

In The Matter Of:
Municipality of Anchorage
Board of Adjustment

Board of Adjustment Appeal No. 2016-1
April 26, 2017

Highlighting Notes:

Blue - good background info

Green - critical parts of conversation

The logo features a stylized aurora borealis in shades of blue and green, with small white stars, positioned behind the word "NORTHERN". Below "NORTHERN" is the word "LIGHTS" in a large, white, serif font. A horizontal white line separates "LIGHTS" from "REALTIME & REPORTING", which is also in a white, serif font.

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Page 1	Page 3
<p>1 2 3 4 5 6 MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT 7 APPEAL FROM PLANNING & ZONING COMMISSION 8 RESOLUTION NO. 2016-029 9 10 PLANNING & ZONING COMMISSION CASE NO. 2016-0023 11 BOARD OF ADJUSTMENT APPEAL NO. 2016-1 12 13 Pages 1 - 186 14 April 26, 2017 15 16 VOLUME 1 OF 4 17 18 19 20 Board of Adjustment Members: 21 Bernd C. Guetschow, Chair 22 Robert B. Stewart 23 William Dwayne Adams, Jr. 24 Others Participating: 25 Barbara A. Jones, Municipal Clerk Julia Tucker, Board Counsel</p>	<p>1 previous meeting. Why that is, I'm not quite 2 sure, but what do I know. And there is no 3 old business. The only new business on the 4 agenda tonight is the hearing on BOA Appeal 5 No. 2016-1, Planning & Zoning Commission 6 Resolution No. 2016-029 for Case 2016-0023, 7 commonly referred to as the Nordstrom Rack at 8 Sears Mall Site Plan Review. 9 The first thing we have to find 10 out is if there are any conflicts. 11 Mr. Adams? 12 MR. ADAMS: None. 13 CHAIRMAN GUETSCHOW: Mr. Stewart. 14 MR. STEWART: I do not have any, 15 but I want to put on the record that my 16 daughter is not working in the planning area 17 now. She's working directly for the 18 Community Planning and Development director 19 in a position that does not handle anything 20 related to these cases. 21 CHAIRMAN GUETSCHOW: Okay. And I 22 do not have a conflict either. 23 Let us then consider the Appeal, 24 2016-1. This is an appeal in a case that 25 comes back to us. It has been before us</p>
Page 2	Page 4
<p>1 CHAIRMAN GUETSCHOW: Good 2 evening, ladies and gentlemen. This is the 3 Municipality of Anchorage Board of Adjustment 4 regular meeting, scheduled meeting of 5 April 26, 2017. 6 I'm Bernd Guetschow, Chair. 7 Madam Clerk, would you please 8 call the roll? 9 THE CLERK: Dwayne Adams. 10 MR. ADAMS: Here. 11 THE CLERK: Bernd Guetschow. 12 CHAIRMAN GUETSCHOW: Here. 13 THE CLERK: Robert Stewart. 14 MR. STEWART: Here. 15 THE CLERK: You have a quorum. 16 CHAIRMAN GUETSCHOW: Thank you, 17 Madam Clerk. 18 We have in front of us an agenda 19 for tonight, and presumably you have all 20 looked at that. Are there any additions, 21 deletions, changes that you wish to make to 22 the agenda? 23 Seeing none, this will be the 24 order in which we proceed tonight. 25 There are no minutes of the</p>	<p>1 before in 2015, I believe it was, no? 2 Anyway, we had occasion to rule on a prior 3 decision of the Planning & Zoning Commission 4 in this case. It was appealed to the 5 Superior Court, and the Superior Court sent 6 it back to the Planning & Zoning Commission. 7 And I would like to discuss this 8 appeal by going through the Superior Court 9 decision, because I think it is useful in 10 terms of shedding light on the appeal that 11 we're here to consider tonight. Now, this 12 Superior Court decision -- and I'm looking at 13 the record, pages 9 through -- 9 through 14 20 -- came before the Court from the appeal 15 of our decision not to require a public 16 hearing in the case. 17 And so the Court was confronted 18 with having to decide whether a public 19 hearing was required and we know, of course, 20 no secret here, that the Court decided that a 21 public hearing had to be held. But I think 22 it is useful for us to go through this 23 decision and to see how the Court came to 24 that decision. 25 When you look at the discussion</p>

<p style="text-align: right;">Page 5</p> <p>1 on page -- and when I'm referring to page 2 numbers, I'm referring to the order itself, 3 to the page numbers of the order. On page 5, 4 starting on page 5, the Court gives its 5 reasoning why a public hearing is required in 6 this case. I think it is interesting to look 7 at how the Court came to that conclusion. 8 The Court went through the 9 various code provisions and came to the 10 conclusion that basically there was as much 11 argument -- first of all, the Code 12 provisions, if I can paraphrase it -- the 13 Code provisions are ambiguous. And, 14 secondly, there could be as much argument for 15 mandating a public hearing as there could be 16 for not holding a public hearing as this 17 board had done. 18 Being in that way faced with a 19 conundrum, the Court looked at other ways to 20 come to a conclusion on this, and it 21 basically concluded that public policy 22 favors -- favors holding a public hearing. 23 And I think when you turn to page 9 of the 24 decision, the bottom paragraph: "Since 25 neither the plain language of the statute nor</p>	<p style="text-align: right;">Page 7</p> <p>1 highlight the proposals, economic benefits, 2 and minimize any potential drawbacks and 3 complications." 4 In other words, if you don't have 5 a public hearing, any party aggrieved by the 6 decision is really at a disadvantage, because 7 in looking at the decision that in this case 8 the Planning & Zoning Commission prepares, 9 signs, votes on, and presumably approves, an 10 appellant can only guess at what should have 11 been on the record and what wasn't on the 12 record. 13 And so what is really important 14 is that the decision that is rendered by the 15 court, by the lower body, Planning & Zoning 16 Commission, that that decision is based on 17 having given an opportunity to all parties to 18 provide input, so to speak, before the 19 decision is made. And as we all know, in 20 the -- what led to the 2014 resolution of the 21 Planning & Zoning Commission in this case, 22 that was not the case. 23 The -- only the owner of the 24 property was given an opportunity to present 25 the case. Because there was no public</p>
<p style="text-align: right;">Page 6</p> <p>1 the legislative history definitively resolves 2 the issue, the Court must discover the 3 interpretation which best fits with concepts 4 of justice and equity." 5 I think those are the two 6 crucial -- the three crucial words, justice 7 and equity that is required under the 8 circumstances. 9 Towards the bottom of that page, 10 page 9, the Court says: "The only way to 11 preserve a meaningful right to judicial 12 review in such cases is to provide aggrieved 13 parties with an opportunity to articulate 14 their objections and build a record for an 15 appeal." 16 And I think that is one of the 17 crucial sentences here, because it 18 concludes -- the Court then comes to the 19 decision that a right of appeal -- and I'm 20 looking at the bottom of page 10: "Any right 21 of appeal is meaningless without an 22 opportunity to build an evidentiary record at 23 the level of the initial decision. Any 24 appeal will place an appellant at an unfair 25 disadvantage as the applicant will likely</p>	<p style="text-align: right;">Page 8</p> <p>1 hearing, the opponents, mostly merchants in 2 this case, merchants in the mall, really 3 didn't have an opportunity to voice their 4 positions and thereby provide some input to 5 the Planning & Zoning Commission before it 6 made its decision. 7 So when you -- when you look at 8 it from that vantage point, what really is 9 required, it seems to me -- and I want to 10 hear from you two as well, of course -- is 11 that before the Planning & Zoning Commission 12 makes a decision, everybody has to be given 13 an opportunity. Anybody who has -- who is 14 affected by the case has to be given an 15 opportunity to voice any objection or 16 approval or whatever. 17 Not only that, a decision that is 18 made by the Planning & Zoning Commission 19 needs to be in such a form that the opponents 20 have an opportunity to voice -- to build a 21 record and to prepare an opposition to it and 22 to appeal it on that basis. 23 So when we look at this -- and 24 these are the guidelines from the Superior 25 Court. And as you know, it was sent back to</p>

<p style="text-align: right;">Page 9</p> <p>1 the Planning & Zoning Commission on that 2 basis. Now, on the surface, the order from 3 the Superior Court was simply to hold a 4 hearing. And that's how -- when we look at 5 the transcript of what occurred, how in June 6 of last year the Planning & Zoning Commission 7 at the recommendation -- on the 8 recommendation of the Planning Department 9 initially proceeded.</p> <p>10 They just took the position: 11 Hey, we have to hold a public hearing. Let's 12 hold a public hearing, and let's get 13 everybody an opportunity to be harried. It 14 was only towards the end of the evening that 15 it occurred to the chairman, and after a 16 presentation by Mr. Reeves, I think it was, 17 that there's more to it than that and that, 18 in fact, what the Superior Court really 19 required was, in essence, a new consideration 20 of the entire record, of the entire case.</p> <p>21 And so that's what then led to 22 the Planning & Zoning Commission directing 23 the Planning Department to contact the City 24 Attorney's office and say: Hey, what do we 25 have to do here?</p>	<p style="text-align: right;">Page 11</p> <p>1 should be -- there is a strong implication 2 that any hearing would be fair and impartial. 3 So that's what I tried to look at as I went 4 through the record. And, you know, 5 there's -- there's some Municipal Code 6 references that talk about it needs to be 7 that, both in fact and in appearance.</p> <p>8 And some of the things I looked 9 at in there seemed to indicate that they had 10 made their mind up beforehand and that they 11 just were kind of going through the motions 12 in order to fulfill this requirement of 13 having a hearing. And it seems to me like in 14 a couple of places that they may have applied 15 the wrong test in determining some of their 16 discussion in what constituted during 17 those --</p> <p>18 During the last hearing, I think 19 it was on the 14th, some of the things that I 20 saw were -- it looked like when they were 21 talking about modifications -- and this might 22 be going into the weeds a little bit too 23 much -- but they were looking at 24 modifications that increased conformity, but 25 it seemed like they were making the decision</p>
<p style="text-align: right;">Page 10</p> <p>1 And when they came in July, came 2 back in July, it was, in fact, a mandate to 3 reconsider the entire case. And so that's 4 what was done in July. Now, when we -- and 5 that's what then led to the resolution that 6 is entitled whatever it was entitled, 7 2016-029.</p> <p>8 So when we look at that 9 resolution, as we must on appeal here, we 10 really must determine initially whether that 11 resolution satisfies the mandate of the 12 Superior Court. And I would like us to focus 13 on that aspect for a while if we can, okay?</p> <p>14 So having given this long speech 15 here, I first would like to hear from the two 16 of you, what your thoughts are initially as 17 to how we should -- how we should attack this 18 appeal, because as you can tell from my 19 presentation, I would like to attack it on 20 the basis of: Does it comply with the 21 Court's order of December 2, 2015.</p> <p>22 Any thoughts? Mr. Stewart.</p> <p>23 MR. STEWART: Well, I think one 24 of the things that I'm looking at from the 25 resolution is that there -- to me there</p>	<p style="text-align: right;">Page 12</p> <p>1 based on the current status of the 2 construction, not as where the LRE was in 3 comparison to the May 8, 2001 Code. So it 4 looked like they were applying that in a 5 manner that showed bias on their part.</p> <p>6 There were several comments made 7 about that. So I tried to focus on the 8 hearing as it was implied to be conducted 9 fairly and unbiased. And if you look at 10 Anchorage Municipal Code 21.55.130, it 11 directs the Planning & Zoning to process the 12 application in the same manner as a proposal 13 for a new facility; but when you get into the 14 hearing part, if you look at the oath in 15 1.35.010, boards and commissions are sworn to 16 support the State Constitution and the 17 Anchorage Charter.</p> <p>18 And then if you look at Anchorage 19 Municipal Code 3.60.065, in the ex parte, it 20 says: "Commissions shall be impartial in all 21 matters, both in fact and appearance."</p> <p>22 Then I looked at some of the 23 other -- I looked at some case law involved 24 in this, and I'm not sure if -- I think it's 25 still current, I think it's good case law,</p>

<p style="text-align: right;">Page 13</p> <p>1 but it was State of Alaska versus Lundgren 2 Pacific Construction, 603 P2d 889. It's a 3 1979 case, and they discussed administrative 4 due process. 5 Then they referred to it's either 6 Keiner or Keiner, K-e-i-n-e-r, versus City of 7 Anchorage, and that was at 378 P2d 406, and 8 it's a 1963 Alaska case. In that case the 9 City Council acted as the Board of 10 Adjustment, and the process that they looked 11 at was due process requirements. Was the 12 hearing conducted consistent with the 13 essentials of a fair trial? And some of the 14 other tests they applied was the Board was 15 not impartial and there was no substantial 16 failure to follow or observe applicable laws 17 and rules of procedure. In that case the 18 impartiality of the decision is an essential 19 element of due process. 20 So what I was looking at was the 21 impartiality, whether or not it met the 22 requirements of an actual hearing. I have 23 some questions whether or not the intent of 24 that public hearing was actually met. 25 CHAIRMAN GUETSCHOW: Okay.</p>	<p style="text-align: right;">Page 15</p> <p>1 was not referred to them as: Well, what do 2 you got to do to make it better after you 3 listen to the public? It was new evidence, 4 and based on that evidence, what will your 5 planning be? And that's the thing I found 6 troubling. 7 That one stood out to me, but 8 there were several others that: Well, it's 9 probably as good as we can do. That sort of 10 language doesn't -- that's not appropriate. 11 It needs to be evidentiary in their findings. 12 I'm not sure that the findings represented, 13 to the degree necessary, specifics with 14 respect to why we approved this. It did tend 15 to place a little doubt as to, when they 16 entered, whether this truly represented 17 consideration of all the facts of the case as 18 a whole. 19 CHAIRMAN GUETSCHOW: Well, while 20 you were talking about that, it occurred to 21 me that there is a regulation that requires 22 boards such as P&Z to prepare their decisions 23 in a particular manner. What I'm looking at 24 is AMC 21.10.304, which says: "Every 25 decision made by the Commission shall be</p>
<p style="text-align: right;">Page 14</p> <p>1 Mr. Adams. 2 MR. ADAMS: I guess I had just a 3 couple concerns as I read, as they were 4 summing up, certain language that I found 5 puzzling. The test is whether it complies 6 with conditions as outlined in the bridge 7 document basically. It's pretty 8 straightforward. Actually what it has, and 9 what I would have looked for, and having sat 10 on planning commissions, to look and respond 11 directly to those. 12 But what I -- the sort of thing 13 that always troubles me is language like that 14 he looked at other malls, other pad sites. 15 People get out in the traffic all the time. 16 And I believe the petition is as good as 17 anyone can do. Well, that's not the test. 18 And I found that language kind of troubling 19 that this -- a lot of this kind of speaks to 20 what Bob started with. That's the simple 21 matter that it begs the question, you know: 22 Were they focused on, okay, we've got an 23 approved proposal here. Now what have we got 24 to do to make it work? And that's not the 25 test. That's not what was referred back. It</p>	<p style="text-align: right;">Page 16</p> <p>1 based on and include findings of fact and 2 conclusions. Every finding of fact shall be 3 supported in the record of the proceeding -- 4 "proceedings," plural. The findings shall be 5 sufficient to provide a reasonable basis for 6 understanding the reasons for the decision. 7 In considering and applying any applicable 8 approval criteria, the Commission shall make 9 specific findings as to why the criteria have 10 or have not been met." 11 And I think that's what you were 12 just saying, because when we look at the 13 resolution, and I'm trying to find it -- oh, 14 I have it right here. When you look at that 15 resolution that presumably was adopted on 16 August 8, 2016 -- and that, by the way, is 17 another issue here. When you look at that 18 resolution and you look at the portion that 19 is entitled "Findings of Fact," well, lo and 20 behold, it is virtually identical to the 21 resolution that was passed in 2014. Because 22 if you look at that -- and, remember, this 23 board tinkered with the resolution and 24 supplemented it. So when you leave out our 25 supplementation of that 2014 resolution,</p>

<p style="text-align: right;">Page 17</p> <p>1 well, lo and behold, it is virtually 2 identical. It is as though there was no 3 hearing held at all following 2014. 4 The only difference between those 5 two resolutions that I could discern was that 6 the 2016 resolution added two conditions, and 7 they had to do with a pedestrian sidewalk and 8 signage along the north side of the Nordstrom 9 Rack, and to construct the approved sidewalk 10 and install the approved signage along the 11 north side of Nordstrom Rack. And this was 12 apparently added because the petitioner 13 himself offered to do this. This was not as 14 a result of the hearing. This was strictly 15 in response to what the petitioner, maybe 16 realizing that there was a deficiency here, 17 offered to do. 18 So the sidewalk was an issue and 19 the signage was added as additional 20 conditions in the 2016 resolution; but aside 21 from that, it is virtually -- in substance it 22 is identical to the earlier one. And I must 23 tell you: Considering the evidence that was 24 presented at the public hearing, that is most 25 surprising because there are all kinds of</p>	<p style="text-align: right;">Page 19</p> <p>1 would come to the same conclusion. It's 2 incomprehensible. 3 Next one: "The loading dock 4 addition" -- and I'm looking at finding of 5 fact No. 4: "The loading dock addition, 6 while necessary for the use, does not promote 7 the balance of the additional building that 8 is without a prominent front side and divides 9 the pedestrian access." 10 What does that mean? How does -- 11 now, we know that findings of fact have to 12 relate to evidence that has been presented. 13 How does this relate to evidence that has 14 been presented? And it seems to me when you 15 go through the findings of fact that I listed 16 as No. 1 through 5, they are -- in the light 17 of the Court's decision and the court order, 18 they are totally sufficient because -- 19 insufficient, I'm sorry, because they do not 20 give an aggrieved party an opportunity to 21 discern how the decision that they arrived 22 at, which was to approve the amended site 23 plan, how it was arrived at. 24 What are the facts that caused 25 the Planning & Zoning Commission to come to</p>
<p style="text-align: right;">Page 18</p> <p>1 things that were brought out at the public 2 hearing that, to my mind, would have raised 3 all kinds of red flags in terms of what had 4 been approved before. 5 So it seems to me that -- plus 6 when you read the findings, they are -- I'm 7 not sure what they mean. Look at finding No. 8 3, for example. Finding No. 3 says: 9 "Northern design elements should be 10 implemented where possible; the covered 11 walkway between entrances is important." 12 What does that mean? Does that 13 mean that it brings the project towards 14 conformity -- and we can talk about this for 15 a long time later on -- or what does it mean? 16 What does that sentence mean? Why is that 17 added? Does it mean that more northern 18 construction elements need to be added, or is 19 it sufficient the way it has been done? All 20 it says is "the covered walkway between 21 entrances is important." 22 Well, it means nothing to me, and 23 I'm sure it doesn't mean anything to anybody 24 outside the Planning & Zoning Commission. 25 Looking at this -- and anybody doing that</p>	<p style="text-align: right;">Page 20</p> <p>1 the decision to approve the amended site 2 plan? Can't tell. 3 Now, there is -- and while I'm 4 talking about this, there is a formal defect, 5 by the way. I don't know if you have noticed 6 this. The resolution says on page -- well, 7 it's page 8 of 296. It says: "Passed and 8 approved by the Anchorage Planning & Zoning 9 Commission this 11th day of July, 2016. 10 Adopted by the Municipal Planning & Zoning 11 Commission this 8th day of August." 12 Well, what was passed and 13 approved in -- on July 11, when we read the 14 transcript, was something entirely different. 15 There was a motion made and the motion 16 passed. So this resolution was not passed on 17 July 11th; instead there was a motion made 18 that passed. 19 The term -- the reference to 20 "adopted by the Municipal Planning & Zoning 21 Commission this 8th day of August," I don't 22 have the foggiest idea where that comes from. 23 There's nothing in the record that is before 24 us -- and I have searched high and low -- 25 there is nothing in the record that shows</p>

<p style="text-align: right;">Page 21</p> <p>1 that this proposed decision -- resolution was 2 approved by the Planning & Zoning Commission 3 on that day. I'm not even sure they met on 4 that day. We don't know. There are no 5 minutes here. There's nothing to support it. 6 So the question is: What is this 7 based on? And particularly when you look at 8 it and say: This is virtually identical to 9 what was done in 2014, what springs to your 10 mind, to the innocent mind of an observer, is 11 that this was simply prepared by the Planning 12 Department and was stuck under the nose of 13 the chairman and he signed it. 14 MR. ADAMS: If I may share -- 15 CHAIRMAN GUETSCHOW: Yes. 16 MR. ADAMS: -- I know that the 17 way that they often work is that this 18 resolution for a motion, which they're 19 calling the approval, took place on the 11th. 20 That's when the public hearing was. That's 21 when the motion was made and this resolution 22 wasn't approved, but a motion was approved. 23 So that is correct. 24 CHAIRMAN GUETSCHOW: Yes, as I 25 said.</p>	<p style="text-align: right;">Page 23</p> <p>1 no. 2 CHAIRMAN GUETSCHOW: We just 3 don't know. So I think that I must tell you, 4 I view that as a problem. 5 So the other thing that struck me 6 was -- and I need to call on you, Mr. Adams, 7 on the basis of your experience. When you 8 look at the transcript of what occurred on 9 July 11th, it was that a motion was made and 10 then there was a little bit of discussion. 11 Virtually nothing relating to findings of 12 fact. The motion was called. It was voted 13 on. It was approved. And then the chairman, 14 apparently recognizing that there were 15 findings of fact missing, called on members 16 to supply findings of fact. 17 Was it the usual -- or is that a 18 usual method of proceeding that -- shouldn't 19 it be the other way around? Aren't we 20 putting the cart before the horse? There 21 should be findings of fact before you vote on 22 this thing? 23 MR. ADAMS: Yes, there should -- 24 there certainly should be. And they should 25 have -- there should have been discussion,</p>
<p style="text-align: right;">Page 22</p> <p>1 MR. ADAMS: Their standard way of 2 doing business is then that staff drafts a 3 resolution. That resolution is presented on 4 the consent agenda at the following meeting, 5 which I presume to be in August, and that at 6 that point, right or wrongly, if it's not 7 pulled, then it's considered passed and 8 adopted. 9 So that's not an unusual way for 10 them to do business. Now, whether that's 11 right or wrong is a whole different 12 discussion perhaps, but that is not -- that 13 is a typical way that they do business. 14 CHAIRMAN GUETSCHOW: Okay. Well, 15 then perhaps what is missing simply is a set 16 of minutes relating to -- 17 MR. ADAMS: That shows that. 18 CHAIRMAN GUETSCHOW: -- to August 19 the 8th -- 20 MR. ADAMS: Correct. 21 CHAIRMAN GUETSCHOW: -- that 22 there was -- that it was on the consent 23 agenda. It's entirely possible, but we don't 24 know. 25 MR. ADAMS: There's no evidence,</p>	<p style="text-align: right;">Page 24</p> <p>1 but it's not unusual for them to make a 2 motion. And, in fact, it's not -- it is 3 actually often the case that a motion will 4 simply be made to get it onto the table, and 5 then it is discussed -- 6 CHAIRMAN GUETSCHOW: Yes. 7 MR. ADAMS: -- as a body of the 8 whole -- well, not as a body of the whole, 9 but as -- while sitting. And then the maker 10 of the motion will vote against it, but 11 advance the motion just to get it on the 12 table for discussion first. That's their 13 typical way of doing business. So that's -- 14 it's not unusual that they would make a 15 motion, but they certainly wouldn't vote on 16 it beforehand, of course; but that is a 17 standard way of doing business. 18 CHAIRMAN GUETSCHOW: Yeah. And, 19 you know, having served on another land use 20 planning board myself, I'm well familiar with 21 that. 22 MR. ADAMS: Sure. 23 CHAIRMAN GUETSCHOW: But, you 24 know, at least you need to refer to the 25 findings before you vote on the motion, it</p>

