 2004 and the Town Commission in March. Their main focus had been on the issues raised in Mr. Keller's report due to the time constraint placed on them, along with the architectural style.

Ms. Delegal stated that Mr. Piedra testified that subsequent to the Town Commission's approval, he worked on the details of the design development documents and the construction drawings. It was then that his research led him to believe that changes needed to be made to the stairwell due to the application of the NFPA 101 and other applicable codes. Meetings were held with various officials to verify his findings. An exhibit was shown during their presentation of the expanded stairwell outward 4' ¾" and 1' 10" in width.

Ms. Delegal stated that the architect explained they could not just push the building back and move the stairs back because there were constraints due to the narrowness of the site, along with parking and internal circulation issues. The stairwells were then expanded and shown in plans from that time forward. There had been no attempt to sneak in any one change because there had been 24 changes to the site plan at that time. Most changes were made due to addressing code issues. Testimony was provided of two witnesses who prepared sheets included in the construction drawings stating they were consistent with the amended site plan. The site plan was provided as evidence as submitted to the Department of State in connection with the condominium filings in June 2004, and the site plans submitted to Florida DEP in September 2004. They both reflected the stairwells extending further toward the roadway.

Ms. Delegal further stated that no site plan anywhere in the public record subsequent to March 2004 showed the stairwells in any location other than as they existed today. She explained these were the same site plans submitted to the Town in November 2004. Mr. Nichols stated he had delivered 14 sets of construction drawings for each of the 7 buildings, including a revised site plan showing the revised stairwell. These were the documents submitted to Messrs. Schlegal and Deal for their review. The plans were then picked up and taken to Mr. Nichols office and no sheets had been changed. They were then delivered to the Broward County Building Department. The plans reviewed by the County had revised pages, which were put behind the concerned pages as worked on. In March 2004 this was not a controversial project.

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Ms. Delegal advised that the Planning and Zoning Board and the Town Commission unanimously approved this project. They do not believe that Messrs. Schlegal and Deal misrepresented any facts associated with this project. They were suggesting that their recollection was faulty. Documents had not been reviewed in over two years and were asked to recall information with the pressure of this hearing looming overhead and the possibility of admitting that errors had been made.

Ms. Delegal further stated that to believe the plans bearing the Town's signature had been altered, one would have to believe that three professionals had put their licenses on the line and lied about what had been done. She asked the Commission to apply common sense. She stated it had been recognized that when the stairwells encroached further into the setback, the plans should have been brought before the Commission for consideration of the amendment, but the architect did not know that requirement. There was no reason to change pages or enter into any type of deceit. It was reported that changes were made to site plans all the time.

Ms. Delegal stated that a question was raised regarding the stamp and handwritten note accompanying the initials of Messrs. Schlegal and Deal. The note on the back page of the drawing stated it was subject to the Pier Pointe Beach Village Overlay District and site plan approval development order dated April 27, 2004. The purpose of the note was to cover any details that could have been missed during the review. She added that Mr. Coker explained that the Zoning Administrator did not normally review all of the construction sheets but focused mainly on the site. The statement on the letter stated that individuals had reviewed all the sheets submitted during review. Ms. Melgren admitted she reviewed all such documents for Southwest Ranches.

Ms. Delegal explained that the Commission must now determine whether the evidence supports the findings they had to make. Modifications must be granted if they are consistent with the intent of the ordinance, and that the modification should include an enhanced site design. Ms. Melgren prepared animations to demonstrate that one could not perceive the difference between the building with the stairs forward and the stairs back. She also testified that in her professional judgment the amendment met the criteria of the ordinance. Mr. Keller recommended approval of the amendment per the conditions contained in his letter, along with the Planning and Zoning Board.

Ms. Delegal stated they would agree to all of the conditions that were set forth either in the Planning and Zoning request or in Mr. Keller's letters of January 17 and February 12. Ms. Delegal stated as far as the landscaping additions in the rear, the Department of Environmental Protection has been contacted and those types of improvement need to be put in after turtle nesting season, approximately October 31. Ms. Delegal said she would not like to the Certificate of Occupancy held up because of this.