<p style="text-align: right;">Page 25</p> <p>1 seems to me, because --</p> <p>2 MR. ADAMS: Yes.</p> <p>3 CHAIRMAN GUETSCHOW: --</p> <p>4 presumably the decision is based on the</p> <p>5 findings. And here you don't have that,</p> <p>6 because when you read the transcript -- and</p> <p>7 I'm not going to go through this, we don't</p> <p>8 need to do that -- you are left with the</p> <p>9 impression that at the July 11th hearing, the</p> <p>10 motion was made and, as you said before, they</p> <p>11 had pretty much made up -- the members of P&Z</p> <p>12 had pretty much made up their minds</p> <p>13 beforehand, and they were simply going</p> <p>14 through the motions of approving the -- what</p> <p>15 was then later on turned into a resolution.</p> <p>16 There was nothing until the vote was taken,</p> <p>17 that I can find, that related the</p> <p>18 requirements of the Code, and I'm</p> <p>19 specifically talking about 55.130 -- 50.130,</p> <p>20 I'm sorry, to the facts as they had been</p> <p>21 presented. It seems to me that that is a</p> <p>22 significant deficiency.</p> <p>23 MR. ADAMS: One thing that -- you</p> <p>24 can see the struggle. On page 134 of the</p> <p>25 record, that motion carries and then Chair</p>	<p style="text-align: right;">Page 27</p> <p>1 to overstate this, but I've mentioned before</p> <p>2 that the two resolutions, the earlier one,</p> <p>3 the 2014 resolution, and the 2016 resolution,</p> <p>4 are substantially identical? Am I</p> <p>5 overstating this? Am I -- because what I'm</p> <p>6 getting at is if I had been on the Planning &</p> <p>7 Zoning Commission in 2016 and I had heard</p> <p>8 this litany of complaints, I would have made</p> <p>9 sure that there are some findings of fact</p> <p>10 that either support my decision to approve</p> <p>11 this in spite of all of the evidence, or I</p> <p>12 would have voted against it and I would have</p> <p>13 said: Here's why I'm voting against it.</p> <p>14 Here's all the testimony that we've heard.</p> <p>15 Here are the documents. Remember, there were</p> <p>16 pictures taken and, you know, all these</p> <p>17 things. Am I off base in saying that those</p> <p>18 things should have been added to the later</p> <p>19 resolution?</p> <p>20 MR. STEWART: I don't think that</p> <p>21 there's any nexus between those two. I think</p> <p>22 there's no findings to support it. I think</p> <p>23 what they did is that they made a motion to</p> <p>24 accept what Planning & Zoning -- or Planning</p> <p>25 Department had presented to them, and accept</p>
<p style="text-align: right;">Page 26</p> <p>1 Robinson says: Are there additional</p> <p>2 findings? Now that's unusual. I've not seen</p> <p>3 a request for additional findings after the</p> <p>4 vote takes place.</p> <p>5 CHAIRMAN GUETSCHOW: Okay.</p> <p>6 That's precisely what I was referring to.</p> <p>7 MR. ADAMS: That is -- that's</p> <p>8 very different.</p> <p>9 CHAIRMAN GUETSCHOW: It's putting</p> <p>10 the cart before the horse, is it not?</p> <p>11 MR. ADAMS: Yes, they're -- yes,</p> <p>12 I would agree.</p> <p>13 CHAIRMAN GUETSCHOW: Mr. Stewart,</p> <p>14 you're a lawyer. What do you think about</p> <p>15 this?</p> <p>16 MR. STEWART: That's the basis</p> <p>17 for my observation that their mind was</p> <p>18 already made up, and they were -- it was not</p> <p>19 a fair and impartial hearing. It was a -- it</p> <p>20 was not even a work of art. They just went</p> <p>21 through the process thinking that a hearing</p> <p>22 is all they needed to do because they'd</p> <p>23 already made the decision.</p> <p>24 CHAIRMAN GUETSCHOW: Okay. What</p> <p>25 do you make out of the fact -- I don't want</p>	<p style="text-align: right;">Page 28</p> <p>1 what was in that advice from the Planning</p> <p>2 Department. That seems to be what they base</p> <p>3 their resolution on.</p> <p>4 MR. ADAMS: And that's not --</p> <p>5 CHAIRMAN GUETSCHOW: Mr. Adams.</p> <p>6 MR. ADAMS: -- not out of the</p> <p>7 ordinary that they would not simply go to</p> <p>8 what staff provided them. Now, I think a lot</p> <p>9 of that was based on a previous motion, which</p> <p>10 carried, the one that was appealed and -- the</p> <p>11 first one that was appealed, I should say.</p> <p>12 CHAIRMAN GUETSCHOW: Yes, yes.</p> <p>13 MR. ADAMS: And, you know, my</p> <p>14 reading of this -- you know, if we were to</p> <p>15 step back 10,000 feet is they had a case that</p> <p>16 they feel they passed. They worked at it and</p> <p>17 so they were directed at a public hearing.</p> <p>18 That public hearing, out of the testimony,</p> <p>19 they pulled all the things that they felt</p> <p>20 were important. And I think that we're</p> <p>21 moving a little bit beyond where we are right</p> <p>22 now, but, in essence, two-thirds of that was</p> <p>23 removed from the table. So what they were</p> <p>24 left with was lighting and an access issue.</p> <p>25 And that's what they dealt with and virtually</p>

Page 29

1 everything you see here in their findings of
2 fact speaks to that, and it doesn't really
3 speak to the rest of this -- all the other
4 stuff that they're called findings of fact,
5 whether you agree that they are or not, which
6 I agree they're pretty weak.
7 But they dealt with those things
8 that they could deal with that did come up in
9 the public hearing and, in essence, a broader
10 discussion and findings of fact on other
11 things just disappeared because those issues
12 were deemed moot by staff direction.
13 That's -- we're moving, you know, off in
14 another discussion, I think, here, but, you
15 know, I think that's -- the way I read it,
16 that's what the chair was trying to get to
17 is -- well, you know, twice he asked: Well,
18 anybody else? You know, I'm trying to build
19 something here.
20 CHAIRMAN GUETSCHOW: And it
21 didn't come.
22 MR. ADAMS: Yeah. "I'm going to
23 ask people to speak to the important aspects
24 of that if you support it. I want to know
25 what's negotiable and not negotiable from

Page 30

1 traffic engineers." So he's really focusing
2 on an access issue, and that's what it
3 distilled to was that singular issue. So any
4 building of findings of facts beyond that
5 just -- kind of, I think that they felt that
6 they dealt with it. The public didn't speak
7 to it, so they didn't either.
8 CHAIRMAN GUETSCHOW: So -- I'm
9 sorry, Madam Clerk.
10 THE CLERK: Mr. Chair, I'd like
11 to bring up a procedural matter. Assembly
12 Counsel Dean Gates just joined by telephone.
13 That's why your telephone rang. And I just
14 wanted to make sure that you understood that
15 Mr. Gates was listening on the phone.
16 CHAIRMAN GUETSCHOW: Okay. Thank
17 you so much --
18 THE CLERK: You're welcome.
19 CHAIRMAN GUETSCHOW: -- for
20 telling us. I appreciate it.
21 Now, we know that there are two
22 really crucial code sections that are
23 involved in this entire matter. The first
24 one is .55.130A. That is the one that is the
25 framework for considering this entire matter,

Page 31

1 and it incorporates .50.320.
2 Do you find -- without going into
3 the details, do you find anything in the
4 resolution that tells you that P&Z has
5 addressed, first of all, the main
6 considerations under .55.130 and also under
7 .50.320?
8 Do you find anything in that
9 resolution that we are here deciding whether
10 it passes muster or not that refers to those
11 sections or the standards and considerations
12 that are in those ordinances?
13 Mr. Stewart.
14 MR. STEWART: I didn't find any
15 of that in there, but I think what Dwayne
16 referred to, those issues that were brought
17 up during this hearing that they could
18 address, that's what they addressed. But I
19 think what they were doing, and there's
20 discussion in the transcript where they
21 talked about: Well, we could accept what
22 we've already done and go from there.
23 So it doesn't -- I think what it
24 showed to me is that they did not feel like
25 they had to go through this, where in my

Page 32

1 perspective I would look at it and say: This
2 is complicated. We were told to go over a
3 new one -- or have a hearing. I would have
4 gone through the whole thing and looked
5 initially as though we had never had the case
6 in front of us to set the record up.
7 CHAIRMAN GUETSCHOW: Well, in
8 fact, isn't that what the code of procedure
9 requires? Remember, I read to you the
10 section that relates to findings of fact.
11 "Every decision made by the Commission shall
12 be based on and include findings of fact and
13 conclusions. Every finding shall be
14 supported in the record of the proceeding.
15 The findings shall provide -- shall be
16 sufficient to provide a reasonable basis for
17 understanding the reasons for the decision."
18 Doesn't that mean you have to
19 refer to the two Code provisions that are
20 really crucial in disposing of this matter,
21 i.e., 55.130A and 50.320? Shouldn't the
22 evidence that was produced, or the basis for
23 their decision, shouldn't that have tied in
24 to those two Code provisions? Isn't that
25 what basic fairness requires that the

Page 33

1 Superior Court talked about in its order?
2 MR. ADAMS: I think they offer
3 one simple broad brush, and that is the
4 Commission makes a finding upon findings of
5 fact that complies with the standards in
6 55.130 and 50.320. So that --
7 CHAIRMAN GUETSCHOW: Yeah, but
8 what does that mean?
9 MR. ADAMS: That was a rather --
10 that was a rather broad brush.
11 MR. STEWART: That doesn't
12 explain --
13 MR. ADAMS: No, no.
14 CHAIRMAN GUETSCHOW: It doesn't
15 explain a thing, does it?
16 MR. STEWART: It doesn't give you
17 the nexus.
18 MR. ADAMS: No. No, it -- you
19 know, it -- a well-crafted resolution should
20 have addressed each of the aspects and
21 discussed the conformity with that,
22 especially since what's key -- the nut of
23 this whole thing is this question of -- you
24 know, the appellant calls it backsliding,
25 whether there was backsliding.

Page 34

1 So the issue and one of the key
2 issues is: Did they conform or not? Does it
3 conform or not? Does it conform to each one
4 of these? And there should have been a
5 discussion of that because that was part of
6 the public testimony. There was a lot of
7 public testimony about they're backsliding.
8 You know, they're pulling away from
9 conformance. And there was a minor amount of
10 discussion. John Spring talked about that in
11 his discussion, but, again, it was a pretty
12 broad brush that was applied.
13 And, you know, each of those
14 criteria that's in there should have been
15 discussed, whether they met and conformed
16 with that, and discussed the issue of did
17 they backslide, whatever term you want to
18 use. Did they move towards or away from
19 conformed meetings, one of those, because
20 that is critical to the whole issue.
21 CHAIRMAN GUETSCHOW: Okay. There
22 is another aspect that troubles me, and that
23 is that the Department may have accidentally
24 misled them, I'm not sure. But when you look
25 at the Department memorandum, and it's at the

Page 35

1 beginning of -- where is it? Let me come up
2 with it. Oh, it starts at page 29 of the
3 record. When you go through this, it starts
4 out -- the Commission was -- let me find
5 this. It was really striking that basically
6 the Department took the view -- 55.130 -- oh,
7 here, I have it. It's on page 29. The
8 changes to the Sears Mall are reviewed under
9 AMC 21.55.130, which states that, quote, 'the
10 Commission shall apply the standards set out
11 in 21.50.320 in a manner proportionate to the
12 extent of the expansion, comma,
13 reconstruction, comma, renovation, comma, or
14 remodeling proposed,' unquote. The cost of
15 compliance with those standards shall not
16 exceed 10 percent of the cost of
17 reconstruction."
18 Now, that's not at all what
19 21.55.130 states. That's only a small
20 portion of what that section states. That
21 section is the underpinning for the entire
22 proceeding. And it is fairly long and, as
23 you have read in -- there are six or seven
24 sentences that are in .130, and they all have
25 a particular meaning. In fact, when you look

Page 36

1 at this in our trusty Code here, you come to
2 the conclusion -- you come to the conclusion,
3 as I did, that that is another section that
4 was very poorly drafted. So I'm hopeful that
5 this didn't come back into the new Code. I
6 haven't checked it, I must tell you. But
7 when you look at that section, it goes on for
8 three-quarters of a page and there's a lot
9 stuffed in there.
10 In fact, if I had been drafting
11 this and, remember, I'm just a little old
12 country lawyer, I would have turned this into
13 seven different separate sections, because
14 each sentence has a particular meaning that
15 is important. These sentences are not
16 necessarily connected. As you determine from
17 the Department's -- from the Planning
18 Department's view, all those seven sentences
19 can be reduced to two.
20 Well, that doesn't do justice at
21 all, and it gives the wrong direction to the
22 Planning & Zoning Commission, in my view.
23 Because I'm not sure that they ever even read
24 that long section. They were not urged by
25 the Department to do that. I didn't see any

<p style="text-align: right;">Page 37</p> <p>1 particular discussion of it, and so I'm not 2 sure that they were aware of all the 3 requirements that that section imposed on 4 them. So I must tell you, I find this 5 resolution woefully deficient. And I -- you 6 know, we have discussed it. You have 7 mentioned it. You have voiced your views on 8 this, too. 9 Is there any further discussion 10 before we try to formulate this into some 11 action? 12 MR. ADAMS: Well, I guess, you 13 know, what's real troubling is it directs 14 them to adhere to these, apply the standards, 15 and then adds this statement. And as soon as 16 that statement's added, then that's where the 17 attention goes to, that that's the focus of 18 the statement, that the concluding -- 19 CHAIRMAN GUETSCHOW: It's a 20 conclusory statement. 21 MR. ADAMS: -- concluding 22 statement and so, okay. So 10 percent. So, 23 you know, adhering to these other pages, you 24 know, seven pages I think we have here, then 25 become subsidiary to the concluding</p>	<p style="text-align: right;">Page 39</p> <p>1 MR. ADAMS: No, the resolution 2 does not -- the 2016 resolution, I don't 3 believe, addresses any 10 percent. 4 CHAIRMAN GUETSCHOW: It does not 5 address the 10 percent, but there was 6 discussion at the hearing. And they were 7 under the impression -- "they" meaning the 8 Planning & Zoning Commission, was under the 9 impression that the 10 percent rule was a 10 maximum that could be or was required to be 11 spent by the applicant towards bringing the 12 project closer to conformance. It was based 13 strictly on the cost of work related to 14 exterior stuff, not interior stuff. You will 15 recall that argument. 16 Well, where this originated from, 17 apparently, was from a memorandum that the 18 planning director at the time, Mr. Weaver, 19 prepared. Because when you look at 20 Mr. O'Dell's memo to the Planning & Zoning 21 Commission starting at page 29 of the record, 22 when you look at page 31, it says: "As noted 23 in the attached Department memo from 2009, 24 the goal of the Department is to use this 25 10 percent dollar figure to work on bringing</p>
<p style="text-align: right;">Page 38</p> <p>1 statement, I think, just by a simple focus. 2 So it's a -- it is a poorly crafted memo, I 3 think, but that does not remove the Planning 4 & Zoning Commission from having to meet its 5 requirements. 6 So the question remains: Do they 7 meet the requirements regardless of what the 8 staff package said? Now, whether there's 9 erroneous direction is a whole different 10 matter that we'll talk about. But, you know, 11 I -- that is quite where I can -- 12 CHAIRMAN GUETSCHOW: Okay. 13 Mr. Stewart, anything that you 14 wish to add at this point? 15 MR. STEWART: Now, you're talking 16 only in terms of the resolution right now, 17 right? 18 CHAIRMAN GUETSCHOW: Yes. 19 MR. STEWART: No. 20 CHAIRMAN GUETSCHOW: Okay. The 21 resolution talks about -- I think it does. 22 It talks about the 10 percent. Let me find 23 this very quickly. Why can't I put my finger 24 on it right now? Here's the resolution, 25 okay.</p>	<p style="text-align: right;">Page 40</p> <p>1 the expansion of the new structure and the 2 existing structure towards compliance with 3 the architectural standards while also trying 4 to bring improvements to the site." 5 And then you look at Mr. Weaver's 6 memorandum -- 7 MR. ADAMS: Page 41. 8 CHAIRMAN GUETSCHOW: -- page 9 41 -- page 41, he indeed says that interior 10 remodeling -- I'm looking at the middle of 11 the second paragraph. "Interior remodeling, 12 renovation, or repair to interior portions of 13 large retail establishments is clearly 14 exempt. This would be true if the remodeling 15 is within the same existing footprint of the 16 existing structure, or if an addition to the 17 building is planned, or if a new structure is 18 being added to the site." 19 So he has -- he has his own 20 interpretation of this troubling sentence in 21 21.55.130 that refers to the 10 percent. I'm 22 not sure that he's correct, first of all. 23 Secondly, this apparently is 24 viewed as gospel by the Planning Department, 25 and it appears that it was accepted as such</p>

Page 41

1 by the Planning & Zoning Commission.
2 So we need to take a look at
3 that; but it seems to me that this is some
4 kind of an interpretation that was never
5 sanctioned by anybody other than Mr. Weaver
6 and simply has been passed along. I think
7 that's problematic in view of the Municipal
8 requirements for passing regulations.
9 So I'm simply throwing this out.
10 It is something that we need to talk about.
11 MR. ADAMS: Later on.
12 CHAIRMAN GUETSCHOW: Anything
13 else that you have to observe -- or that
14 you're observing regarding the 2016
15 resolution by the Planning & Zoning
16 Commission? Anything else at all?
17 All right. I have nothing
18 further. It seems to me we have discussed
19 the resolution at length, and the question is
20 whether that complies with the court order,
21 first of all; and, secondly, whether the
22 resolution complies with the Code mandates,
23 specifically .55.130A and 50.320. So just to
24 get this matter on the table and give some
25 direction to our proceedings here tonight, I

Page 42

1 would entertain a motion that relates to that
2 to either find the Resolution 2016-029 either
3 complies or is deficient.
4 Mr. Adams.
5 MR. ADAMS: I move that the Board
6 of Adjustment find that -- two points. The
7 first point being that, indeed, the Planning
8 & Zoning Commission did hold a public hearing
9 as required by Superior Court, but that in
10 doing so, we find that their findings are
11 sufficient to address the requirements to
12 illustrate that the proposed project complies
13 with AMC 21.55.130 and 21.50.320.
14 CHAIRMAN GUETSCHOW: Okay. And,
15 Mr. Stewart, will you be seconding that
16 motion?
17 MR. STEWART: A question first.
18 CHAIRMAN GUETSCHOW: Oh, I'm
19 sorry.
20 THE CLERK: I'm not sure that I
21 heard the second clause of that.
22 MR. ADAMS: The second clause is
23 that we find that the Planning & Zoning
24 Commission did not provide findings of fact
25 that illustrate compliance with the proposed

Page 43

1 project with the requirements of AMC
2 21.55.130 and AMC 21.50.320.
3 CHAIRMAN GUETSCHOW: I hope
4 you're taking notes.
5 MS. TUCKER: Well, I think the
6 clerk takes all the action of motions down.
7 So I wasn't sure that I heard it in the
8 positive or the negative. So I'm not -- it's
9 taped, and do I have that right that you'll
10 be transcribing the actual words of the
11 motion?
12 CHAIRMAN GUETSCHOW: Yeah, but
13 not tonight. That's the problem. So we need
14 to have something because we need to address
15 this tomorrow.
16 MR. STEWART: I think he phrased
17 it in the negative, so --
18 CHAIRMAN GUETSCHOW: I think he
19 phrased it in the negative.
20 MR. STEWART: -- did not provide
21 findings.
22 CHAIRMAN GUETSCHOW: Yes.
23 THE CLERK: Mr. Chair, my request
24 would be that it was actually two motions in
25 one, and for clarity of the record that I'm

Page 44

1 creating for you --
2 CHAIRMAN GUETSCHOW: Yes.
3 THE CLERK: -- if you could make
4 it two motions, that would be more helpful as
5 well.
6 CHAIRMAN GUETSCHOW: Okay.
7 THE CLERK: Is that too much --
8 CHAIRMAN GUETSCHOW: I understand
9 what you're saying.
10 Dwayne, would you address that
11 issue, please?
12 MR. ADAMS: I move that the Board
13 of Adjustment find that the Planning & Zoning
14 Commission conducted a public hearing as
15 required by the Superior Court in their
16 order --
17 CHAIRMAN GUETSCHOW: Order for
18 remand.
19 MR. ADAMS: -- order of remand.
20 Thank you.
21 CHAIRMAN GUETSCHOW: All right.
22 Is that clear?
23 THE CLERK: That is very clear.
24 CHAIRMAN GUETSCHOW: Terrific.
25 MR. STEWART: I'll second it for

Page 45

1 discussion.
2 CHAIRMAN GUETSCHOW: Mr. Stewart,
3 you are seconding that for discussion.
4 Mr. Adams.
5 MR. ADAMS: There were -- there
6 was a lot of discussion in the Superior Court
7 order, but fundamental to that was the simple
8 matter of conducting a public hearing in
9 accordance with requirements of the Municipal
10 Code. It was adequately advertised and the
11 public had an adequate opportunity. In fact,
12 it was actually reopened to provide
13 additional testimony, which did take place.
14 So based on the evidence that's
15 provided, it appears that they complied with
16 that part of it accordingly.
17 CHAIRMAN GUETSCHOW: Okay.
18 Mr. Stewart.
19 MR. STEWART: So I have some
20 difficulty with the definition of a public
21 hearing as it's used here, because if it's a
22 public hearing, it should be fair and
23 impartial. It should meet all the
24 requirements of due process. I don't think
25 this public hearing did that; at least that's

Page 46

1 the way it appears to me so far.
2 So if we approve this motion,
3 we're saying that they met all the
4 requirements of a public hearing, or did they
5 just go through the motions?
6 We have a question over here,
7 Bernd.
8 CHAIRMAN GUETSCHOW: Yes?
9 THE CLERK: And, Dwayne, also --
10 do you want to speak first?
11 MR. ADAMS: Well, I guess I have
12 a question: What is the definition of public
13 hearing? Is the action of the body --
14 because they close the public hearing before
15 they take action or even discuss it
16 internally.
17 So in my interpretation of a
18 public hearing, it is that aspect of the
19 hearing of the public testimony on a
20 public -- in a public forum, that that is a
21 public hearing that is gaveled closed. That
22 took place. Now, whether the procedures were
23 correct afterwards is the second motion.
24 CHAIRMAN GUETSCHOW: So really
25 what you're saying is you're viewing the

Page 47

1 public hearing requirement as something
2 different from the way that Mr. Stewart is
3 looking at it.
4 MR. STEWART: I'm looking at it.
5 CHAIRMAN GUETSCHOW: Okay. But
6 does it make sense to you? What we're trying
7 to do at this point, I think, is to see if at
8 least on the surface the Planning & Zoning
9 Commission complied with the order of the
10 Superior Court.
11 MS. TUCKER: Could I make a
12 comment?
13 CHAIRMAN GUETSCHOW: Yes.
14 MS. TUCKER: The way that -- the
15 way that Mr. Adams combined two things, I
16 think that one thing that could help
17 reconcile what I'm hearing each of you saying
18 is to go to the record at page 17, which is
19 page 9 of the order from the Court.
20 What the Court says is that:
21 "Moreover, the only way to preserve a
22 meaningful right to judicial review is to
23 provide an aggrieved party with" -- and then
24 I'm going to insert, "one, an opportunity to
25 articulate their objection." So we call

Page 48

1 that -- we call that also an opportunity to
2 be heard and, two, to build a record on
3 appeal. So maybe if your motion was
4 rephrased to say that "in compliance with the
5 order, P&Z made sure that the public had an
6 opportunity to be heard." Then we're not
7 going to get the --
8 MR. ADAMS: The definition
9 doesn't (indiscernible).
10 THE CLERK: Yeah. Does that make
11 sense?
12 MR. STEWART: I think that's a
13 good fix because it tells -- they were given
14 the opportunity to be heard and that they
15 build -- they were given the opportunity to
16 build a record on appeal -- or for appeal.
17 So that would -- that would meet those two
18 criteria and that would suffice -- that would
19 take care of my objection.
20 CHAIRMAN GUETSCHOW: Okay.
21 MR. ADAMS: Okay. So may I
22 rephrase that?
23 CHAIRMAN GUETSCHOW: Yes, please.
24 MR. ADAMS: Because I don't think
25 there's a second, is there?

Page 49

1 CHAIRMAN GUETSCHOW: Yes, there
2 was.
3 MR. STEWART: For discussion we
4 did.
5 CHAIRMAN GUETSCHOW: There was.
6 MR. ADAMS: So -- so with
7 approval of the second, I will remake my
8 motion, if I may.
9 CHAIRMAN GUETSCHOW: Go ahead.
10 MR. ADAMS: That the Board of
11 Adjustment finds that the Planning & Zoning
12 Commission provided a right or -- provided a
13 right to the aggrieved parties to provide
14 input to this process and articulate their
15 objections for the purposes of building a
16 record for appeal.
17 CHAIRMAN GUETSCHOW: Okay.
18 Mr. Stewart, does that comport
19 with what you want to second?
20 MR. STEWART: I would -- I would
21 add one other thing --
22 CHAIRMAN GUETSCHOW: All right.
23 What is that?
24 MR. STEWART: -- as an amendment.
25 In a forum -- in a public hearing forum, so

Page 50

1 we get public hearing in it.
2 CHAIRMAN GUETSCHOW: We are back
3 into the track.
4 MR. STEWART: Wait a minute. You
5 used public hearing already in the beginning,
6 right?
7 MR. ADAMS: Nope, not this time.
8 MR. STEWART: Oh.
9 MS. TUCKER: Maybe you could
10 rephrase it so I can write it down.
11 CHAIRMAN GUETSCHOW: Why don't
12 you -- Mr. Stewart, why don't you --
13 MR. ADAMS: Why don't you make
14 the --
15 CHAIRMAN GUETSCHOW: Why don't
16 you try to rephrase --
17 MS. TUCKER: I didn't mean
18 rephrase. I meant you would repeat it. I
19 misspoke.
20 CHAIRMAN GUETSCHOW: Repeat the
21 motion as you understand it.
22 MR. STEWART: That P&Z provided
23 a -- the aggrieved parties with an
24 opportunity to articulate their objections
25 and provide a -- build a record on appeal --

Page 51

1 or for appeal.
2 MR. ADAMS: I will accept that as
3 a friendly amendment.
4 CHAIRMAN GUETSCHOW: Okay.
5 MR. ADAMS: Or however we want to
6 phrase that, but I'd accept that.
7 CHAIRMAN GUETSCHOW: Our esteemed
8 counsel here is writing, and this is crucial
9 that she gets this down.
10 MS. TUCKER: Okay. So I have
11 it -- I have some of the words here, that P&Z
12 provided the --
13 MR. STEWART: Aggrieved parties.
14 MS. TUCKER: -- aggrieved parties
15 with --
16 MR. STEWART: The opportunity
17 to -- actually it would be rephrasing the
18 court decision on the public policy.
19 CHAIRMAN GUETSCHOW: Wait a
20 minute. Provided the aggrieved parties with
21 opportunity --
22 MR. STEWART: Opportunity to
23 articulate objections and build a record for
24 appeal.
25 CHAIRMAN GUETSCHOW: To

Page 52

1 articulate objections and build a record for
2 appeal.
3 MS. TUCKER: Okay.
4 MR. STEWART: Now, do we --
5 CHAIRMAN GUETSCHOW: Page 9.
6 MS. TUCKER: You're at the bottom
7 of page 9.
8 MR. STEWART: Do we need to add
9 through a public hearing format?
10 CHAIRMAN GUETSCHOW: Yes.
11 MR. ADAMS: Are you waiting on
12 me?
13 CHAIRMAN GUETSCHOW: No. You're
14 waiting on me with my slow writing here,
15 because I'm trying to also write the motion
16 down.
17 MR. ADAMS: Yeah. Just while
18 we're paused here for a second, I think what
19 I find interesting is on the top of 18 that
20 the statement is: "The Court concludes that
21 the Commission must hold a public hearing on
22 all proposals to modify large retail
23 establishments."
24 That one is an eye-opener to me
25 without modification as to what that means.

Page 53	Page 55
<p>1 CHAIRMAN GUETSCHOW: But we don't 2 need to worry about that. 3 MR. ADAMS: It doesn't matter on 4 this -- 5 CHAIRMAN GUETSCHOW: No. 6 MR. ADAMS: -- but it certainly 7 opened my eyes. 8 CHAIRMAN GUETSCHOW: Okay. So 9 the motion is -- and I need to call on both 10 Barbara and Julia to correct me if I'm wrong. 11 The motion is that P&Z provided the aggrieved 12 parties with an opportunity to articulate 13 their objections and build a record for 14 appeal through public hearing. 15 MS. TUCKER: It's a 16 (indiscernible) process that through a public 17 hearing (indiscernible). 18 THE CLERK: Mr. Chair, would you 19 read the last: Through a public hearing? Is 20 that the way the sentence ends? 21 CHAIRMAN GUETSCHOW: Yes. 22 THE CLERK: Okay. And then I 23 would like to add, Mr. Chair, that the 24 beginning of the motion started "the Board of 25 Adjustment finds that P&Z provided."</p>	<p>1 Mr. Adams and then amended by Mr. Stewart 2 with the consent of Mr. Adams. That's how 3 procedurally it worked. 4 THE CLERK: Okay. 5 CHAIRMAN GUETSCHOW: Okay? Does 6 that make sense? Am I correct? 7 MS. TUCKER: Right. So they 8 include both of them. 9 CHAIRMAN GUETSCHOW: All right. 10 Anything further to be said about 11 the motion? 12 MR. STEWART: Okay. I just want 13 to clarify for the record. This, I 14 interpret, as meeting those two criteria in a 15 public format type hearing, not going to the 16 basis of whether it was fair and impartial or 17 anything like that. 18 CHAIRMAN GUETSCHOW: That is 19 correct. 20 MR. STEWART: Okay. 21 CHAIRMAN GUETSCHOW: Because 22 that's the second portion of the motion and 23 we have bifurcated it. Okay? All right. 24 Mr. Adams, anything further you 25 wish to add at this point?</p>
Page 54	Page 56
<p>1 CHAIRMAN GUETSCHOW: Thank you. 2 And just by way of explanation, the reason 3 that we are trying to get these motions down 4 is because the normal procedure is that we 5 await the transcript by the clerk's office 6 and that usually takes a few days. And we do 7 not have the luxury of waiting in this 8 particular case because our esteemed counsel 9 is leaving Friday evening. So if we don't 10 put this whole thing to bed by Friday 11 evening, we are in real trouble. I would 12 like to avoid that if I can. So that's why I 13 want to be sure that all the motions that we 14 are making, that they are clear, not just on 15 the record, but also clear to those of us who 16 have to take notes here so that they can be 17 reproduced here in the next day or so. 18 All right. Madam clerk. 19 THE CLERK: Mr. Chair, 20 Mr. Stewart made this motion, and that's all 21 the farther we've gotten. We've got the 22 motion. 23 CHAIRMAN GUETSCHOW: Well, 24 actually it was amended -- it was by way of 25 amendment. The original motion was made by</p>	<p>1 MR. ADAMS: No. 2 CHAIRMAN GUETSCHOW: All right. 3 So this is the -- as far as I'm concerned, 4 this is the motion -- no controversial aspect 5 of the entire (indiscernible). Excuse me. 6 So, Madam Clerk, would you call 7 the roll on the vote, please? 8 THE CLERK: Yes. 9 Mr. Chair, Mr. Guetschow. 10 CHAIRMAN GUETSCHOW: Yes. 11 THE CLERK: Mr. Stewart? 12 MR. STEWART: Yes. 13 THE CLERK: Mr. Adams. 14 MR. ADAMS: Yes. 15 CHAIRMAN GUETSCHOW: Thank you. 16 Approved three to nothing. 17 All right. Now, then, Mr. Adams, 18 you have the second portion of the motion and 19 this is a standalone second motion. 20 MR. ADAMS: Let's see if I can 21 remember it. Bob liked it a lot, so now I've 22 got to remember what I said. The Board of 23 Adjustment finds that at the conclusion of 24 public -- of the public hearing and upon 25 deliberation, that -- well, let me pause</p>

<p style="text-align: right;">Page 57</p> <p>1 here. We're looking for a positive motion. 2 So is this -- 3 CHAIRMAN GUETSCHOW: Yes. 4 MR. ADAMS: -- a motion that if 5 we're -- so that would suggest that I state 6 we find that they provided findings of fact. 7 MR. STEWART: Yes. 8 MS. TUCKER: I interpret this 9 rule to be that you state it the way that -- 10 that if you were voting, your vote would be 11 affirmative; otherwise, we get a double 12 negative. If you -- if you say that they did 13 something that -- because I understood your 14 motion to be -- and that's why I asked you 15 about repeating it before. I couldn't tell 16 before if you were saying that it was 17 sufficient or insufficient. But if you are 18 thinking that it's insufficient, then your 19 motions should say that the Board -- they 20 moved that the Board of Adjustment finds that 21 Planning & Zoning's resolution following 22 public hearing was insufficient, blah, blah, 23 blah. Then the response to that is a vote 24 yes. If you say something and then you vote 25 no, it's not that, then you're going to be</p>	<p style="text-align: right;">Page 59</p> <p>1 MR. ADAMS: -- AMC 21.55.130? 2 CHAIRMAN GUETSCHOW: A. 3 MR. ADAMS: AMC. 4 CHAIRMAN GUETSCHOW: No, no, no. 5 It's 130A. There's no B, but it says A for 6 some reason. 7 MR. ADAMS: You're absolutely 8 right, so I want that A in there -- and AMC 9 21.55.320. 10 CHAIRMAN GUETSCHOW: Okay. All 11 right. 12 MS. TUCKER: So it helps me if 13 the clerk -- even if we're not going to see 14 it, can read back what she has. But what I 15 have -- 16 CHAIRMAN GUETSCHOW: What do you 17 have? 18 THE CLERK: My pleasure. The 19 clerk has: "The Board of Adjustment finds at 20 the conclusion of the public hearing and 21 after deliberation, the Planning & Zoning 22 Commission did not provide findings of fact 23 sufficient to document their decisions and 24 something that started with r-e-f -- and 25 reference, I believe, compliance with 21. --</p>
<p style="text-align: right;">Page 58</p> <p>1 here all night voting on things that you 2 know. It's like, you know, there's no 3 alligators. 4 CHAIRMAN GUETSCHOW: Okay. 5 MR. ADAMS: See, that's my belief 6 as well because if -- wherever we go, it 7 provides specific direction to whoever 8 wherever this goes. 9 CHAIRMAN GUETSCHOW: It is true 10 that in the past I have favored positive 11 motions. It is true. But I think in this 12 case, I think it would be better if you 13 phrase it in a manner that you feel about the 14 subject matter. 15 MR. ADAMS: Okay. Mr. Chair, I 16 move that the Board of Adjustment find that 17 at the conclusion of the public hearing -- 18 and I'll speak slowly -- and after 19 deliberations, that the Planning & Zoning 20 Commission did not find -- provide findings 21 of fact sufficient to document their 22 decisions and reflect compliance with 23 21.55.130 -- 24 CHAIRMAN GUETSCHOW: A. There's 25 a capital B there for some reason.</p>	<p style="text-align: right;">Page 60</p> <p>1 is it 50 or 55? 2 CHAIRMAN GUETSCHOW: 55. 3 THE CLERK: Okay. 21.55.130A and 4 AMC 21.55 -- 5 CHAIRMAN GUETSCHOW: No, 50. 50. 6 The second one is 21.50.320. 7 THE CLERK: Okay. So let me try 8 the -- I'm just going to start "compliance 9 with" at the end of the sentence. 10 CHAIRMAN GUETSCHOW: Okay. 11 THE CLERK: "Compliance with AMC 12 21.55.130A and AMC 21.50.320. 13 MR. ADAMS: My only question was 14 the project's conformance. Did we say that? 15 THE CLERK: You did not. 16 MR. ADAMS: Okay. It needs to 17 say the -- document the project's 18 conformance. 19 CHAIRMAN GUETSCHOW: Try again. 20 THE CLERK: Start from the top. 21 CHAIRMAN GUETSCHOW: Start from 22 the top. "Board of Adjustment finds that at 23 the conclusion of the public hearing and 24 after deliberations, the Planning & Zoning 25 Commission did not provide findings of fact</p>

Page 61	Page 63
<p>1 or conclusions of law in compliance with 130A 2 and 320." 3 MR. ADAMS: I think it should say 4 that "document the project's conformance with 5 the requirements." 6 Does that make sense? 7 CHAIRMAN GUETSCHOW: Did not 8 provide findings of fact or conclusions of 9 law -- 10 MR. ADAMS: To document the 11 project's -- we could say the proposed 12 project's compliance. 13 CHAIRMAN GUETSCHOW: Document the 14 proposed project's compliance with. Okay. 15 THE CLERK: Okay. So, 16 Mr. Chair -- 17 CHAIRMAN GUETSCHOW: Yes. 18 THE CLERK: I have a couple of 19 different -- a couple of added words and a 20 couple of missing words, so I just want to 21 make sure that I've got them all. 22 CHAIRMAN GUETSCHOW: Okay. All 23 right. 24 THE CLERK: Okay? One of the 25 words they dropped that time was sufficient.</p>	<p>1 MR. ADAMS: Through the Chair, we 2 spent quite a bit of time in the earlier 3 portion of this evening discussing the -- 4 several issues. One of those being that, 5 based on face value, if there is a 6 possibility that someone could conclude that 7 members of the Commission may have accepted 8 the project as approved and with the intent 9 that perhaps just a bit of tinkering was all 10 that was necessary. 11 There's also a question whether 12 they complied with many of the requirements 13 and only dealt with a very narrow portion of 14 the project. All of that, as well as some 15 concerns that Robert brought up, begged the 16 question of whether there was fairness and a 17 record built that, as the court order 18 requires, that could be a basis of appeal, if 19 necessary. And with respect to that as to 20 what the findings of fact do, and they were 21 deficient in this case. 22 CHAIRMAN GUETSCHOW: Okay. I 23 have previously spoken about my view of the 24 insufficiency of the resolution, and I will 25 simply incorporate those comments for</p>
Page 62	Page 64
<p>1 Findings of fact or conclusions of law 2 sufficient to document. 3 CHAIRMAN GUETSCHOW: Sufficient 4 to document, okay. Good. 5 THE CLERK: And then this time 6 you dropped their decisions and reference, 7 and I think it probably makes more sense. So 8 I'll read it without those two words. 9 CHAIRMAN GUETSCHOW: Please do. 10 THE CLERK: Okay. "The Board of 11 Adjustment finds at the conclusion of the 12 public hearing and after deliberation, the 13 Planning & Zoning Commission did not provide 14 findings of fact or conclusions of law 15 sufficient to document the proposed project's 16 compliance with AMC 21.55.130A and AMC 17 21.50.320. 18 CHAIRMAN GUETSCHOW: Okay. 19 Mr. Adams, does that reflect your 20 motion as you wish it to be? 21 MR. ADAMS: Yes. 22 CHAIRMAN GUETSCHOW: All right, 23 then. I will second that. 24 Would you address the motion, 25 please?</p>	<p>1 purposes of us voting on the motion. 2 Mr. Stewart, anything you wish to 3 add? 4 MR. STEWART: It's just that, for 5 the record, I agree that the findings are not 6 sufficient to provide that nexus between 7 findings and the decision and between the 8 conclusions that were drawn. 9 CHAIRMAN GUETSCHOW: Okay. 10 MR. STEWART: So I intend on 11 voting to support it. 12 CHAIRMAN GUETSCHOW: Ms. Tucker. 13 MS. TUCKER: I have one minor 14 technicality for the Chair's consideration. 15 CHAIRMAN GUETSCHOW: Okay. 16 MS. TUCKER: When the motion was 17 repeated by the Chair -- well, let me back 18 up. The standard in 21.10.304 is that "any 19 decision made by the Commission shall be 20 based on and include findings of fact and 21 conclusions," and the words "of law" are not 22 necessarily -- conclusions can be of various 23 things. I know that as attorneys we're used 24 to throwing in, every time we hear 25 conclusions, to be findings of fact and</p>

<p style="text-align: right;">Page 65</p> <p>1 conclusions of law, but the Code doesn't say 2 that. So I would just -- 3 CHAIRMAN GUETSCHOW: So you would 4 request that we drop that last portion after 5 conclusion? Okay. All right. 6 Mr. Adams, any problem with that? 7 MR. ADAMS: Sounds good to me. 8 CHAIRMAN GUETSCHOW: Okay. It's 9 acceptable to me. If you feel that that's 10 the better way to proceed, I think that's how 11 we ought to do it. Okay. And the record 12 should reflect that the words "of law" have 13 been dropped from the motion. 14 THE CLERK: We will did so. 15 CHAIRMAN GUETSCHOW: All right. 16 Are we ready to vote on the 17 motion? If so, Madam Clerk. 18 THE CLERK: Bernd Guetschow. 19 CHAIRMAN GUETSCHOW: Yes. 20 THE CLERK: Mr. Stewart. 21 MR. STEWART: Yes. 22 THE CLERK: Mr. Adams. 23 MR. ADAMS: Yes. 24 CHAIRMAN GUETSCHOW: And the 25 motion passes three to zero.</p>	<p style="text-align: right;">Page 67</p> <p>1 should we go from here? 2 That's really the next thing that 3 we need to decide. By way of introduction, 4 let me just tell you that I'm not terribly 5 keen on tinkering with the existing 6 resolution in such a fashion that it 7 complies. The reason that I'm not keen on 8 doing that is because it requires so much 9 guesswork on our part that I'm not sure we 10 are really capable of doing that. 11 I think we simply need to send 12 this back and have Planning & Zoning take 13 another look at this in the light of our 14 discussions, and maybe later on we can give 15 them some direction on it, but that's not 16 before us right now. I would like to see it 17 simply sent back for a new consideration by 18 the Board -- by the Planning & Zoning 19 Commission and see if they can apply the Code 20 requirements of .55.130A and .50.320 in such 21 a manner to the facts that -- the two of them 22 tied together. In other words, that the 23 decision that they come to can be easily 24 understood to be based on the requirements of 25 the Code and is supported by the evidence</p>
<p style="text-align: right;">Page 66</p> <p>1 So having concluded now that what 2 the Planning & Zoning Commission did was 3 insufficient, the question is: Where do we 4 go from here? When you look at the powers of 5 the Board of Adjustment, you come to the 6 conclusion that pursuant to 21.30.095, we can 7 either affirm or reverse the decision of the 8 Planning & Zoning Commission, in whole or in 9 part, or we can remand the matter back to the 10 Planning & Zoning Commission. 11 What we have done in the past is 12 that we have also made separate 13 determinations -- well, that we can 14 supplement motion -- resolutions. You will 15 recall that we have done this with the 2014 16 resolution; that, in fact, we supplemented 17 that rather than send it back to the Planning 18 & Zoning Commission and it stood -- because 19 we have that power. 20 So my question really is: What 21 are the druthers of the other members here? 22 Do we remand this, or do we come up -- do we 23 substitute our own decision for the Planning 24 & Zoning Commission decision? Do we 25 supplement the resolution of 2016? Where</p>	<p style="text-align: right;">Page 68</p> <p>1 that was presented. 2 I don't think we are capable -- 3 it would be such a monumental task that I 4 don't think we would ever be able to comply 5 with it and to provide a proper answer. So 6 for that reason, my druthers would be to send 7 it back, but I'm open to hearing your views 8 on this. Remember, there is no motion 9 pending at the present time. We are simply 10 discussing this before we make a motion. 11 Mr. Stewart. 12 MR. STEWART: I would rather send 13 it back because if we try to correct the 14 error, then what we're saying is the hearing 15 was held and that the hearing constituted due 16 process and that it was fair and impartial. 17 By remanding it, they have the opportunity to 18 make the correct determinations using the 19 Code and all the references that are 20 available in the Code, because it's spelled 21 out very clearly in the Code itself. 22 MR. ADAMS: So are we requesting 23 that they reopen the public hearing or just 24 simply -- 25 CHAIRMAN GUETSCHOW: No, no. I</p>