Ms. Delegal pointed out that there were two view corridors on the Oriana project and there was only one on the Villa Capri project. The projects were very similar and had comparable attributes. The approval of the Town Commission was for the stairwells to go to 15'. All evidence points to approval of the site plan amendment. There has been no competent substantial evidence submitted either by the applicant or the Town's staff that provides for any grounds to deny this project. Therefore, they request that this amendment be approved with the conditions of approval complying with the variations as she had indicated.

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Mr. Coker stated the law was not being disputed here and this proceeding was quasi-judicial. It was the applicant's burden to present evidence to demonstrate a prima facie case that applies with the code. The burden then switches to the government to show that the code was not complied with in this case. No matter what decision was made, it must be supported by competent substantial evidence, and only this Commission would be making the determination.

Mr. Coker stated if the Town made a mistake, a developer could still not rely on such mistake because they were to be aware of the requirements of the code. The analysis of who is right and who is wrong was inappropriate and the Commission should limit their consideration to the site plan in weighing the evidence.

Town Attorney Cherof directed the Commission to begin their deliberation.

Mayor Parker advised that both sides had presented arguments, and discussion would now take place among the Commissioners.

Mayor Parker stated the first thing he wanted to make clear was this was a quasi-judicial proceeding and a standard had been provided. Questions of wrongdoing could not be considered, nor allegations of wrongdoing. Therefore, he would not do so. If they based their decisions on such, it would be reversible error. He hoped all the Commissioners would disregard any allegations of wrongdoing. It was his understanding they were not to consider the percentage of build out either for the project. A Fire Inspector informed them the stairwells needed to be changed, and an amended site plan application was submitted. The Commission needed to decide whether such site plan met the requirements of the Overlay District. He stated everyone had to rely upon his or her own recollection. The architect stated he did not consider moving the stairs in, but automatically moved them out. He stated that was his recollection of that matter. He further stated that he could not imagine why the stairwells had not been moved inward. This alone was not grounds to vote either in favor or against the application.

Mayor Parker further stated that the real question was whether this plan met the requirements of the Overlay District. He stated that the evidence presented by Ms. Melgren was the most impressive so far in this proceeding. Her presentation convinced him that if the building were moved 4' closer to the sidewalk, the development would no longer be pedestrian friendly. He stated that maybe they made a mistake in connection with the Villa Capri, and therefore, they would not be bound by such mistakes. He did not feel they had made a mistake because he believed the Villa Capri was distinguishable from the Oriana. Plans for both projects had been presented and reviewed. He believed there was a different pedestrian feel with the Villa Capri project.

Mayor Parker continued stating that the rules allowed them to consider hearsay evidence for the purpose of supplementing other testimony or evidence, but they should not base their opinion solely on such evidence. He would totally disregard such evidence and would base his decision on the evidence presented by Mr. Keller and Oriana, primarily by the evidence presented by Ms. Melgren. He further stated that Mr. Goldstein stated the Commission should grant their approval due to an estoppel. He stated there were two problems with the estoppel. First, there was no estoppel because staff made a mistake. The stamp should have put them on notice that they needed to come back to ask permission in order to change the site plan, but that was not done. He believed that would constitute unclean hands. He would base his decision solely and entirely on the issue of whether he would approve the site plan if a building did not exist, and

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whether the applicant came requesting a change prior to the beginning of construction. It was his understanding that of the 24 changes, one was abandoned and that was #11 that he proceeded to read. He did not believe that he could agree to Items #1 and 2. Both would intrude upon the setbacks and make the development less pedestrian friendly.

Mayor Parker advised that he had been on the original board that approved the site plan, and this change altered the site plan dramatically.

Mayor Parker motioned that the Commission deny requests #1, 2 and 11 of the site plan amendment, and that they approve requests #3 through 10 and 12 through 24 subject to any additional conditions staff would impose at the Commission meeting in March 2007. Commissioner Silverstone seconded the motion.