<p style="text-align: right;">Page 69</p> <p>1 don't think -- and by "public hearing" you 2 mean that people can come forward and 3 testify. I think that's -- we need to make 4 sure that we understood the two different 5 considerations and concepts of a public 6 hearing. But I think you are limited simply 7 to providing people an opportunity to talk 8 again. That's not what I'm referring to. 9 What I'm referring to is that on 10 the basis of the public testimony that was 11 given and on the basis of the presentation by 12 the Department, that they review what they 13 have done and they comply with the Code, 14 which is apply those two crucial sections of 15 the Code to the evidence that was presented, 16 and either vote it up or down on the basis of 17 that. 18 But their decision needs to 19 reflect a discussion of the specific 20 requirements of -- of all elements of those 21 two Code provisions. That's what I have in 22 mind. 23 MR. ADAMS: Okay. That was just 24 clarification. It was important. 25 CHAIRMAN GUETSCHOW: Okay.</p>	<p style="text-align: right;">Page 71</p> <p>1 were wallowing in trying to figure out what 2 to do, and despite staff's valiant attempts 3 to try to devise a course, that didn't happen 4 appropriately. So they deserve that chance 5 to come back with a fresh look and good 6 guidance. 7 CHAIRMAN GUETSCHOW: And I think 8 it would behoove us to provide guidance, I 9 must tell you. 10 MR. ADAMS: I agree. 11 CHAIRMAN GUETSCHOW: Okay. Now, 12 having said all this, what concerns me is 13 that this whole process started a number of 14 years ago. If we were to short-circuit this 15 and simply substitute our own decision for 16 that of the Planning & Zoning Commission, any 17 party aggrieved by this immediately runs to 18 Superior Court. You know, it shortcuts the 19 appeal procedure. There's no more 20 administrative appeal possible at that point. 21 By sending it back, we are 22 starting the appeal -- the administrative 23 appeal process all over again, and 24 considering how long it has already taken 25 here -- we did the decision in 2015 and we</p>
<p style="text-align: right;">Page 70</p> <p>1 MR. ADAMS: I think there's also 2 the issue of some of the -- the staff packet 3 and what was provided. I think it was 4 deficient and very possibly mistaken in some 5 of its direction. At some point or another 6 we need to discuss what are we sending back. 7 And, you know, if we were just to approve a 8 motion and walk away, I don't think that 9 leaves us much better than where we are now. 10 So we certainly have a lot more work to do. 11 CHAIRMAN GUETSCHOW: Most 12 definitely. I agree with you. I think we 13 would not be doing our job adequately if we 14 simply walked away after having said: You 15 need to do this over again. 16 MR. ADAMS: And with that said, 17 then it simply is fair to the Planning & 18 Zoning Commission with good direction, a 19 different staff packet that fleshes these 20 issues out a lot more than has happened thus 21 far, then they would be in a better position 22 to be able to make a deliberation. 23 I think it's very clear on the 24 record they had to postpone the public 25 hearing and reopen the public hearing. They</p>	<p style="text-align: right;">Page 72</p> <p>1 are now in 2017. So we're looking at another 2 two years possibly before this is finally 3 decided. Now, that's a burden on, not just 4 the opponents, but also on the applicant. 5 I am concerned about that, but I 6 must tell you, I don't see a solution to 7 this. You know, short of us taking on the 8 role of being the P&Z and substituting our 9 own decision for that of P&Z. As we 10 discussed before, I'm not in favor of that. 11 So I just do not see an alternative to this 12 lengthy process that will result if we simply 13 send it back. 14 Now, P&Z by regulation is 15 required to consider our decision at -- I 16 can't remember exactly what the wording is, 17 but basically in an expedited manner in 18 simple terms. So hopefully -- this being the 19 end of April, hopefully by the end of the 20 summer there will be a new P&Z decision on 21 this hopefully. Then whoever feels aggrieved 22 can then appeal to us, to the Board of 23 Adjustment again. So it's entirely possible 24 that this will come back to us sometime once 25 P&Z has come up with a new decision. But I</p>

Page 73

1 don't see any alternative to that. I don't
2 know how you feel about this.
3 Mr. Stewart, what's your thinking
4 about this?

5 MR. STEWART: You hit on one of
6 the things that struck me when I first read
7 through this particular case, is that after
8 going through all of this, what truly is a
9 good remedy? I don't think there is a good
10 remedy to this case, because the Rack has
11 already constructed. It's operating.

12 There's just -- there's no way to
13 really come up with an expeditious way of
14 handling this. I think it needs to go
15 through the process and P&Z looks at what
16 they should be doing, and hopefully do the
17 right thing and provide the appropriate due
18 process. Then let that be challenged.

19 CHAIRMAN GUETSCHOW: Okay. You
20 know, the fact that Nordstrom Rack is
21 operating while all these proceedings are
22 still going on is, in fact, pretty unusual.
23 I cannot think of another case where an
24 applicant has simply forged ahead, torpedoed
25 be damned. That's really what has happened

Page 74

1 here. It's not our concern, you know; let
2 the chips fall where they may.

3 We need to make a decision based
4 on the record before us, and the fact that
5 the Rack is operating really should not
6 influence our decision one way or the other,
7 quite frankly. Mr. Adams.

8 MR. ADAMS: Yeah. Sadly these
9 processes always take time. I have
10 represented numbers of clients over many
11 years who have been in similar circumstances,
12 not in an appeal situation, but in
13 forestalled P&Z hearings or platting cases or
14 whatever. The remedy they have, of course,
15 is proceed at risk, which is what they've
16 done. And it's very unfair, but it's also
17 unfair to the public if due process doesn't
18 take place.

19 The sad thing is that the Rack in
20 this case, Nordstrom in this case, has to
21 deal with vagaries of whether a public
22 process should have taken place or a public
23 hearing should have taken place. They
24 proceeded at the direction of staff. They
25 found out otherwise through the appeal

Page 75

1 process, but it's the way it works, you know,
2 and it's sad and that happens.

3 But I've represented someone who
4 thought they were working and it cost them a
5 million and a half bucks right off the table.
6 You know, they went with it and they moved
7 on. It's very sad, but that's the process we
8 have. I feel for Nordstrom, but the public's
9 right -- you know, I think Superior Court has
10 laid it out. The public's right is
11 paramount.

12 CHAIRMAN GUETSCHOW: Okay.

13 Anything you wish to add,
14 Mr. Stewart?

15 MR. STEWART: No.

16 CHAIRMAN GUETSCHOW: I have
17 nothing to add.

18 My concern is -- and I need to
19 turn to our esteemed counsel. Do we need to
20 come up with a conclusion, or can we simply
21 make a motion to do whatever we want to do
22 now that we have essentially disapproved of
23 the way that P&Z has handled it?

24 Do we need to -- in other words,
25 is it a two-step process to get to the

Page 76

1 remedy, or is it simply a one-step process?

2 Do you understand what I'm
3 saying?

4 MS. TUCKER: I guess I'm not --

5 CHAIRMAN GUETSCHOW: We have
6 findings of fact. We passed two findings --

7 MS. TUCKER: Right.

8 CHAIRMAN GUETSCHOW: -- by way of
9 motion. Do we now need to come up with a
10 conclusion, or can we simply move directly to
11 the remedy?

12 MS. TUCKER: I think that -- I
13 think that if the -- I don't know if this
14 answers your question or not, so I'll just
15 put it out there and then you can tell me if
16 it does.

17 If the Board of Adjustment
18 decides that they want to remand with
19 guidance and instruction, then you would go
20 ahead and make additional findings and/or
21 conclusions of law to interpret Code and have
22 that be guidance. Then after you've worked
23 through those, then you can kind of do -- and
24 decide what those are, then you can say that
25 the -- then you might be in a better position

<p style="text-align: right;">Page 77</p> <p>1 to do your motion to say that the remand 2 should be with these additional provisions or 3 you can do what you talked about doing. 4 I mean, that you talked about as 5 the alternative, and I didn't understand that 6 you were intending -- none of the discussion 7 favored that, but that was to do the remand 8 based on only the two findings that you had. 9 So if it's easier for the Board, you could 10 have another motion that said: We're going 11 to remand with some -- with some guidance, 12 but since I haven't heard any particular 13 guidance yet, I don't know how you wanted to 14 approach that. 15 CHAIRMAN GUETSCHOW: Okay. Well, 16 maybe you didn't quite understand what I was 17 getting at. Even though I like findings of 18 fact and conclusions of law, we have already 19 struck the two words "of law," but it seems 20 to me that there still needs to be a 21 conclusion. Having come up with findings, we 22 now need to conclude that the resolution of 23 the Planning & Zoning Commission is 24 insufficient and is of no force. 25 No, we can't say that, can we?</p>	<p style="text-align: right;">Page 79</p> <p>1 not provide fair -- 2 MS. TUCKER: Yeah, so I think -- 3 CHAIRMAN GUETSCHOW: Tie into 4 the -- 5 MS. TUCKER: So I have something 6 for you on this. 7 CHAIRMAN GUETSCHOW: Okay. Tell 8 me. 9 MS. TUCKER: And I'm sorry if I 10 was still not on track, but it seemed to me 11 when you were talking about the -- about 12 21.10.304, that that Code section and other 13 Code sections by other boards are backed up 14 by judicial document. So when courts look at 15 this they say, and in this case I'm going to 16 quote from (indiscernible) Kodiak City 17 Council, 628 P2d 927 at 933. It's a 1981 18 case. 19 It says that "the relationship 20 between evidence and findings and between 21 findings and ultimate action is" -- you know, 22 that's the test. So that "only by focusing 23 on the relationship between evidence and 24 findings and between findings and ultimate 25 action can a reviewing tribunal determine if</p>
<p style="text-align: right;">Page 78</p> <p>1 MS. TUCKER: I think your 2 conclusion would be based on those two 3 findings -- 4 CHAIRMAN GUETSCHOW: Yes. 5 MS. TUCKER: -- that the Board 6 needs to remand. That's your conclusion of 7 law, it seems. 8 CHAIRMAN GUETSCHOW: No, that's 9 the remedy. 10 MS. TUCKER: Oh, okay. 11 CHAIRMAN GUETSCHOW: That's the 12 remedy. But the conclusion still is that it 13 doesn't comply with the court's order or 14 with -- 15 MS. TUCKER: Or that it doesn't 16 provide a fair hearing. That's where I 17 thought you guys started out -- 18 CHAIRMAN GUETSCHOW: Okay. 19 MS. TUCKER: -- was -- was that 20 the -- 21 CHAIRMAN GUETSCHOW: So, does not 22 reflect a fair hearing. Is that what you're 23 saying? The Board of Adjustment concludes, 24 on the basis of its findings, that the 25 Planning & Zoning Commission's resolution did</p>	<p style="text-align: right;">Page 80</p> <p>1 the action below was supported by substantial 2 evidence." So you're unable to make those 3 conclusions is what I'm hearing. 4 CHAIRMAN GUETSCHOW: Correct. 5 MS. TUCKER: So the conclusion 6 could be that the Board of -- you know, 7 because -- 8 CHAIRMAN GUETSCHOW: Okay. Let's 9 formulate a motion here. I will -- and we 10 need to wordsmith this together here, Julia. 11 The Board of Adjustment concludes, on the 12 basis of its findings, that the relationship 13 between the evidence and the findings and 14 between the findings and the ultimate 15 action -- 16 MS. TUCKER: That the record is 17 sufficient -- is insufficient. 18 CHAIRMAN GUETSCHOW: Is 19 insufficient. 20 MS. TUCKER: Thank you. To 21 establish the relationship -- 22 CHAIRMAN GUETSCHOW: To establish 23 the relationship between evidence and 24 findings and between findings and ultimate 25 action --</p>

Page 81

1 MS. TUCKER: That's supported by
2 substantial evidence.
3 CHAIRMAN GUETSCHOW: Is
4 insufficient to establish the relationship
5 between evidence and findings and between
6 findings and ultimate action.
7 MS. TUCKER: Is supported in the
8 record of the case. I mean, I guess I
9 don't --
10 CHAIRMAN GUETSCHOW: Yeah, yeah.
11 We just need to come up with proper wording
12 here. Can you help us out here? No.
13 MR. ADAMS: No. Among other
14 things, he was doing something. It says and
15 "does hereby remand." Is that what we --
16 CHAIRMAN GUETSCHOW: No, no, no.
17 The remand -- no, the remand by itself is the
18 next motion that we will make. This simply
19 is the conclusion that, on the basis of the
20 findings, it's insufficient what they did.
21 MR. ADAMS: Okay. I think you
22 said it.
23 CHAIRMAN GUETSCHOW: On the basis
24 of its findings.
25 MR. STEWART: What's wrong with

Page 82

1 keeping it right the way it is with a period
2 after "ultimate action"?
3 CHAIRMAN GUETSCHOW: To establish
4 the relationship required by Code. How is
5 that?
6 MS. TUCKER: Yeah, and in Alaska
7 case law.
8 CHAIRMAN GUETSCHOW: And required
9 by Code and the court's order. How's that?
10 Because we have not -- or do
11 you -- (indiscernible) Alaska case law.
12 That's fine by me. We have -- you already
13 put that Kodiak City Council case on the
14 record here. So that the motion says -- let
15 me read it to you: The Board of Adjustment
16 concludes, on the basis of its findings, that
17 the Planning & Zoning Commission's resolution
18 is insufficient to establish the relationship
19 between evidence and findings and between
20 findings and the ultimate action as required
21 by Code and Alaska case law.
22 How's that? Does that satisfy
23 you?
24 MS. TUCKER: That satisfies me.
25 CHAIRMAN GUETSCHOW: All right.

Page 83

1 THE CLERK: Mr. Chair, could you
2 read it one more time for me?
3 CHAIRMAN GUETSCHOW: Of course.
4 THE CLERK: Thank you.
5 CHAIRMAN GUETSCHOW: Also, for my
6 cohorts here.
7 The Board of Adjustment
8 concludes, on the basis of its findings,
9 comma, that the Planning & Zoning
10 Commission's resolution -- and we need to
11 identify the resolution -- is insufficient to
12 establish the relationship between evidence
13 and findings and between findings and
14 ultimate action as required by Code and
15 Alaska case law.
16 MS. TUCKER: And that resolution
17 is P&Z resolution 2016-0029.
18 CHAIRMAN GUETSCHOW: Okay. All
19 right. Does this motion pass muster with our
20 esteemed counsel?
21 MS. TUCKER: Yes. I'm good.
22 CHAIRMAN GUETSCHOW: Okay.
23 MR. STEWART: It's just one zero,
24 right?
25 MS. TUCKER: 029. Did I say 00?

Page 84

1 I'm sorry.
2 CHAIRMAN GUETSCHOW: Yeah, 029.
3 MR. STEWART: Yeah, just one
4 zero.
5 CHAIRMAN GUETSCHOW: Okay. Are
6 we clear on the motion? All right. I'm the
7 one who made the motion. I need a second.
8 MR. STEWART: I'll second.
9 CHAIRMAN GUETSCHOW: Mr. Stewart
10 has seconded. I -- I want to cross the T and
11 dot the I. When there are findings of fact,
12 there needs to be a conclusion of law, even
13 though the words "of law" have been dropped.
14 So this is designed to be the conclusion that
15 then leads us to the remedy.
16 Okay? Are we ready to vote?
17 Ready to vote?
18 MR. STEWART: Yes.
19 CHAIRMAN GUETSCHOW: Madam Clerk.
20 THE CLERK: Mr. Guetschow.
21 CHAIRMAN GUETSCHOW: Yes.
22 THE CLERK: Mr. Stewart.
23 MR. STEWART: Yes.
24 THE CLERK: Mr. Adams.
25 MR. ADAMS: Yes.

Page 85	Page 87
<p>1 CHAIRMAN GUETSCHOW: Thank you.</p> <p>2 Now, let's do one more thing before we take a</p> <p>3 break, and that concerns the remedy. I think</p> <p>4 all of us are in agreement that this case</p> <p>5 needs to be sent back to P&Z for</p> <p>6 reconsideration. We have already discussed</p> <p>7 the fact that we are going to give them some</p> <p>8 direction, but that, I think, needs to come</p> <p>9 after we have made the decision to send it</p> <p>10 back.</p> <p>11 My view of the matter is that the</p> <p>12 way to handle this is that we say by way of</p> <p>13 guidance to the Planning & Zoning Commission,</p> <p>14 we wish to address the following issue. Then</p> <p>15 we have a laundry list of items that need to</p> <p>16 be considered. That would be my view of how</p> <p>17 we should handle this.</p> <p>18 Does that make sense to you?</p> <p>19 MR. ADAMS: Yes.</p> <p>20 CHAIRMAN GUETSCHOW: Okay. So</p> <p>21 the motion that we now need to craft is</p> <p>22 simply to send the matter back to P&Z.</p> <p>23 Julia, you need to help me out</p> <p>24 here. Should we say the Board of Adjustment</p> <p>25 decides pursuant to AMC 21.30.095 to return</p>	<p>1 this decision. Then --</p> <p>2 CHAIRMAN GUETSCHOW: Okay. So</p> <p>3 you would start -- let's look at this. And</p> <p>4 we are looking, by the way, at 21.30.100,</p> <p>5 which gives guidance to this Board as to what</p> <p>6 we can do.</p> <p>7 MS. TUCKER: And so I would think</p> <p>8 that it would say: Because the Board of</p> <p>9 Adjustment has concluded, because you just</p> <p>10 did the --</p> <p>11 CHAIRMAN GUETSCHOW: Right.</p> <p>12 MS. TUCKER: -- conclusion, as</p> <p>13 concluded, that there is -- that there is</p> <p>14 insufficient evidence in the record on issues</p> <p>15 material --</p> <p>16 CHAIRMAN GUETSCHOW: There is</p> <p>17 insufficient -- just a second. That there's</p> <p>18 insufficient --</p> <p>19 MS. TUCKER: -- evidence --</p> <p>20 CHAIRMAN GUETSCHOW: Evidence.</p> <p>21 MS. TUCKER: -- in the record.</p> <p>22 CHAIRMAN GUETSCHOW: Evidence in</p> <p>23 the record or in the resolution?</p> <p>24 MS. TUCKER: In the record.</p> <p>25 Yeah, that's what it says, in the record.</p>
Page 86	Page 88
<p>1 the matter to the P&Z for purposes of</p> <p>2 reconsidering the case in the light of the</p> <p>3 findings, the conclusions, and the</p> <p>4 recommendations below?</p> <p>5 Does that make sense?</p> <p>6 MS. TUCKER: Well, someplace I</p> <p>7 would hope that the Board would work in --</p> <p>8 and maybe I'm past that -- but what --</p> <p>9 somehow in there is, you know, the standards</p> <p>10 for remand on remedies in (indiscernible).</p> <p>11 CHAIRMAN GUETSCHOW: Where are</p> <p>12 the standards for a remand?</p> <p>13 MS. TUCKER: They're in 100. And</p> <p>14 so they -- that is there is insufficient</p> <p>15 evidence in the record on an issue material</p> <p>16 to the decision on the case. So I would</p> <p>17 think that you would start there, and because</p> <p>18 you found this one conclusion, that it's</p> <p>19 insufficient. And then you say because the</p> <p>20 evidence -- because the Board of Adjustment</p> <p>21 has concluded that the evidence is</p> <p>22 insufficient on the record on issues material</p> <p>23 to the decision of this case, the case is</p> <p>24 remanded by the Board of Adjustment to</p> <p>25 Planning & Zoning with guidance included in</p>	<p>1 CHAIRMAN GUETSCHOW: In the</p> <p>2 record.</p> <p>3 MS. TUCKER: The resolution is in</p> <p>4 the record. Not only is the resolution in</p> <p>5 the record, but all that discussion is in</p> <p>6 there.</p> <p>7 CHAIRMAN GUETSCHOW: Okay. In</p> <p>8 the record.</p> <p>9 MS. TUCKER: On issues -- this is</p> <p>10 an issue, but you can do both.</p> <p>11 CHAIRMAN GUETSCHOW: On issues.</p> <p>12 MS. TUCKER: Material to the</p> <p>13 decision of the case, comma, the Board of</p> <p>14 Adjustment --</p> <p>15 CHAIRMAN GUETSCHOW: And</p> <p>16 therefore remands the case.</p> <p>17 MS. TUCKER: Well, I started with</p> <p>18 because. So because. Then you just need a</p> <p>19 comma: Because the Board of Adjustment finds</p> <p>20 this, comma, the Board of Adjustment remands</p> <p>21 the case to the Planning & Zoning Commission</p> <p>22 consistent with --</p> <p>23 CHAIRMAN GUETSCHOW: No. For --</p> <p>24 for reconsideration? Consistent with.</p> <p>25 MS. TUCKER: Yeah, so I was going</p>

Page 89

1 to say consistent -- you don't have all the
2 other things yet that you're going to want to
3 be consistent with, so we just take
4 consistent with this --
5 CHAIRMAN GUETSCHOW: No. For a
6 decision consistent with. It needs a --
7 because the Board of Adjustment has
8 concluded, et cetera, et cetera, the Board
9 remands the case to P&Z --
10 MR. STEWART: Why can't you just
11 say for compliance?
12 MS. TUCKER: Consistent with
13 this --
14 CHAIRMAN GUETSCHOW: For
15 compliance with.
16 MR. STEWART: With the two Code
17 provisions.
18 CHAIRMAN GUETSCHOW: For
19 compliance --
20 MR. STEWART: Would that work?
21 MS. TUCKER: Yeah.
22 CHAIRMAN GUETSCHOW: For
23 compliance with Code.
24 MS. TUCKER: Yeah.
25 CHAIRMAN GUETSCHOW: For

Page 90

1 rendering a decision in compliance with Code.
2 MS. TUCKER: Yeah. I mean, yes,
3 sir.
4 CHAIRMAN GUETSCHOW: We are not
5 in the military here. For rendering a
6 decision in compliance -- in compliance with
7 Code. Does that sound good?
8 MS. TUCKER: Yes, it does.
9 CHAIRMAN GUETSCHOW: All right.
10 So the motion -- Barbara, would you correct
11 me? I will read it, and it will be my motion
12 because I seem to be the wordsmith here
13 partially. Because the Board of Adjustment
14 has concluded that there is insufficient
15 evidence in the record on issues material to
16 the decision of the case, the Board of
17 Adjustment remands the case to the Planning &
18 Zoning Commission for rendering a decision in
19 compliance with Code.
20 THE CLERK: I've got that,
21 Mr. Chair.
22 CHAIRMAN GUETSCHOW: Okay.
23 You've got that, too?
24 MS. TUCKER: Yes.
25 CHAIRMAN GUETSCHOW: Who's going

Page 91

1 to second that?
2 MR. ADAMS: Second.
3 CHAIRMAN GUETSCHOW: Mr. Adams
4 will second that.
5 I think, in speaking to the
6 motion, I intend to support it because as I
7 have indicated before, it is not practical
8 for us to correct the Planning & Zoning
9 Commission resolution here. There is just --
10 there are too many issues here that the
11 Planning & Zoning Commission needs to
12 address, and they are embodied by basically
13 the two Code provisions that we have now
14 talked about several times.
15 And it is my intention that if
16 this motion passes, that we will provide some
17 guidance to the Planning & Zoning Commission
18 in terms of having to focus on particular
19 issues. So I intend to vote for the motion.
20 Mr. Adams.
21 MR. ADAMS: I agree, and I think
22 you summed it up nicely.
23 CHAIRMAN GUETSCHOW: Okay.
24 Mr. Stewart, any discussion?
25 MR. STEWART: No. I intend to

Page 92

1 vote in favor of this.
2 CHAIRMAN GUETSCHOW: Okay.
3 Julia, anything that we should
4 consider, talk about before we vote on this?
5 MS. TUCKER: No. I think you, as
6 Mr. Adams said, you summarized it.
7 CHAIRMAN GUETSCHOW: Thank you,
8 Madam Clerk.
9 THE CLERK: Mr. Guetschow.
10 CHAIRMAN GUETSCHOW: Yes.
11 THE CLERK: Mr. Stewart.
12 MR. STEWART: Yes.
13 THE CLERK: Mr. Adams.
14 MR. ADAMS: Yes.
15 CHAIRMAN GUETSCHOW: And the
16 motion passes three to zero.
17 Before we go to the next phase,
18 which is giving guidance to the Planning &
19 Zoning Commission on a raft of issues that
20 are involved in this case, which I think is
21 only fair for us to do to make sure that they
22 are not sitting there just totally bewildered
23 at what we have done here, but that we are
24 actually providing them with some active
25 guidance as to what they need to consider to

<p style="text-align: right;">Page 93</p> <p>1 come up to a proper decision in this case.</p> <p>2 Before we do that, I need to take</p> <p>3 a break. We have been at it for two hours.</p> <p>4 So we are going to have a ten-minute recess.</p> <p>5 Thank you.</p> <p>6 (Break.)</p> <p>7 CHAIRMAN GUETSCHOW: All right.</p> <p>8 We are back on the record in Appeal Case</p> <p>9 2016-1, which is the Municipal Board of</p> <p>10 Adjustment.</p> <p>11 When we took the break, I said</p> <p>12 what we need to discuss after the break is</p> <p>13 direction that we wish to give to the</p> <p>14 Planning & Zoning Commission so that they</p> <p>15 don't sit there in total bewilderment and</p> <p>16 say: What do we do now?</p> <p>17 What I have in mind, frankly, is</p> <p>18 that we come up with a series of</p> <p>19 considerations that P&Z needs to apply the</p> <p>20 facts to, and then hopefully come up with a</p> <p>21 more complete decision than what they have</p> <p>22 done before. So my intention is that we talk</p> <p>23 about specific issues that we want to refer</p> <p>24 to them. Julia will put them on the</p> <p>25 blackboard, and right now they should be in</p>	<p style="text-align: right;">Page 95</p> <p>1 site plans and not nonconforming uses or</p> <p>2 structures." I think this is a useful</p> <p>3 reminder to them, to P&Z, that this LRE is</p> <p>4 deemed approved and it is not a nonconforming</p> <p>5 structure. And so I would like them to make</p> <p>6 sure that in their deliberations they</p> <p>7 understand the distinction between the two.</p> <p>8 So drop down to the first sentence.</p> <p>9 You then go -- are you done?</p> <p>10 MS. TUCKER: Yeah. So I had</p> <p>11 grandfathered LRE, deemed approved, and not</p> <p>12 nonconforming.</p> <p>13 CHAIRMAN GUETSCHOW: Yes. Second</p> <p>14 sentence, and it reads: "The provisions of</p> <p>15 this chapter notwithstanding, the expansion,</p> <p>16 reconstruction, renovation, or remodeling of</p> <p>17 a large retail establishment existing on this</p> <p>18 date takes effect may be allowed only after a</p> <p>19 limited site plan approval is granted."</p> <p>20 Okay? So second sentence: "Limited site</p> <p>21 plan approval is required in this case."</p> <p>22 Third sentence: "What is</p> <p>23 required" -- oh. "Applications for limited</p> <p>24 site plan approval under this subsection</p> <p>25 shall be processed in the same manner as</p>
<p style="text-align: right;">Page 94</p> <p>1 no particular order. Once they are all put</p> <p>2 down, then we simply go through them, put</p> <p>3 them in order, and then formalize it.</p> <p>4 Does that make some sense to you,</p> <p>5 to the two of you?</p> <p>6 MR. STEWART: Just sort of</p> <p>7 brainstorming.</p> <p>8 CHAIRMAN GUETSCHOW: Yeah, yeah.</p> <p>9 And just by way of starting out, the obvious</p> <p>10 one to me is that they need to consider</p> <p>11 21.55.130A in significant detail, because</p> <p>12 that's the basis upon which they need to make</p> <p>13 a decision. When you turn to that section,</p> <p>14 it has seven separate sentences, if my memory</p> <p>15 serves me correctly.</p> <p>16 MR. STEWART: That's correct.</p> <p>17 CHAIRMAN GUETSCHOW: And my idea</p> <p>18 is that they should go through that section</p> <p>19 sentence by sentence, because there are some</p> <p>20 items there that are not immediately obvious</p> <p>21 when you read the paragraph as a whole. And</p> <p>22 so the first sentence is rather obvious.</p> <p>23 The first sentence is: "A large</p> <p>24 retail establishment existing on or before</p> <p>25 May 8, 2001 shall be deemed to be approved</p>	<p style="text-align: right;">Page 96</p> <p>1 applications for site plan removal --</p> <p>2 approval required for new establishments."</p> <p>3 So put in there "same application</p> <p>4 process for limited site plan amendment as</p> <p>5 for original site plan."</p> <p>6 MR. STEWART: Is this a place</p> <p>7 where we would reference a requirement that</p> <p>8 consideration of the public hearing has to be</p> <p>9 incorporated in that?</p> <p>10 Would we make a statement to that</p> <p>11 effect?</p> <p>12 CHAIRMAN GUETSCHOW: Yes. Yes.</p> <p>13 Fourth sentence, and this is one that may</p> <p>14 require a little more work. "No site plan</p> <p>15 removal application required for interior</p> <p>16 work only." And what I have in mind here,</p> <p>17 the reason that I'm stopping at this is when</p> <p>18 you look at the memo and when you look at the</p> <p>19 Planning Department's position, they say if</p> <p>20 it's only interior, we don't get involved at</p> <p>21 all.</p> <p>22 I don't think that is a true</p> <p>23 statement, because as this case indicates,</p> <p>24 interior work can also affect -- or exterior</p> <p>25 work can also affect interior work and vice</p>

Page 97

1 versa. And I think in those situations it
2 should not be beyond and is not beyond the
3 Planning & Zoning Commission's purview to
4 address interior issues. In other words,
5 nothing in this sentence creates a taboo
6 against Planning & Zoning Commission
7 requiring conditions affecting interior
8 spaces when the project requires a limited
9 site plan review.
10 By way of example, to illustrate
11 what I have in mind here is, if Sears Roebuck
12 were suddenly to block off all access from
13 its store to the mall, to the interior mall,
14 that would be interior work; but I don't
15 think the Assembly had in mind to cut off
16 Planning & Zoning Commission's review or
17 right of review because that kind of a
18 situation would affect the entire mall, not
19 just the interior space of Sears Roebuck, or
20 whatever they are called nowadays. I think
21 in that situation the Planning & Zoning
22 Commission should have the right and does
23 have the right, and there is no prohibition
24 here that says the Planning & Zoning
25 Commission does not have the right to review

Page 98

1 that situation and impose conditions.
2 MR. ADAMS: Yeah, when you look
3 at the (indiscernible) it very clearly is, to
4 me, is intended to address the interior
5 remodel that anyone should be able to do to
6 move partitions around, as long as it doesn't
7 affect those key provisions of the Code.
8 CHAIRMAN GUETSCHOW: Yes.
9 MR. ADAMS: And to the degree
10 that it starts affecting them, then it has a
11 dramatic effect on all those things and moves
12 it out of conformance --
13 CHAIRMAN GUETSCHOW: Yes.
14 MR. ADAMS: -- through
15 requirements of the Code. And at the point
16 it starts moving out of conformance with the
17 Code, then it's subject to the requirements
18 of the Code.
19 CHAIRMAN GUETSCHOW: Okay.
20 MR. STEWART: This might be a
21 good time to put in the sections dealing with
22 like 21.55.100 that says: "Change is
23 permitted only in the direction of
24 conformity," not out of conformity.
25 CHAIRMAN GUETSCHOW: Julia, does

Page 99

1 that fit in here or do we -- or should we put
2 that -- no, I think that goes with the fifth
3 sentence. Take a look at the fifth sentence.
4 "In approving limited site plans under the
5 this subsection, the Commission shall apply
6 the standards set out in 21.50.320 in a
7 manner proportionate to the extent of the
8 expansion, reconstruction, renovation, or
9 remodeling proposed."
10 MS. TUCKER: I think that what
11 Mr. Stewart was talking about, and I don't
12 know if it goes here or not, but isn't the
13 one that you said -- I think he was talking
14 about the general site plan review
15 standards --
16 CHAIRMAN GUETSCHOW: Yeah.
17 MS. TUCKER: -- which -- is that
18 what you just quoted?
19 CHAIRMAN GUETSCHOW: Yeah.
20 MS. TUCKER: The T200. And so I
21 don't know where to put that in, but since
22 this is kind of brainstorming, we'll just put
23 this up here, but that's the backsliding. So
24 I don't know if it goes here or in the
25 summary discussion itself, but let's just get

Page 100

1 it on the board.
2 CHAIRMAN GUETSCHOW: Yeah.
3 MS. TUCKER: Let's go back to
4 something because I didn't -- I -- you were
5 saying, Chairman Guetschow, if interior
6 change affects the exterior compliance
7 requirements, is that where you were going?
8 MR. ADAMS: I think I was
9 addressing that, but I guess exactly what
10 Mr. Guetschow was talking about, and that is
11 that you can't -- you cannot have freedom to
12 conduct any sort of an interior remodel with
13 carte blanche to do as you please when it can
14 have a drastic effect on the public safety,
15 circulation, any of those other standards
16 that we require of LREs.
17 MS. TUCKER: And so then that was
18 what you were saying. If it moves the LRE,
19 even the grandfathered LRE, out of
20 conformance -- if an interior remodel moves
21 the LRE out of conformance, then --
22 CHAIRMAN GUETSCHOW: Then P&Z
23 shall have a right to review.
24 MS. TUCKER: Yeah. Then P&Z
25 review is triggered.

Page 101

1 CHAIRMAN GUETSCHOW: Yes.
2 MS. TUCKER: Under this section
3 that we're talking about.
4 CHAIRMAN GUETSCHOW: Correct.
5 MS. TUCKER: Okay. And then
6 that -- I think that that's what led
7 Mr. Stewart to know here that that -- that
8 that also has a tie-in to 21.50.200.
9 MR. STEWART: 100.
10 MS. TUCKER: Oh, 100.
11 MR. ADAMS: I think what does
12 merit discussion in our --
13 MR. STEWART: I think it's 100.
14 Let me look at it again.
15 MR. ADAMS: In our direction I
16 think one thing that's merited is reference
17 to Mr. Weaver's September 2nd, 2009 memo
18 where he's provided an interpretation, but he
19 doesn't have that latitude.
20 CHAIRMAN GUETSCHOW: Well, I
21 think we need to address that separately.
22 MR. ADAMS: Okay.
23 CHAIRMAN GUETSCHOW: I want to --
24 MS. TUCKER: Well, I'm just going
25 to put it down here, and then we can move it

Page 102

1 someplace else because you said we were
2 brainstorming. That's the 2009 --
3 MR. ADAMS: Weaver memorandum.
4 CHAIRMAN GUETSCHOW: Okay. Are
5 we at the fifth sentence, or have we already
6 talked about the fifth sentence?
7 MS. TUCKER: You were at No. 4,
8 so now you've got to look at No. 5.
9 CHAIRMAN GUETSCHOW: Okay. No. 5
10 is: "In approving limited site plans under
11 this subsection, the Commission shall apply
12 the standards set out in 21.50.320 in a
13 manner proportionate to the extent of the
14 expansion, reconstruction, renovation, or
15 remodeling for both." Proportionate
16 application of 21.50.320. I think that's how
17 we should entitle this.
18 MS. TUCKER: Say that again.
19 CHAIRMAN GUETSCHOW: Proportionate
20 application of 21.50.320.
21 MS. TUCKER: Okay.
22 CHAIRMAN GUETSCHOW: No. 6 --
23 MS. TUCKER: How about No. 5?
24 CHAIRMAN GUETSCHOW: That's what
25 we have.

Page 103

1 MS. TUCKER: That was 5. I'm
2 sorry, I misnumbered.
3 CHAIRMAN GUETSCHOW: Yeah. So
4 No. 6: "The cost of compliance with the
5 standards set forth in 21.50.320 shall not
6 exceed 10 percent of the cost of expansion,
7 reconstruction."
8 So entitle this: 10 percent
9 limitation issue -- 10 percent cost
10 limitation issue. And the seventh sentence
11 is the five issues to be considered in the
12 last sentence. I don't think we need to go
13 through those in detail, but simply list the
14 five considerations --
15 MS. TUCKER: In --
16 CHAIRMAN GUETSCHOW: Five, the
17 five what?
18 MS. TUCKER: Mitigation.
19 CHAIRMAN GUETSCHOW: They're not
20 necessarily mitigations. Five issues to be
21 considered. Let's say five issues to be
22 considered.
23 MS. TUCKER: Don't you think
24 they're standards or criteria?
25 CHAIRMAN GUETSCHOW: Call them

Page 104

1 criteria. I don't -- I don't think -- five
2 criteria spelled out in the last sentence.
3 Where do we fit in the
4 backsliding issue? Shall that be a separate
5 heading?
6 MR. ADAMS: I think we addressed
7 that, Julia, in No. 3, was it? We have
8 backsliding somewhere.
9 MS. TUCKER: I put it under
10 No. -- I put it under No. 4.
11 MR. ADAMS: Okay.
12 MS. TUCKER: Because -- and I
13 also had the 2009 memo right under No. 4.
14 MR. STEWART: Now, under the 2009
15 memo, is that where we also need to include
16 something relating to Municipal rulemaking
17 rather than --
18 CHAIRMAN GUETSCHOW: Well, that
19 ties in with the memo.
20 MR. STEWART: That ties in --
21 okay.
22 MS. TUCKER: He's just saying
23 what we're going to do. So municipal
24 rulemaking, okay.
25 CHAIRMAN GUETSCHOW: Okay.

Page 105

1 MS. TUCKER: Okay. So one thing
2 that --
3 CHAIRMAN GUETSCHOW: What's
4 missing?
5 MS. TUCKER: -- that I was
6 thinking about, No. 7, and why we're saying
7 criteria, is that in looking at it it says
8 that "in determining the degree to which the
9 standards in 21.50.320 shall apply."
10 So you had -- you had -- you
11 had -- you had the proportionate one, which
12 was No. 5.
13 CHAIRMAN GUETSCHOW: I think so.
14 MS. TUCKER: And that also
15 implicates 320. And so the question is: Do
16 you want to look at those two together since
17 they both seem to address what P&Z is
18 supposed to do when they're applying 320?
19 CHAIRMAN GUETSCHOW: Okay. Can
20 you lump them together?
21 MS. TUCKER: Well, I think that
22 just for terms of -- you know, for the
23 Board's discussion, you're going to be
24 addressing presumably the relationship
25 between those two, that when the -- when the

Page 106

1 P&Z is instructed to look at the limited site
2 plan review, they're supposed to apply the
3 standards set out in 320. So we know that
4 there's a litany of standards in 320, and
5 they're going to apply those in proportion --
6 CHAIRMAN GUETSCHOW: Yeah.
7 MS. TUCKER: -- in a manner
8 proportionate to the extent of the expansion.
9 Then, if you drop down to that No. 7 that you
10 just said, it says: In determining the
11 degree to which the standards in 320 shall
12 apply to the project. That's not to the
13 whole -- I mean, that's the site plan review,
14 the Commission shall also consider --
15 CHAIRMAN GUETSCHOW: Five
16 separate --
17 MS. TUCKER: And then that's why
18 I called them the mitigation factors in my
19 shortcut here, because this says: You know
20 what they'll do is proportionate and then
21 this says: And here's some criteria to help
22 you do that.
23 CHAIRMAN GUETSCHOW: Okay.
24 MS. TUCKER: Right?
25 CHAIRMAN GUETSCHOW: Yes. True.

Page 107

1 MS. TUCKER: Yeah. So when
2 you -- you know, when we go through the
3 discussion in lumping things together, you
4 know, that's -- I was just thinking that you
5 would have arrows for those two is just what
6 I was saying.
7 CHAIRMAN GUETSCHOW: Yeah. Now,
8 the Weaver memo and the requirement of
9 rulemaking should be a separate point
10 altogether. I don't think we have them
11 lumped in with anything else.
12 MS. TUCKER: Okay. Well, in
13 some -- I think that what the connection --
14 there was -- what I heard somebody say is you
15 got the rulemaking part, but why they brought
16 it in is that there are things in that memo
17 that you discussed earlier were being
18 applied.
19 CHAIRMAN GUETSCHOW: Right.
20 MS. TUCKER: And so -- an
21 interpretation of this criteria. So somehow
22 that memo is going to be implicated in your
23 consideration of these all the way through,
24 but the actual rulemaking, you want to take
25 both here is what I'm hearing.

Page 108

1 MR. STEWART: Well, they have to
2 have some rulemaking because -- basically
3 that 2009 memo is invalid.
4 CHAIRMAN GUETSCHOW: Yes. So
5 that's why I wanted it to be a separate item
6 altogether, that we say because they didn't
7 adhere to the rulemaking provision, that memo
8 is invalid and, in any event, it doesn't make
9 sense because it talks about a 10 percent
10 limitation that really doesn't apply. We
11 need to talk about the 10 percent limitation
12 issue somewhere.
13 MS. TUCKER: Okay. So you have
14 that under No. 6.
15 CHAIRMAN GUETSCHOW: Okay.
16 MS. TUCKER: The 10 percent cost
17 limitation issue.
18 CHAIRMAN GUETSCHOW: Right.
19 MS. TUCKER: So I guess what I'm
20 not -- so now you'll decide sort of the order
21 that you've taken them in, and it seems to me
22 that you either want to take the rulemaking
23 memo first or -- or it's going to be
24 implicated in a bunch of other things.
25 CHAIRMAN GUETSCHOW: Yeah. So

Page 109

1 what you are saying is stick it way at the
2 beginning.

3 MS. TUCKER: Well, you might if
4 what I'm hearing -- I mean, what I'm hearing
5 is people saying that it's not valid. So
6 someplace you're going to have to
7 (indiscernible).

8 MR. ADAMS: Well, I think that,
9 you know, what's germane to a lot of this is
10 that they received inappropriate direction
11 from staff and -- first of all, corrections
12 must be made with the direction provided by
13 staffs.

14 CHAIRMAN GUETSCHOW: The way I
15 see it, such as inappropriate guidance from
16 staff such as the memo, the 2009 memo.

17 MR. ADAMS: Which provides
18 direction or guidance that was
19 inappropriate -- or not inappropriate, but
20 (indiscernible).

21 MR. STEWART: Well, like -- I
22 think we need to say it's invalid because it
23 wasn't promulgated in accordance with
24 rulemaking.

25 CHAIRMAN GUETSCHOW: Yeah, but

Page 111

1 they're looking at it more as a power center
2 rather than part of the mall, because the
3 staff also said it's really not part of the
4 mall, does that increase the proportionality
5 because of the greater effect?