Mayor Pro Tem Clark stated that he liked the project when it was first presented and he still liked it, and believed it was pedestrian friendly. He further stated that implications of wrongdoing had no place in his hearing. It was his understanding that they were to judge the request for this amendment on its merits or demerits. He was in favor of moving forward with this project. Wrongdoing was the purview of the State Attorney and there was an investigation in progress. He finds this project very pleasing and was in favor of voting for the project to move forward. However, he wants to see a condition added which was that if the amendment was approved the developer would have to pay for all additional legal and administrative expenses incurred.

Mayor Pro Tem Clark motioned to approve the request for the site plan amendment with the proviso that the developer would have to pay for all additional legal and administrative expenses incurred, and Items #1 and 2 be restored. Vice Mayor Yanni seconded the motion.

Vice Mayor Yanni asked what would be gained with the elimination of Items #1 and 2.

Mayor Parker stated they would obtain a pedestrian friendly development.

Commissioner McIntee stated that if additional footage were taken away, the development would be less pedestrian friendly. He explained that he was distressed with Oriana's presentation because they attacked two Town employees and Mr. Coker. He related the events in this case chronologically. By June 2006 everyone knew this problem with the encroachment existed. He believed if the applicant wanted to act in good faith, he would have come to the Town and admitted the mistake made and attempt to try to remedy the situation. He stated this building has a 20' 8" setback. The Town Attorney told the applicant in a letter to build at his or her own risk.

Commissioner McIntee stated further that volunteers were put in a bad situation in connection with this project. He felt the credibility of the presentation of the models went out the window since only two buildings had been shown. He felt that was another link of weakness on the part of the applicant. He felt they knew the project would look bad if the other building had been shown.

Commissioner McIntee stated that he was not sure of the thought process used by the Planning and Zoning Board in connection with their approval of this project. Therefore, their credibility was challenged. He stated they could have moved the stairs inside, but he believed they took the easy way out which took away 5' of the sidewalk.

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Commissioner Silverstone stated the 5' made a difference in the project. He did not feel that Ms. Melgren's video portrayed the exact dimensions. He stated how they got to this point was irrelevant.

Vice Mayor Yanni stated they should leave things, as they were if they believed the project to be pedestrian friendly. It was a beautiful project and the sidewalks were an improvement to what had existed previously. He did not understand what everyone was objecting to. He believed people had their minds made up already regarding this situation. He further stated that one member of the Planning and Zoning Board did not speak as they should have because their meeting was the place for such discussion. Therefore, they had been removed from that Board. He hoped that the Mayor would reconsider what he was proposing.

Mayor Parker reiterated that he did not believe the project as it presently exists was pedestrian friendly. The point of the Overlay District was to redesign a project so it would be more pedestrian friendly.

Mayor Parker advised that the Commission would first vote on the motion to amend. He explained that if one voted yes they were in favor of the project.

Mayor Parker asked the Town Clerk to take the roll. Vice Mayor Yanni and Mayor Pro Tem Clark voted yes. Commissioner McIntee, Commissioner Silverstone, and Mayor Parker voted no. Motion to amend failed 2-3.

Mayor Parker advised that they would now vote on the underlying motion, which was the motion to outright deny amendments 1, 2 and 11, and to grant amendments 3 through 10 and 12 through 24 subject to staff returned to the first Commission meeting in March and present additional conditions as part of the approval. At that point the site plan would be finalized.

Mayor Parker asked the Town Clerk to take the roll. Commissioner McIntee, Commissioner Silverstone, and Mayor Parker voted yes. Vice Mayor Yanni and Mayor Pro Tem Clark voted no. Motion passed 3-2.

Mayor Parker asked Commissioner McIntee if by voting yes he had set aside all allegations of wrongdoing and did he concentrate solely on the issue of whether the amendment would be pedestrian friendly and consistent with the Overlay District.

Commissioner McIntee asked if it was appropriate for the Mayor to ask him that question.

Town Attorney Cherof stated that the question was not appropriate because deliberations were concluded and a vote was taken. Therefore, the matter was concluded.

Mayor Pro Tem Clark motioned to adjourn the meeting. Commissioner McIntee seconded the motion.

There was no further business for discussion and the meeting was adjourned.

Town Commission Regular Meeting Agenda  
January 23, 2007

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Mayor Oliver Parker

**ATTEST:**

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Dolores Regis for Town Clerk

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Date