6 CHAIRMAN GUETSCHOW: I hadn't
7 thought about that, I must tell you.

8 MR. STEWART: It's -- there
9 was -- that's a concern for me.

10 MS. TUCKER: So there's a -- so
11 there's -- so I didn't get it up here.
12 What -- or on my pad. What I heard
13 Commissioner Adams say that -- about sort of
14 these -- and --

15 MR. ADAMS: That they received
16 faulty direction from staff.

17 MS. TUCKER: Yes.

18 CHAIRMAN GUETSCHOW: We need to
19 start out with that.

20 MS. TUCKER: Received faulty
21 direction and then -- and you were talking
22 about the memo at that time, but now I'm
23 hearing Mr. Stewart say there's also other
24 places in the record --

25 MR. STEWART: Yeah, in the record

Page 110

1 substantively speaking, we want to also say
2 that substantively speaking it's wrong.
3 Remember? It's not just the fact that it was
4 not properly adopted. It wasn't that.

5 MR. ADAMS: Could we say it
6 wasn't promulgated in Code and it is wrong.

7 CHAIRMAN GUETSCHOW: It's just
8 flat wrong.

9 MR. STEWART: Yes.

10 CHAIRMAN GUETSCHOW: Yes. But
11 then once we have said that it's flat wrong,
12 we also need to tell them in what way it is
13 flat wrong.

14 MR. ADAMS: Right, and we can do
15 that.

16 CHAIRMAN GUETSCHOW: Okay. All
17 right. Anything else that we need to
18 address?

19 MR. STEWART: There's one thing
20 that bothers me a little bit on the
21 proportionality issue. You know, and I'm
22 just thinking out loud now. If they treated
23 the Rack as a power center similar to places
24 downtown, which they talked about a lot on
25 the record, does that -- the fact that

Page 112

1 and in the transcript.

2 MS. TUCKER: Places in transcript
3 and record where direction was faulty. One
4 of those that he's identified is this talking
5 about --

6 MR. STEWART: Power center
7 concept.

8 CHAIRMAN GUETSCHOW: Power center
9 concept.

10 MS. TUCKER: Power center, but
11 even more importantly, no matter how they
12 described it, this concept that somehow came
13 down, you believe, to -- I'm hearing you say
14 to the Planning & Zoning Commission, that
15 staff said the Rack was treated --

16 MR. STEWART: How they said it
17 was not part of the mall.

18 MS. TUCKER: It was not part of
19 the mall. And that sort of is the problem,
20 you know, because they got direction in Code
21 on what to do about what the -- what site
22 plan amendments are. It was filed with the
23 site plan amendment. And so -- so I think --
24 I mean, no matter how you -- what order you
25 take them in, we'll take notes and make

Page 113

1 findings and then you can reorder them or
2 kind of -- I mean --
3 CHAIRMAN GUETSCHOW: Well, I
4 would like to start out with this issue, the
5 faulty --
6 MS. TUCKER: About what --
7 CHAIRMAN GUETSCHOW: The faulty
8 advice.
9 MS. TUCKER: Okay. So let's
10 go --
11 CHAIRMAN GUETSCHOW: Okay?
12 MS. TUCKER: Yeah.
13 CHAIRMAN GUETSCHOW: Okay. So
14 the first advice we should give them is that
15 they received faulty advice. How do we --
16 how do you envision us giving them some
17 direction?
18 MR. ADAMS: Well, I think, first
19 of all, we need to say that this memo is --
20 provides no basis involved and the guidance
21 is in conflict with Municipal Code.
22 CHAIRMAN GUETSCHOW: I'm trying
23 to follow the -- I'm trying to step back a
24 little further and that is: How do we direct
25 this to P&Z? By way of -- and, Julia, you

Page 114

1 need to give us some assistance here. How do
2 we -- how do we raise all of this?
3 Do we simply say: Once we have
4 done the decision now to send this thing
5 back, do we simply then say and by way of
6 some -- of guidance -- of giving guidance to
7 the Planning & Zoning Commission, we would
8 like -- or the Board of Adjustment would like
9 P&Z to consider the following.
10 MS. TUCKER: You might think
11 about making a motion first, and that would
12 be that you're going to exercise your
13 authority to -- that you have under Code,
14 that P&Z doesn't have, to interpret Code
15 and -- and at -- but that that -- that's what
16 it sounds to me like you're wanting to do.
17 The board -- P&Z -- if P&Z wants to do
18 something with Code, they have to do it with
19 regulation.
20 CHAIRMAN GUETSCHOW: Yeah.
21 MS. TUCKER: But a board -- the
22 Board of Adjustment as a board of appeals has
23 the ability and, you know, you have --
24 CHAIRMAN GUETSCHOW: It is
25 somewhere.

Page 115

1 MS. TUCKER: I saw the reference
2 in --
3 CHAIRMAN GUETSCHOW: We need to
4 dig it out. Too many tabs here.
5 MR. STEWART: Are you talking
6 about 21.30.090B --
7 MS. TUCKER: Probably. That
8 sounds --
9 MR. STEWART: -- in the judgment?
10 CHAIRMAN GUETSCHOW: Yes.
11 MR. STEWART: On matters that
12 relate to interpretation and the construction
13 of ordinances or other provisions of law.
14 CHAIRMAN GUETSCHOW: Which
15 section do you look at -- are you looking at
16 now?
17 MR. STEWART: 21.30.090B.
18 CHAIRMAN GUETSCHOW: "May
19 exercise its independent judgment on legal
20 issues raised." Is that what you're talking
21 about?
22 MS. TUCKER: Yes. That's what I
23 was talking about.
24 CHAIRMAN GUETSCHOW: Okay.
25 That's the scope of the review, 21.30.090B.

Page 116

1 MS. TUCKER: So --
2 CHAIRMAN GUETSCHOW: Capital B.
3 MS. TUCKER: Yes. So the Board
4 of Adjustment may exercise its independent
5 judgment on legal issues raised by the
6 applicant. The term legal issue as used in
7 this section means those -- the print is so
8 small -- those matters that relate to the
9 interpretation of construction ordinances or
10 other provisions of law. So for -- but it
11 seems to me that you're -- it sounds to me
12 like you intend to exercise --
13 CHAIRMAN GUETSCHOW: Yes.
14 MS. TUCKER: -- the authority
15 that you have under --
16 CHAIRMAN GUETSCHOW: Under that
17 section.
18 MS. TUCKER: -- under that
19 section to provide P&Z with -- with
20 interpretation and construction of ordinances
21 and other provisions of law to assist them on
22 remand.
23 CHAIRMAN GUETSCHOW: Yes.
24 MS. TUCKER: So you would do
25 that. Then you'd have a discussion here and

Page 117

1 then you would -- you would give those rules
2 to them that you come up with here, your
3 interpretation. So one of the things that
4 you've already talked about is that -- and I
5 don't know where you want to stick it. It
6 didn't sound, Mr. Chair, that you wanted to
7 start with this one off the top, but it was
8 just included in the panoply of things here,
9 was that Municipal rulemaking is -- you know,
10 that the memo doesn't have the force of law
11 because it wasn't exercised -- it wasn't, you
12 know, whatever that is.
13 CHAIRMAN GUETSCHOW: Right.
14 MS. TUCKER: It wasn't
15 promulgated as a regulation as required by
16 Code. So that would just be one of different
17 findings. So you could take -- wherever you
18 want to start, you would -- you would -- it
19 seems to me that at the end -- I guess my
20 counsel is that you give Planning & Zoning as
21 clear as you can what you think the law is.
22 Don't worry about -- don't let it go -- don't
23 spend the whole memo talking about what they
24 did wrong.
25 CHAIRMAN GUETSCHOW: No, no, no,

Page 118

1 no, no.
2 MS. TUCKER: I mean, it's just --
3 in briefing it's -- and other legal exercises
4 so much time is spent disputing what was
5 said. He said -- you know, and it seems to
6 me that you have some clarity here that you
7 want to share with them.
8 So go in the clarity that you
9 want to share, and then at the end if you
10 want to say, you know, to the extent that
11 they received advice to the contrary, they're
12 to follow your advice. I mean, that's the
13 gist of it.
14 CHAIRMAN GUETSCHOW: So we start
15 out by way of preamble saying that pursuant
16 to 21.30.090B, the Board of Adjustment
17 exercises its independent judgment on legal
18 issues raised in the case, simply in the
19 case. No. 1, Jerry Weaver's memo of
20 September 2, 2009.
21 MS. TUCKER: No, it's
22 (indiscernible) to the Planning Department.
23 CHAIRMAN GUETSCHOW: Planning
24 Department, yeah, whatever it's called.
25 Planning Department memorandum does not have

Page 119

1 the force of -- not the force of law. Should
2 not be a guiding -- should not provide
3 guidance to P&Z in this case because it was
4 not adopted in conformance with whatever the
5 rulemaking ordinance is. We'll come up with
6 that in a second here.
7 MR. ADAMS: Or it could say
8 misapplies the 21.50.320 -- inappropriately
9 applies the conditions of 21.50.320.
10 CHAIRMAN GUETSCHOW: It wasn't
11 320. It was 130A.
12 MR. ADAMS: 130, I'm sorry.
13 CHAIRMAN GUETSCHOW: Yeah. And
14 then there were --
15 MR. ADAMS: You could say
16 misapplies the criteria and --
17 CHAIRMAN GUETSCHOW: Yes.
18 MR. ADAMS: -- and does not have
19 a -- (indiscernible) it said it's not
20 codified in Municipal Code.
21 CHAIRMAN GUETSCHOW: But we need
22 to specifically talk about the two areas that
23 the memo addresses, and that is that it holds
24 that interior work is not subject to review
25 by P&Z or by the Department. And then we

Page 120

1 need to talk about the 10 percent rule. So
2 those were the two areas that the memo
3 addresses. Oh, and No. 3, that the
4 10 percent dollar figure is to be applied
5 primarily --
6 MR. ADAMS: Correct.
7 CHAIRMAN GUETSCHOW: Well, it's
8 inconsistent, because on the one hand it says
9 we are looking at architectural standards.
10 Then down below it says: We primarily look
11 at vehicular and pedestrian safety
12 improvements and, No. 2, blending the
13 exterior of the old facility to the new
14 facility and, 3, its landscaping and drainage
15 improvements. So I'm not sure what in the
16 world --
17 MR. STEWART: Like that goes back
18 to what Dwayne was talking about where they
19 only looked at those issues that were raised
20 at that last hearing. They didn't address
21 the rest of the issues.
22 CHAIRMAN GUETSCHOW: Okay. So
23 how do we incorporate --
24 MS. TUCKER: Well, there's one --
25 one other point that I would bring up about

Page 121

1 that is that that's a 2009 memo. It's not
2 even necessarily applying. I mean, this --
3 you can have sort of a standard memo out
4 there that apparently was supposed to be
5 applied to every case. It's not just in this
6 case. So I think that that rulemaking idea
7 comes up there.

8 CHAIRMAN GUETSCHOW: Yes.

9 MS. TUCKER: And so -- and I
10 think that it's -- and that's why that term
11 doesn't have the force of law. They took it
12 as an interpretation of law, and it's not.
13 So I think that --

14 CHAIRMAN GUETSCHOW: And would
15 you then simply leave it at that? It does
16 not have the force of law because it wasn't
17 adopted properly?

18 MS. TUCKER: Right. And then to
19 bring in what Mr. Adams said, and then to say
20 also that -- that the Board -- the Board
21 finds that it is in conflict with the Board's
22 interpretation of 21.55.130.

23 MR. ADAMS: Misinterprets the
24 application of that provision.

25 CHAIRMAN GUETSCHOW: In that --

Page 122

1 okay, and then we'd go on to those two or
2 three points. The question is one of
3 wording. That's our problem right now.

4 MS. TUCKER: Okay. So --

5 MR. ADAMS: Which one do you want
6 to deal with first?

7 CHAIRMAN GUETSCHOW: Well, I
8 would like to address just in the order in
9 which Jerry addressed it in this memo, that
10 it is not correct that --

11 MR. ADAMS: Interior remodels?

12 CHAIRMAN GUETSCHOW: -- that
13 exclusively interior remodeling necessarily
14 prohibits review by P&Z, rather if interior
15 remodeling has an effect on the entire
16 project, it should enable P&Z -- or it does
17 enable P&Z to review the issue.

18 MR. ADAMS: Yeah, I don't think
19 we necessarily -- I mean, not that that isn't
20 worth getting into, but I'm not sure in this
21 case we even need to go there in this case.
22 It goes beyond the interior, and with respect
23 to that that it qualifies (indiscernible) in
24 a limited site plan review, and that's what
25 opened the door to the (indiscernible).

Page 123

1 That's what opened the door to everything.
2 It does have ramifications interior and
3 exterior to everything and that's what
4 matters. In doing so, it moves it out of
5 conformity.

6 CHAIRMAN GUETSCHOW: Yeah.

7 MR. ADAMS: And it's not to say
8 that that isn't an argument worth getting
9 into, but I don't know that this is --

10 CHAIRMAN GUETSCHOW: I don't
11 think we should. We need to turn a clamp
12 down on it rather than expand it too much.

13 MR. STEWART: But they're still
14 using the 10 percent in this manner.

15 CHAIRMAN GUETSCHOW: Well, that
16 comes later. We haven't even addressed
17 the -- we haven't even addressed the
18 10 percent yet. We are still on the
19 perceived prohibition of the Planning
20 Department and P&Z getting involved when
21 there is exclusively interior remodeling.

22 MS. TUCKER: So one avenue that
23 you can do is -- I mean, so far I took down
24 the two things that we were talking about,
25 the 2009 Planning Department memo was not

Page 124

1 adopted in regulation and does not have the
2 force of law.

3 No. 2, the 2009 Planning
4 Department memo is in conflict with the
5 Board's interpretation of 21.55.130 and
6 misapplies the provisions in Code.

7 Then I think the next step that
8 you might consider doing is just one by one,
9 whether you start with interior or not, give
10 the Board's interpretation. This is the
11 interpretation, and then say that it was
12 misapplied and show in the record where your
13 interpretation was not -- was not -- the
14 interpretation that you find correct was not
15 applied and P&Z needs to apply that.

16 If that -- so that would be -- if
17 you're talking about the interior, let's
18 write down how -- the -- what I heard
19 Mr. Adams say is that this application --
20 this is an application for site plan review
21 and it's not excluded by the exemption for
22 interior.

23 Then what I'm hearing Bernd say:
24 And that -- the Board's -- that
25 interpretation of the Board -- or the P&Z's

Page 125

1 interpretation conflicts with that because
2 they apparently relied on this memo to
3 exclude all interior work from -- I mean,
4 that's what's in the record. The people
5 say --
6 CHAIRMAN GUETSCHOW: Right,
7 right. But --
8 MR. ADAMS: It's in the
9 transcript, too, because staff was very
10 explicit.
11 MS. TUCKER: Yeah, yeah. But
12 when the Commissioner said: Well, jeez, you
13 know, we understand that this is -- I don't
14 know -- somebody used the word taboo here.
15 So I think that it's important to leave out
16 what is the Board's interpretation of Code,
17 and then we can -- and then I can write
18 down --
19 CHAIRMAN GUETSCHOW: We cannot
20 get too far afield here. I mean, we cannot
21 put in 50 pages of considerations here for
22 P&Z. It just isn't feasible. So we need to
23 limit this in some fashion and need to be
24 very concise.
25 We have already said that the

Page 126

1 memo does not have the force of law, No. 1.
2 No. 2, the provision of the memo
3 that strictly interior remodeling does not
4 subject the project to review by the Planning
5 & Zoning Commission is incorrect. In fact,
6 if interior work does affect the entire
7 project, Planning & Zoning Commission may
8 review and mandate remedies that affect the
9 interior.
10 MR. ADAMS: And to the extent
11 they affect conformance to requirements of
12 21.55.130,
13 MR. STEWART: Well, when you take
14 the interior and you affect it so much that
15 it triggers a site plan review, then --
16 CHAIRMAN GUETSCHOW: How do we
17 put that in words in a simple sentence?
18 That's the issue here.
19 MS. TUCKER: Well, I have: If
20 interior work -- if interior work is so
21 significant that it requires --
22 MR. STEWART: Limited site plan
23 review?
24 MS. TUCKER: An application --
25 MR. ADAMS: Well, interior work

Page 127

1 doesn't require that, you know.
2 CHAIRMAN GUETSCHOW: The interior
3 may involve site plan review.
4 MR. ADAMS: If site plan review
5 is required --
6 CHAIRMAN GUETSCHOW: No, no, it's
7 the other way around.
8 MS. TUCKER: I don't think so.
9 CHAIRMAN GUETSCHOW: If interior
10 work affects the entire project, it may
11 involve a site plan review.
12 MR. ADAMS: I don't think that's
13 (indiscernible).
14 MS. TUCKER: I'm not following
15 that at all.
16 CHAIRMAN GUETSCHOW: You don't
17 like that, okay.
18 MS. TUCKER: Well, I just -- I
19 think that -- I think that maybe, Mr. Adams,
20 you can give me just off the top of your head
21 and I'm going to write it down, what you
22 think the provision regarding interior
23 work -- your interpretation of that
24 provision. And I understood that to be
25 that -- that the exemption for interior work

Page 128

1 is not --
2 MR. ADAMS: Where those effects
3 are held within the building.
4 MS. TUCKER: Yeah, it does not
5 apply. It does not apply.
6 MR. ADAMS: Where --
7 MS. TUCKER: Where an application
8 for limited site plan review is under
9 consideration, it exempts interior-only
10 projects --
11 MR. ADAMS: And those effects are
12 kept within the --
13 MS. TUCKER: -- if the effects
14 are limited to the interior. Something like
15 that.
16 MR. ADAMS: Yeah. I like that.
17 MS. TUCKER: Did that capture
18 what you --
19 MR. ADAMS: Oh, absolutely.
20 Absolutely it does.
21 MS. TUCKER: Okay.
22 MR. ADAMS: Yeah.
23 CHAIRMAN GUETSCHOW: So that's
24 the first one. Then we need to address the
25 10 percent rule.

Page 129

1 MR. ADAMS: I think the confusion
2 is that that 10 percent review applies to
3 those nonconforming aspects of the project
4 existing at the time of application.
5 MR. STEWART: No, I don't think
6 it's the project. I think it's the entire
7 LRE, 10 percent for the entire --
8 MR. ADAMS: Yeah, I saw that.
9 CHAIRMAN GUETSCHOW: Absolutely.
10 MR. ADAMS: I should have said
11 the sites, yeah.
12 MR. STEWART: Yeah, that's what
13 they were trying to do in this case, was keep
14 it confined to the project.
15 CHAIRMAN GUETSCHOW: Exactly,
16 yeah. To the exterior of the project,
17 remember? Not in the interior.
18 MR. ADAMS: Well, the application
19 that's often used, and I've worked on another
20 shopping center here in town, and whatever
21 they did, it didn't matter. That 10 percent
22 was applied to everything to bring it into
23 conformance, the new stuff, the old stuff, it
24 didn't matter. It was applied to all of it.
25 CHAIRMAN GUETSCHOW: Not just to

Page 130

1 the cost of --
2 MR. ADAMS: Not just those things
3 that are in valid conformance at the time of
4 application.
5 MS. TUCKER: Wait. So this is
6 one of the things that in the -- that Dean
7 Gates picked up, and so I'm going to share
8 with you his comment because he's upstairs.
9 CHAIRMAN GUETSCHOW: Okay. Tell
10 us.
11 MS. TUCKER: And it says that a
12 conclusion of law, VOA, may -- you know, is
13 that the planning director's 2001 memo is not
14 conforming and is incorrect. The VOA
15 interpretation of 21.55.130A is different.
16 The 10 percent cost for compliance applies to
17 the whole project. Once it is determined,
18 limited site plan review slash approval is
19 required.
20 MR. ADAMS: The whole project.
21 MR. STEWART: He means the whole
22 site.
23 CHAIRMAN GUETSCHOW: The whole --
24 MS. TUCKER: Yeah, the whole
25 site.

Page 131

1 MR. STEWART: The LRE as it was
2 approved in 2001.
3 MS. TUCKER: Yeah, he means the
4 whole site. Yes.
5 CHAIRMAN GUETSCHOW: Yes. That's
6 a great statement.
7 MS. TUCKER: Okay. So --
8 CHAIRMAN GUETSCHOW: Yes.
9 MS. TUCKER: So I'm going to
10 write this down. The 10 percent cost for
11 compliance applies to the whole grandfathered
12 LRE site plan. Once it is determined,
13 limited site plan review and approval by P&Z
14 is required.
15 MR. ADAMS: But what's key is the
16 understanding that the Planning & Zoning's
17 conditions of approval required conditional
18 approval. They aren't limited by that
19 10 percent.
20 MS. TUCKER: Planning & Zoning --
21 MR. ADAMS: Correct?
22 CHAIRMAN GUETSCHOW: Correct.
23 MS. TUCKER: Planning & Zoning --
24 say that again. P&Z's --
25 MR. ADAMS: Conditions imposed by

Page 132

1 the Planning & Zoning Commission to achieve
2 conformance with Code are not limited by a
3 10 percent limitation.
4 MR. STEWART: Well, but isn't the
5 purpose of that 10 percent to provide a
6 bridge between the nonconforming uses on the
7 LRE as they existed in 2001 and the --
8 CHAIRMAN GUETSCHOW: And what was
9 applied for in the (indiscernible).
10 MR. STEWART: From the project
11 application, yes.
12 CHAIRMAN GUETSCHOW: Yes, that is
13 true.
14 MR. STEWART: So there is -- or
15 there would be; otherwise, if there's no
16 limitation, then the 10 percent rule wouldn't
17 protect anybody that was grandfathered in
18 2001.
19 MR. ADAMS: Well, until the time
20 they come into an LRE or a site plan review.
21 MR. STEWART: Oh, for the entire
22 LRE.
23 MR. ADAMS: Well, part and
24 parcel. Proportionality comes into play
25 then.

<p style="text-align: right;">Page 133</p> <p>1 CHAIRMAN GUETSCHOW: Yeah. 2 MR. STEWART: So what does the 3 10 percent rule apply to? 4 CHAIRMAN GUETSCHOW: Let's see if 5 we can address it in that fashion. 6 MR. ADAMS: Now, my 7 understanding, for example, the landscaping 8 or the site -- site -- landscape for the site 9 triangle was their issue. Those things that 10 are part of the LRE that need upgrading, that 11 are really -- 12 MS. TUCKER: That aren't part of 13 the -- 14 MR. ADAMS: -- nonconforming. 15 MS. TUCKER: They aren't part of 16 the -- are you saying that like the site 17 triangles, they weren't really part of the 18 project application, but in reviewing the 19 project application, they had to -- they came 20 up because when P&Z reviews the project, 21 there are things and they provided safety 22 issues. So that the 10 percent is kind of a 23 set aside. 24 CHAIRMAN GUETSCHOW: Should not 25 apply to that.</p>	<p style="text-align: right;">Page 135</p> <p>1 that really should happen. 2 So it's to put a limit, because 3 if it had -- without that, under 200, 4 Planning & Zoning has to be able to say -- 5 under the general standards of review, 6 Planning & Zoning has to say the project's in 7 conformance. Well, they know it's not 8 because it's an LRE. 9 It was deemed -- deemed 10 conforming, but the gap between true 11 compliance and deemed compliance are going to 12 come up potentially anytime somebody puts in 13 a project. So the argument is that when 14 somebody puts in a project, the 15 proportionality and the mitigation factors of 16 320 apply to that actual addition or remodel. 17 MR. STEWART: To the cost of the 18 project. 19 MS. TUCKER: The little project. 20 Those things come into play on how big or 21 small compliance with new Code 320 has to 22 happen. So they're mitigating factors; 23 they're just not the 10 percent one. The 24 10 percent factor goes to the limit on the 25 upgrade. P&Z is allowed to say: Okay, well,</p>
<p style="text-align: right;">Page 134</p> <p>1 MR. ADAMS: It goes to that 2 (indiscernible) exterior -- 3 MS. TUCKER: It goes to roads. 4 It goes to bridges that (indiscernible). 5 MR. ADAMS: So if then Planning & 6 Zoning Commission requires a sidewalk, 7 anything to bring it into conformity as part 8 of the project, if that's required as part of 9 the project, that's not part of the 10 10 percent, right? 11 MS. TUCKER: That's what I -- 12 what I'm hearing -- 13 MR. STEWART: That's my 14 understanding. 15 MS. TUCKER: That's what I'm 16 hearing you say, that -- that the 10 percent, 17 to use your term bridge. So if there's a 18 project that's going to create a new wing of 19 something and it goes for a limited site plan 20 review, and as part of that wing, it goes 21 through review and: Jeez, they can't help 22 but notice that more traffic is going to come 23 in here, and we've got these site triangles, 24 and down at the other end of the -- of the 25 thing we have to have a sidewalk down there</p>	<p style="text-align: right;">Page 136</p> <p>1 now you're coming in here and you're dinking 2 with this project. Now there are all these 3 other things that we're seeing. Oh, my God, 4 you're going to have impact over here and the 5 Code says, no, you only get to do 10 percent, 6 you know, and you don't have to. It's a 7 limit. It's not a -- P&Z doesn't have to go 8 to the full 10 percent, but they can't go 9 over it. What they need to have fixed 10 outside of the project because otherwise -- 11 MR. STEWART: Right. 12 MS. TUCKER: -- if the Code says 13 you're going to apply proportionality and 14 they're going to use these mitigating 15 factors, you can't have another factor like 16 10 percent come in and wipe them out, wipe 17 out the very thing that the P&Z is told to 18 do. You can't be -- they can't be internally 19 inconsistent that way. 20 MR. ADAMS: The way I read this 21 that I think is critical, and in defense of 22 the petitioner, they agreed to put that 23 sidewalk in. So, you know, that was part of 24 the project. And they didn't claim that 25 10 percent, but they could have made that</p>

Page 137

1 claim. They could have said: Well, we would
2 like to put it in, but it goes beyond the
3 10 percent limitation. See, that's the
4 concern I have, is anything -- you know, that
5 10 percent is for addressing existing
6 grandfathered noncompliant --
7 CHAIRMAN GUETSCHOW: Yes.
8 MR. ADAMS: -- issues. I think
9 that's what that's for. So the petitioner is
10 not in a position and did not claim this, but
11 they are not in the position. Planning &
12 Zoning needs to understand that provisions of
13 sidewalks, assuring conformance with those
14 issues so that we aren't backsliding, but
15 maintaining and moving towards conformity as
16 part of that site plan review in their new
17 project. If those are required for that
18 project, that's not part of the 10 percent.
19 Planning & Zoning has authority to demand
20 that.
21 MS. TUCKER: Okay. So let's go
22 back to what you said. The 10 percent
23 limitation is applied -- and you just said it
24 so fast I couldn't do it because I was losing
25 too much of it. Is applied only to --

Page 138

1 MR. ADAMS: To, I guess you could
2 say, noncompliant issues that existed prior
3 to the time of application to the entire LRE.
4 MR. STEWART: Correct, yes.
5 Yeah, that's fair. I mean, they can't --
6 Planning & Zoning can't go and say, and by
7 the way, over there you know where Carrs used
8 to be, we'd really like to have a sidewalk
9 there. I mean, that's in all fairness and
10 that's understandable. However, to add to
11 that, Planning & Zoning is not limited by
12 10 percent. For those items introduced by
13 the new project they're required to achieve
14 conformity with Code.
15 CHAIRMAN GUETSCHOW: Yes.
16 MS. TUCKER: Okay. So P&Z is not
17 limited to --
18 MR. ADAMS: 10 percent
19 limitation.
20 MS. TUCKER: Is not limited by
21 the 10 percent limitation --
22 CHAIRMAN GUETSCHOW: Cost
23 limitation.
24 MS. TUCKER: Cost limitation
25 on --

Page 139

1 MR. ADAMS: Parts of the project
2 that are required to maintain conformance or
3 achieve conformity.
4 MS. TUCKER: On the remodel.
5 MR. ADAMS: On the row model.
6 CHAIRMAN GUETSCHOW: Yes.
7 MS. TUCKER: Remodel of the
8 project. On parts of the remodeled project
9 required to maintain conformity.
10 CHAIRMAN GUETSCHOW: With Code.
11 MS. TUCKER: With Code. Okay.
12 CHAIRMAN GUETSCHOW: Okay.
13 Anything else that we need to say
14 about the Weaver memorandum?
15 MS. TUCKER: I have one question.
16 MR. ADAMS: Yes, there's one
17 thing.
18 CHAIRMAN GUETSCHOW: Was there
19 one more? Now, you had something else?
20 MS. TUCKER: I had -- I have a
21 question, which is it's 10 percent of what?
22 MR. ADAMS: Right, that was the
23 other question. That was the other question
24 is: What is the 10 percent? Does that
25 include the interior remodeling?

Page 140

1 MR. STEWART: In my view in
2 reading the Code it applies to the entire
3 project --
4 CHAIRMAN GUETSCHOW: To the
5 entire project, not just to the exterior.
6 MR. STEWART: Right.
7 CHAIRMAN GUETSCHOW: Which is
8 what Jerry Weaver said. It only applies to
9 the exterior.
10 MR. ADAMS: Parts of the
11 exterior.
12 CHAIRMAN GUETSCHOW: In terms of
13 calculating it.
14 MR. ADAMS: The 10 percent,
15 right?
16 CHAIRMAN GUETSCHOW: Yeah.
17 MS. TUCKER: Okay. So the
18 10 percent calculation that is to be --
19 CHAIRMAN GUETSCHOW: Based upon.
20 MS. TUCKER: Based upon.
21 CHAIRMAN GUETSCHOW: The cost.
22 MS. TUCKER: The cost of the
23 remodeled project?
24 CHAIRMAN GUETSCHOW: Of the
25 entire remodeled project, comma, including

Page 141

1 interior work.

2 MS. TUCKER: Okay.

3 CHAIRMAN GUETSCHOW: Anything

4 else we need to do? I think that's it

5 regarding that one. Okay. Now we come to

6 the seven sentences of 130A, and maybe we

7 need to streamline that and leave out the

8 first sentence and simply say: By way of

9 guidance and regarding the application of

10 130, BOA offers the following interpretation.

11 MS. TUCKER: Did you want to pick

12 up with backsliding, because that's -- you've

13 talked about that a couple of times now in

14 the discussion of other things.

15 CHAIRMAN GUETSCHOW: Yes.

16 MS. TUCKER: And that seems to be

17 the next biggest one.

18 CHAIRMAN GUETSCHOW: Okay. And

19 when we looked at -- where was this?

20 Where did you address the

21 backsliding?

22 MS. TUCKER: The backsliding,

23 well, under sentence 4 is where -- you know,

24 it had to do with the interior. So I think

25 that you already covered the interior, so

Page 142

1 that was the question about it, is where are

2 you going to put it? So I think rather than

3 putting it under any particular sentence,

4 maybe you could just talk about it, and we

5 could then figure out where to --

6 CHAIRMAN GUETSCHOW: Maybe we

7 just have it as a standalone.

8 MS. TUCKER: Yeah.

9 CHAIRMAN GUETSCHOW: Let me see

10 here. You had addressed this, Julia, in

11 issue No. 2 for a grandfathered LRE. "The

12 two sections require the limited site plan

13 amendment to comply fully with standards for

14 a new LRE."

15 MS. TUCKER: Right. So this is

16 how I interpreted the briefing on this -- on

17 the field. So under what -- my

18 interpretation of issue No. 2 sort of had

19 two -- two prongs. One was -- I mean, you

20 know, if we're grandfathered, LRE site plan

21 do AMC 21.55.130 and AMC 21.50.320 require

22 the project proposed in the LRE site plan

23 amendment to fully comply with the standards

24 for a new retail --

25 CHAIRMAN GUETSCHOW: Yeah.

Page 143

1 MS. TUCKER: -- large retail

2 establishment. That seemed to conflate two

3 different principles. One was for a

4 grandfathered plan, does the Municipal Code

5 require the proposed site plan amendment to

6 be in strict compliance with 21.50.320? And

7 so you might want to talk about that right

8 now.

9 We've talked about mitigation

10 factors, so it seems to me on the face of

11 the -- of 21.55.130 that strict compliance

12 isn't required, because it tells Planning &

13 Zoning that they're to apply it proportional

14 and it gives them mitigation factors to do

15 it. So that sort of is that one.

16 But the second prong of that was

17 their grandfathered LRE site plan. The site

18 plan review (indiscernible) allow the

19 subsequent site plan amendments to remove or

20 diminish existing compliant elements. That

21 gets to what you were talking about what --

22 you know, that's the backsliding, that issue.

23 CHAIRMAN GUETSCHOW: So we need

24 to -- how do we introduce this? How about

25 simply referring to your issue No. 2, and

Page 144

1 rather than make a question out of it --

2 MS. TUCKER: Yeah. Well, it's

3 the -- it's appellant's issue.

4 CHAIRMAN GUETSCHOW: Yeah.

5 MR. ADAMS: You could work it in

6 under 21.55.130 if we wanted to get into

7 sentence 7, No. 4, item No. 4 in mitigation.

8 Whether the closed design site members

9 (indiscernible). And what we could do is

10 have some sort of verifying language that

11 this does not allow back -- you know, moving

12 further from compliance per that reference,

13 and just work that into No. 7 and make that

14 as a modifier to that No. 4.

15 CHAIRMAN GUETSCHOW: Yeah, we

16 could do that. Oh, you know what, an item

17 that we haven't addressed at all is the

18 pending federal litigation. That needs to be

19 addressed in some fashion.

20 But let's get to the backsliding

21 here. Where do we put this?

22 MR. ADAMS: It could also be a

23 simple statement right at the front that all

24 elements of the project need to --

25 CHAIRMAN GUETSCHOW: Need to move

Page 145

1 further towards compliance.
2 MR. ADAMS: -- must -- well, they
3 must comply. I mean, all elements of the new
4 project must comply.
5 CHAIRMAN GUETSCHOW: Must comply
6 with Code.
7 MR. ADAMS: With Code. Inasmuch
8 as this is true, items not in compliance must
9 either maintain compliance or move towards
10 compliance or maintain existing conditions or
11 move towards compliance.
12 CHAIRMAN GUETSCHOW: Towards
13 compliance. Yeah. Okay. Scrivener.
14 MS. TUCKER: Okay. I wanted to
15 look up the --
16 CHAIRMAN GUETSCHOW: I think that
17 addresses it very nicely and very simply. We
18 just need to reconstruct it, as we both said.
19 I'm getting rummy.
20 MR. ADAMS: He's good at this.
21 CHAIRMAN GUETSCHOW: Oh, yeah, he
22 really is. Well --
23 THE CLERK: Mr. Chair.
24 CHAIRMAN GUETSCHOW: Yes.
25 THE CLERK: I got part of it for

Page 146

1 you. I missed the middle, but if you would
2 like the --
3 CHAIRMAN GUETSCHOW: Would you,
4 please?
5 THE CLERK: I have: All elements
6 of the new project must comply with Code.
7 Inasmuch as this is true, items that -- and I
8 missed the middle -- must move towards
9 compliance.
10 MR. ADAMS: Must maintain
11 existing condition or move towards
12 compliance. They may not move out of
13 compliance -- further from compliance.
14 CHAIRMAN GUETSCHOW: But is it
15 true that proposed modifications must be
16 totally in compliance with Code, or do they
17 merely --
18 MR. ADAMS: Well, they have to be
19 found to be in compliance. I mean --
20 CHAIRMAN GUETSCHOW: Or do they
21 simply move the project further in the
22 direction of compliance?
23 MR. ADAMS: The new project,
24 components of -- my understanding is the new
25 components of the project must meet Code.

Page 147

1 MS. TUCKER: So -- so --
2 MR. ADAMS: The new part.
3 MS. TUCKER: So let's see -- so
4 in looking at that, I'm not sure --
5 MR. ADAMS: Of the Code at that
6 time, the old Code.
7 CHAIRMAN GUETSCHOW: Yeah, yeah,
8 yeah.
9 MS. TUCKER: So I'm thinking that
10 if we -- if you look at 21.55.130G and at the
11 same time -- it's not really G, but the last
12 sentence of -- the final sentence of 130, and
13 you look at that at the same time as you look
14 at the Code at 320 that it says: "In
15 determining the degree to which the standards
16 set out in 21.50.320 shall apply to the
17 expansion project, to the proposed remodel,
18 the Commission shall also consider."
19 And it has these different what I
20 call mitigations, because new Code applies --
21 we know under 21.55.130 that new Code applies
22 proportional to the -- proportional to the
23 project, you know, to the remodel. So -- so
24 that says, okay, they don't have to bring up
25 the whole other project. We got the

Page 148

1 10 percent to do that. But then it says:
2 "In determining the degree to which those
3 standard set out shall apply," and that's
4 which P&Z is supposed to consider these
5 things, which the record doesn't say that
6 they considered. So they say that a strict
7 compliance would result in peculiar or
8 exceptional practicable difficulties or work
9 undue hardship.
10 So that's one factor. "If it
11 satisfies the intent of the section, well or
12 better." So that's another factor.
13 "When the relaxation of the
14 requirement would impose any significantly
15 greater impact on surrounding properties.
16 Whether the proposed design and site plan
17 brings it into greater compliance."
18 Okay. And then it says "to
19 grandfather existing large establishments and
20 to set standards for the renovation." So, to
21 me, P&Z could go through the new -- a new
22 application and say: Okay, this is how we're
23 going to apply 320 to the new application, by
24 using these factors.
25 CHAIRMAN GUETSCHOW: Right.

Page 149

1 MS. TUCKER: We don't have that
2 they did that, so I can't -- I'm just
3 thinking that that's what this says that
4 you're supposed to do. Then the question is
5 -- and it's so well articulated in the record
6 by Mr. Stallone. He sent a letter.

7 The question is: Does that mean,
8 which P&Z apparently thought it did, that
9 somebody could come in with a project that
10 undoes the compliance of the whole
11 grandfathered LRE and send it back to
12 where -- to backslide it so that there's less
13 overall compliance with the -- with the --
14 with its plan. Then when it was approved at
15 the -- at the -- when it was deemed approved
16 in 2001.

17 And so those are two separate
18 issues. One is: Does it have to comply
19 strictly with Code? Not all comply strictly
20 with Code because they have all these
21 mitigation factors. But can the tail wag the
22 dog? Can somebody come in with a site plan
23 and completely undo the conformity and all
24 the other things that that project -- that
25 the larger project had going for it and

Page 150

1 then -- so that -- and why can't they do
2 that?

3 They can't do that because
4 21.50.200 says that Planning & Zoning in all
5 reviews -- this is what the Appellant said,
6 that the general Code for a site plan review
7 still -- that the authority reviewing the
8 site plan "shall approve the site plan only
9 if it finds that the site plan meets the
10 criteria for approval established under the
11 title."

12 Well, if all of a sudden the
13 grandfathered LRE through this proposed LRE
14 amendment, this project, all of a sudden
15 doesn't meet the criteria under which it was
16 approved. It was approved as it stood,
17 deemed approved under that criteria, but if
18 all of a sudden you're backsliding, then the
19 appellants are saying: How can you, P&Z,
20 make that determination? So that's what the
21 Board needs to decide, if P&Z can make the
22 determination and have the tail wag the dog
23 or not.

24 MR. ADAMS: Yeah. I think, you
25 know, these five caveats, or whatever you

Page 151

1 want to call them, I mean, that's -- for
2 example, you're trying to do some
3 articulation of the rule. But you get in
4 there and you find, well, but the structure
5 won't support it. Well, but what we can do
6 is we'll (indiscernible) achieve this.

7 That's the sort of thing we don't strictly
8 perhaps meet the criteria, but you get the
9 intent of the criteria, so that's fine.

10 So that's the strict
11 interpretation and when you have those kind
12 of provisions, proportionality, you know,
13 well, we can do that. That's going to cost a
14 million dollars on an \$800,000 project. That
15 doesn't make sense for proportionality. But
16 proportionality also works the other way, at
17 the imposition on the public also, you know,
18 of course a safety hazard. Not that this is
19 necessarily, but if it creates vision
20 problems or devastates landscape or whatever
21 it is, it moves it out of compliance. Well,
22 that's not acceptable. So that's where, you
23 know, proportionality comes into play that
24 way, too.

25 CHAIRMAN GUETSCHOW: Okay. We

Page 152

1 need to move forward here. I'm looking at
2 the time.

3 We need to address the
4 backsliding issue the way that you had worded
5 it.

6 MR. ADAMS: So I think that the
7 language that Barbara had, I think we can
8 accept that. I think we do, though, need to
9 ensure that that does not suggest strict
10 compliance that the five conditions or
11 whatever are --

12 CHAIRMAN GUETSCHOW: Okay. So
13 let's see if Barbara can read that back to
14 us.

15 THE CLERK: The language I had
16 was: All elements of the new project must
17 comply with Code. Inasmuch as this is
18 true -- I'm not exactly sure I got that
19 right -- and then it went on. Items that
20 must maintain must move towards compliance.
21 So I'm not sure that that's very helpful
22 after what Julia has said. I'm sorry.

23 MR. STEWART: Maybe what we need
24 to do is to -- as part of the -- as a way to
25 ameliorate strict compliance, these five

Page 153

1 sections or subsections are, in fact, things
2 that give flexibility to P&Z, but we want to
3 make sure that that flexibility doesn't go
4 towards nonconformity.
5 MR. ADAMS: I think you could say
6 something to the effect of while the intent
7 of 21.55.130 buys some flexibility in
8 Planning & Zoning decisions, this is not
9 latitude to move away from --
10 CHAIRMAN GUETSCHOW: Away from
11 conformance.
12 MS. TUCKER: Okay.
13 MR. STEWART: It still needs
14 to --
15 CHAIRMAN GUETSCHOW: I think
16 that's a better way of putting it.
17 MS. TUCKER: So intent of
18 21.55.130 is to provide -- as appellee's,
19 I've talked about a flexible framework --
20 CHAIRMAN GUETSCHOW: Of review,
21 yes.
22 MS. TUCKER: Flexible framework
23 for review.
24 CHAIRMAN GUETSCHOW: For review
25 and not strict compliance --

Page 154

1 MS. TUCKER: Well, you just saved
2 me again. Compliance, but what was the next
3 part that Dwayne said?
4 THE CLERK: But it is not
5 provided to move away from compliance.
6 MS. TUCKER: But it -- but the
7 flexible framework --
8 MR. ADAMS: Does not provide
9 latitude --
10 CHAIRMAN GUETSCHOW: Does not
11 provide latitude to move --
12 MS. TUCKER: Does not provide
13 latitude to move the grandfathered --
14 CHAIRMAN GUETSCHOW: The
15 grandfathered LRE.
16 MS. TUCKER: LRE.
17 CHAIRMAN GUETSCHOW: Further from
18 compliance.
19 MS. TUCKER: Further from
20 compliance.
21 CHAIRMAN GUETSCHOW: Compliance
22 with Code.
23 MS. TUCKER: As of -- as it --
24 further from compliance as -- as of May 8th,
25 2001, right?

Page 155

1 CHAIRMAN GUETSCHOW: Okay.
2 MS. TUCKER: Because that's when
3 it was deemed --
4 CHAIRMAN GUETSCHOW: Correct.
5 That's when it was deemed to comply.
6 MS. TUCKER: Okay. So I have,
7 again: The intent of 21.55.130 is to provide
8 a flexible framework for P&Z review, but the
9 flexible -- but the flexible framework does
10 not provide latitude to move the
11 grandfathered LRE further from compliance as
12 of May 8th, 2001.
13 CHAIRMAN GUETSCHOW: Okay. And
14 you are specifically talking about the last
15 sentence of 55.130, right? You're not
16 talking about the entire -- you're not
17 talking about the entire section. You're
18 simply talking about the last sentence and
19 the considerations contained in it.
20 MR. ADAMS: As far as I'm
21 concerned, that could either be in this
22 preamble that we've talked about or the
23 standalone verb could be a modifier to No. 5,
24 which I think (indiscernible).
25 MS. TUCKER: The modifier to No.

Page 156

1 5?
2 MR. ADAMS: On 21.55.130.
3 Grandfather is retail and substantial
4 renovations for the rendering is first --
5 MS. TUCKER: Oh, the last
6 sentence.
7 CHAIRMAN GUETSCHOW: Yeah, the
8 last sentence.
9 MS. TUCKER: Okay. The five
10 criteria.
11 MR. ADAMS: Yeah. Sorry I'm not
12 very (indiscernible).
13 MS. TUCKER: Okay.
14 CHAIRMAN GUETSCHOW: So, go back.
15 MS. TUCKER: The intent of --
16 CHAIRMAN GUETSCHOW: Of the last
17 sentence of 55.130 and the five criteria
18 contained in that sentence -- or that are
19 part of the sentence.
20 MS. TUCKER: That the five
21 criteria.
22 CHAIRMAN GUETSCHOW: And the five
23 criteria, okay.
24 MS. TUCKER: And the five
25 criteria.

<p style="text-align: right;">Page 157</p> <p>1 MR. ADAMS: I wouldn't call those 2 criteria. 3 MS. TUCKER: And the five -- 4 MR. STEWART: They're five 5 considerations. 6 CHAIRMAN GUETSCHOW: Five 7 considerations, okay. 8 MS. TUCKER: Okay. The intent of 9 the last sentence of 21.55.130 and the five 10 criteria -- they're enumerated, right? 11 CHAIRMAN GUETSCHOW: Yeah, five 12 enumerated criteria. 13 MS. TUCKER: Is to provide a 14 flexible framework for Planning & Zoning 15 review, comma, but the flexible framework 16 does not provide latitude to move the 17 grandfathered LRE further from compliance as 18 of May 8th, 2001. 19 CHAIRMAN GUETSCHOW: Yeah, I 20 think we got it. 21 Next. What do we still have? I 22 had one that concerned me. Oh, I know what 23 that was. So going back to your notes here 24 on the blackboard -- 25 MS. TUCKER: Yes.</p>	<p style="text-align: right;">Page 159</p> <p>1 was proportionality, right? I mean, that's 2 where it got into that discussion. I don't 3 think we -- 4 MR. STEWART: Well, I think there 5 were two different things. One was the 6 treating it as a power center and not part of 7 the mall. That was part of the -- well, 8 there's two things there. One was based on 9 advice and one was something that they picked 10 up and converted. 11 MS. TUCKER: I'm just going to 12 circle this for right now. We certainly 13 tackled this 2009 memo. 14 CHAIRMAN GUETSCHOW: Yes. Okay. 15 Then move to the next one. 16 MS. TUCKER: Okay. That the 17 detail -- so we had the grandfathered LRE is 18 deemed approved and not nonconforming. The 19 limited -- you know, you said we -- we might 20 not have to be so specific on that. 21 CHAIRMAN GUETSCHOW: Yeah, I 22 don't think we need to dress it up. 23 MS. TUCKER: So I'll just kind of 24 put a check there. The limited site plan 25 approval by P&Z is required. Okay. I think</p>
<p style="text-align: right;">Page 158</p> <p>1 CHAIRMAN GUETSCHOW: -- Julia, we 2 have covered No. 1 on the left side. 3 MS. TUCKER: Received the faulty 4 direction. 5 CHAIRMAN GUETSCHOW: Yeah, we 6 addressed that. 7 MS. TUCKER: Okay. I don't know 8 that we've gotten -- can we get that part 9 about -- 10 CHAIRMAN GUETSCHOW: Yes. 11 MS. TUCKER: -- the transcript 12 about the power center and all that? Jeez, I 13 missed that. 14 CHAIRMAN GUETSCHOW: No, I don't 15 think you missed that. I think -- I think 16 we've addressed that. 17 MS. TUCKER: We did? 18 CHAIRMAN GUETSCHOW: Haven't we? 19 MR. STEWART: We talked about 20 that, yes. 21 MS. TUCKER: You sure did talk 22 about it. I don't have any kind of a finding 23 or anything on that, but that's okay. We can 24 try and pick that up later, right? 25 MR. ADAMS: Well, the discussion</p>	<p style="text-align: right;">Page 160</p> <p>1 you talked about that because in the sense 2 that in -- while you're doing the remand is 3 that that's P&Z. You know, that's a special 4 thing that they stuck in for P&Z to do, you 5 know, to do all those factors, not staff or 6 not -- 7 You know, it's a limited site 8 plan review by P&Z to find those. Same 9 application process for limited site plan 10 review as for new standards. Includes public 11 hearing. No limited site plan review 12 application for interior work only. You 13 definitely got that one, right? 14 CHAIRMAN GUETSCHOW: Yeah. 15 MS. TUCKER: Exterior work can 16 affect interior work and vice versa. 17 CHAIRMAN GUETSCHOW: I thought we 18 covered that. 19 MS. TUCKER: Nothing creates a 20 taboo. I'm not sure exactly what happened 21 totally about the interior work, but I'll 22 just -- 23 CHAIRMAN GUETSCHOW: No, we need 24 to take a look at that. 25 MS. TUCKER: Okay. For interior</p>

Page 161

1 spaces, if there is an application to --
2 okay. So I think that this thing about the
3 exterior work and affecting that is put into
4 the backsliding.
5 CHAIRMAN GUETSCHOW: Yeah.
6 MS. TUCKER: I think instead of
7 sticking it here, you addressed it, because
8 you've said that if the project -- but,
9 anyway, if interior change affects the
10 interior compliance required --
11 CHAIRMAN GUETSCHOW: Have we --
12 okay. I can't read it.
13 MS. TUCKER: Okay. So this is if
14 interior change affects interior, you know,
15 these were all the reasons why that balance
16 of -- it's not a taboo, and if interior
17 change affects interior compliance
18 requirements, then --
19 CHAIRMAN GUETSCHOW: We've
20 covered that in the memo.
21 MS. TUCKER: Yeah, I think so.
22 Okay. But if no affect to key provisions, no
23 carte blanche. If the interior moves the LRE
24 out of conformance, a P&Z review is
25 triggered. So those are some other issues

Page 162

1 that you were, you know, kind of talking
2 about if the --
3 CHAIRMAN GUETSCHOW: If we need
4 to give guidance on it, yes.
5 MS. TUCKER: Well, I mean, I
6 guess my question is on this: If an
7 interior -- if an interior solution moves the
8 whole LRE out of compliance, but you don't
9 have an interior-only solution here. I think
10 you just want to make sure that there's no --
11 if the -- where I'm understanding you saying
12 this, if the project -- if the site plan
13 moves the whole project potentially out of
14 conformance, there's no carte blanche against
15 P&Z looking for interior solutions.
16 Is that what you're saying?
17 CHAIRMAN GUETSCHOW: Yeah.
18 Correct.
19 MS. TUCKER: Okay. So maybe we
20 need to pick that one up better.
21 CHAIRMAN GUETSCHOW: Yeah.
22 MS. TUCKER: Now you've covered
23 the -- the --
24 CHAIRMAN GUETSCHOW: The
25 backsliding.

Page 163

1 MS. TUCKER: -- the backsliding.
2 I think that these were just different ways
3 to try and get at the no carte blanche, but
4 I'd say let's go there.
5 CHAIRMAN GUETSCHOW: Okay. So
6 that's an issue that we need to address.
7 MS. TUCKER: Yeah. So that's
8 the -- the appellants talked about the
9 interior -- you know, appellants talk about
10 the interior, you know, interior solutions.
11 The P&Z probably would have been able to talk
12 about interior solutions.
13 CHAIRMAN GUETSCHOW: Had they not
14 been --
15 MS. TUCKER: And they would have
16 made some decision pro or con about interior
17 solutions had they not been told that --
18 instructed by staff that the interpretation
19 offered outside of Municipal rulemaking was
20 that they couldn't ever think about the
21 interior.
22 CHAIRMAN GUETSCHOW: Yeah.
23 MS. TUCKER: And so --
24 MR. ADAMS: Now, I think there's
25 a -- you know, within the record, there's a

Page 164

1 whole other thing going on where we have a
2 petitioner who's been instructed, and that's
3 an understanding, everything interior is --
4 CHAIRMAN GUETSCHOW: Is off.
5 It's off limits.
6 MR. ADAMS: It's off. So we have
7 an appellant who's trying to resolve some
8 solution, but there's no onus on the appellee
9 to resolve that, because Planning & Zoning
10 can't tell them what to do. So part of the
11 relationship in the law of planning projects
12 doesn't happen in Planning & Zoning.
13 The best projects happen before
14 Planning & Zoning. Planning & Zoning
15 actually -- the best projects are de facto
16 approvals because all the parties have come
17 to some resolution. That's what gets removed
18 by that memo that is very troubling. It's
19 that relationship is wiped out.
20 You know, that -- I don't know
21 that what we're doing is going to resolve
22 that because, you know, will the appellee be
23 in -- find this as a reason to open that door
24 again? Will the appellant push that? I
25 don't know. That's their business. But, you

Page 165

1 know, that's where I think, you know, to do
2 good work to the degree we can influence
3 that, I think is good. So I don't know if
4 our language can do that.
5 CHAIRMAN GUETSCHOW: But didn't
6 we address that already? I'm getting
7 confused at this point as to what we have
8 already addressed and what we haven't.
9 MS. TUCKER: Okay. So let's go
10 through what we have in this section, not the
11 other three that we did before about getting
12 here. I have No. 1: The exemption for
13 interior work is not applied where an
14 application for site plan review is under
15 consideration. It exempts interior-only
16 projects and the effects are limited -- but
17 if the effects are limited to the interior.
18 And so that's -- okay. So I'll read the rest
19 of them but, I mean, I think that -- I think
20 you need to do another thing on the carte
21 blanche because I don't see it in that one.
22 Okay.
23 Two, the 10 percent cost for
24 compliance applies to the whole grandfathered
25 LRE site plans and it is -- site plan. It is

Page 166

1 determined -- okay. The 10 percent cost for
2 compliance applies to the whole grandfathered
3 LRE site plan --
4 CHAIRMAN GUETSCHOW: Yeah.
5 MS. TUCKER: -- when it is
6 determined that limited site plan review and
7 approval by P&Z is required. Once, once.
8 CHAIRMAN GUETSCHOW: Once it is.
9 MS. TUCKER: Okay. Once it is
10 determined limited site plan review is
11 required. The 10 percent limitation is
12 applied only to the noncompliant issues prior
13 to the time in existence -- prior to the time
14 of a limited site plant application. P&Z is
15 not limited by the 10 percent cost limitation
16 on parts of the remodel, renovation project
17 required to maintain conformity with Code.
18 MR. ADAMS: So that's the one
19 piece that's missing.
20 MS. TUCKER: The 10 percent
21 calculation is to be based upon the cost of
22 the entire remodel project, including
23 interior work.
24 CHAIRMAN GUETSCHOW: Okay.
25 MS. TUCKER: And then the intent

Page 167

1 of the last sentence, of 21.55.130 and the
2 five enumerated considerations, is to provide
3 a flexible framework for P&Z review, but the
4 flexible framework does not provide latitude
5 to move the grandfathered LRE further from
6 compliance as of May 8th, 2001.
7 CHAIRMAN GUETSCHOW: Okay.
8 MS. TUCKER: So I think you can
9 go back up and look at -- now that you've
10 gotten that far, to the exemption for
11 interior work does not apply where an
12 application for limited site plan review is
13 under consideration.
14 CHAIRMAN GUETSCHOW: Okay.
15 MS. TUCKER: It applies -- it
16 provides an exemption for interior-only
17 projects if the effects are limited to the
18 interior. Okay. So then, I think, you have
19 this other side of it, which is that it also
20 doesn't -- the exemption for -- the exemption
21 for interior work in the -- in the fourth
22 sentence --
23 CHAIRMAN GUETSCHOW: Of
24 21.55.130.
25 MS. TUCKER: Of 21.55.130 is --

Page 168

1 does not --
2 CHAIRMAN GUETSCHOW: Extend to --
3 MS. TUCKER: Well, does not serve
4 as a prohibition.
5 CHAIRMAN GUETSCHOW: Oh, yeah.
6 Does not serve as a prohibition.
7 MS. TUCKER: Prohibition for P&Z
8 to consider interior solutions --
9 MR. ADAMS: Where --
10 MS. TUCKER: Where? It's
11 interior solutions in -- when P&Z is
12 reviewing a remodel project compliance with
13 AMC 21.50.320 and 21.55.130.
14 CHAIRMAN GUETSCHOW: Okay.
15 MS. TUCKER: Is that what you
16 wanted?
17 CHAIRMAN GUETSCHOW: Yeah.
18 That's good. Okay.
19 What else do we need to cover at
20 this point?
21 MS. TUCKER: Well, there -- we
22 had the issue that appellant brought up is --
23 the four issues for the aggrieved, which
24 was -- is Planning & Zoning Commission
25 resolution 2016-029 invalid because the

<p style="text-align: right;">Page 169</p> <p>1 planned modifications are the subject of a 2 federal dispute? That's the thing that you 3 want to talk about. 4 CHAIRMAN GUETSCHOW: Yeah, that's 5 simply -- yeah, we simply say, as to that, 6 the Planning & Zoning Commission is not to 7 consider dependency -- or take into 8 consideration in reviewing this case the 9 pendency of an action in federal district 10 court over there. 11 MS. TUCKER: Well, one of the 12 things that the Board did the last time when 13 this came -- was sort of an issue -- I mean, 14 the federal court case, the Planning & 15 Zoning -- I mean, the Board of Adjustment 16 didn't know about the federal court case and 17 this case in 2015, but the subject of the 18 pending federal case, which was a dispute 19 over declarations and covenants -- 20 CHAIRMAN GUETSCHOW: And CCRs, 21 yes. 22 MS. TUCKER: -- so it seems to me 23 that you can conclude that the -- again, 24 because this is a new appeal, that 25 adjudication of disputes over property</p>	<p style="text-align: right;">Page 171</p> <p>1 CHAIRMAN GUETSCHOW: And others, 2 okay. 3 MS. TUCKER: Regarding the 4 pendency of litigation between the applicant 5 and others and do you want to say in federal 6 court? 7 CHAIRMAN GUETSCHOW: In federal 8 court. 9 MR. STEWART: State court would 10 be the same, wouldn't it? 11 CHAIRMAN GUETSCHOW: Yeah, but it 12 is pending in federal court. 13 MS. TUCKER: Well, if it's in 14 state court -- 15 CHAIRMAN GUETSCHOW: Yeah, but 16 it's in federal court. The assertion that 17 site plan amendments violate CCRs do not 18 empower P&Z or BOA to adjudicate the dispute 19 over CCRs. 20 MS. TUCKER: Okay. The 21 assertion of -- 22 CHAIRMAN GUETSCHOW: The 23 assertion that site plan amendments violate 24 CCRs do not empower Planning & Zoning 25 Commission or the Board of Adjustment to</p>
<p style="text-align: right;">Page 170</p> <p>1 declarations and covenants are 2 nonjurisdictional to Title 21 land use boards 3 and commissions. 4 CHAIRMAN GUETSCHOW: Yes. 5 MS. TUCKER: I mean, without a 6 court order, the merits of the dispute could 7 be relevant in evidence if it inhibited Code 8 compliance. If you actually had a Code and 9 an order, but here allegations about the 10 existence of a dispute outside the 11 jurisdiction of municipal land use boards and 12 commissions are too remote for consideration. 13 CHAIRMAN GUETSCHOW: Are they too 14 remote, or are they simply not applicable? I 15 don't think it's a matter of remote 16 necessary. I'm just telling you. I would -- 17 look, that was issue No. 4 that you're 18 handling. 19 MS. TUCKER: Right. 20 CHAIRMAN GUETSCHOW: I think we 21 simply need to say regarding the pendency of 22 litigation between the applicant and -- is it 23 the -- what's the relationship? 24 MS. TUCKER: I don't know, so it 25 would be -- so the applicant and others.</p>	<p style="text-align: right;">Page 172</p> <p>1 adjudicate such dispute, period. Then we 2 need to add a sentence that -- P&Z's 3 authority extends only to whether or not the 4 proposed site plan amendment complies with 5 Code or not. 6 MS. TUCKER: P&Z's authority 7 extends only to whether a site plan -- 8 CHAIRMAN GUETSCHOW: To a 9 determination whether the site plan -- 10 whether the proposed site plan amendments 11 comply with Code or not. 12 Does that make sense? 13 MR. ADAMS: Yes. 14 MR. STEWART: Yes. Basically 15 you're saying that it's nonjurisdictional. 16 CHAIRMAN GUETSCHOW: Yeah. 17 MS. TUCKER: Yeah. Yeah. I 18 mean, I would like to have that 19 (indiscernible). 20 CHAIRMAN GUETSCHOW: You would 21 like that -- you like that word. 22 MS. TUCKER: Well, I like the 23 word nonjurisdictional because I don't think 24 anybody was -- I don't think even the 25 appellants in their most urgent of pleas to</p>

Page 173	Page 175
<p>1 the Court were asking P&Z to adjudicate 2 those. They're -- the appellant's briefing 3 was, jeez, this was going on. We told you 4 this was going on. How come you didn't do 5 anything acknowledging this was going on? 6 And so I think that they're 7 stating that the pendency of litigation 8 between the applicant and others in federal 9 court -- 10 MR. ADAMS: Could you say it's 11 nonjurisdictional? 12 MS. TUCKER: Did not -- 13 CHAIRMAN GUETSCHOW: It does not 14 give P&Z or the Board of Adjustment 15 jurisdiction. 16 MS. TUCKER: Yeah. 17 CHAIRMAN GUETSCHOW: To 18 adjudicate. Then we also need to continue 19 that the decision by P&Z should not be 20 influenced by the pendency. No? We're 21 getting rummy. 22 MS. TUCKER: Well, that -- I 23 think the widest consent is that the -- is 24 that it spread the issue. And the issue was 25 that somehow the P&Z resolution was invalid</p>	<p>1 the thing. So you can say that -- another 2 way to do it is to say that you were 3 remanding it for other issues, and then just 4 reiterate that the disputes over the CCRs are 5 nonjurisdictional to P&Z and land use boards. 6 CHAIRMAN GUETSCHOW: Yeah. 7 MS. TUCKER: They don't really 8 have to go farther than that. You're 9 saying -- 10 CHAIRMAN GUETSCHOW: So what does 11 that mean to the people on P&Z? So I would 12 like to be more direct and say: You're not 13 to consider the same allegation. 14 MR. ADAMS: Just say that. 15 CHAIRMAN GUETSCHOW: Yeah. 16 MR. ADAMS: Say it's 17 nonjurisdictional of the Board and shall not 18 be considered by P&Z. 19 CHAIRMAN GUETSCHOW: Yeah. 20 MS. TUCKER: And shall not be 21 considered -- 22 CHAIRMAN GUETSCHOW: And 23 something considered. 24 MR. ADAMS: Yeah. 25 CHAIRMAN GUETSCHOW: Yeah, I</p>
Page 174	Page 176
<p>1 because the plan modifications are the 2 subject of a dispute, and I think you want to 3 say no, that the -- that the pendency of the 4 plan modifications doesn't affect the P&Z 5 jurisdiction. You know, I don't think it has 6 to be too complicated. 7 CHAIRMAN GUETSCHOW: No, I agree. 8 So you want to simplify this? 9 MS. TUCKER: Yeah. 10 CHAIRMAN GUETSCHOW: Okay. Try 11 again, looking at what you had there as No. 12 8. 13 MS. TUCKER: Okay. And then -- 14 CHAIRMAN GUETSCHOW: I think 15 we're all in agreement we're just simply 16 searching for proper verbiage. 17 MR. STEWART: And basically so it 18 doesn't get misinterpreted at the lower 19 level. 20 CHAIRMAN GUETSCHOW: Yeah. 21 MR. ADAMS: Keep it simple, I'd 22 say. 23 MS. TUCKER: Well, you're sending 24 the -- you've already -- you've already -- 25 you're already remanding for other issues in</p>	<p>1 think that's fine. Okay. 2 Now, have we covered everything 3 that we wanted to cover? 4 MS. TUCKER: I think you covered 5 the things you put on the board. I'm just 6 checking to see if you covered every issue 7 that the appellants raised. So -- 8 CHAIRMAN GUETSCHOW: Well, let's 9 take a look. 10 MS. TUCKER: So I think that 11 that's the -- 12 CHAIRMAN GUETSCHOW: We have 13 covered issue No. 1 for sure. 14 MS. TUCKER: Okay. 15 CHAIRMAN GUETSCHOW: We have 16 covered issue No. 2. 17 How about issue No. 3? 18 MS. TUCKER: Well, the issue with 19 No. 3 was sort of the number -- was a 20 different way of you stating issue No. 2. So 21 I think that you -- the subissues that I 22 thought related to that were: What's meant 23 by backsliding? Is there a monetary limit on 24 new construction compliance? Does P&Z 25 address standards imposed? You've already</p>

Page 177	Page 179
<p>1 said that that has to go back for that. 2 So -- 3 CHAIRMAN GUETSCHOW: Right. 4 MS. TUCKER: And so then 4 is 5 invalid because of the site plan modification 6 that should be prepared. 7 CHAIRMAN GUETSCHOW: Yeah. 8 MS. TUCKER: So I think -- 9 CHAIRMAN GUETSCHOW: I think 10 we've got it covered. 11 MS. TUCKER: I need a night for 12 me to take a crack at it. 13 CHAIRMAN GUETSCHOW: Good luck. 14 MS. TUCKER: Not tonight. 15 CHAIRMAN GUETSCHOW: No. But you 16 have time to work on this tomorrow? 17 MS. TUCKER: Yes. This is all 18 I'm working on. This is all I'm trying to 19 work on. 20 CHAIRMAN GUETSCHOW: So then 21 coming back to the time, just to reiterate 22 what we usually do. You draft the proposed 23 decision and you and I both know, and we all 24 know that there are other sentences that need 25 to be worked in, the boilerplate stuff. What</p>	<p>1 actually haven't had any coffee this week. 2 CHAIRMAN GUETSCHOW: Wow. Okay. 3 MS. TUCKER: Barbara had 4 something she wants to say. 5 CHAIRMAN GUETSCHOW: Yes, ma'am. 6 THE CLERK: Mr. Chair, I would 7 like to make a special request that you 8 please give Julia dispensation tomorrow from 9 12:00 to 1:00 to attend her going-away party. 10 CHAIRMAN GUETSCHOW: Does it 11 involve alcohol? 12 THE CLERK: It's a Municipal 13 building. It does not. 14 CHAIRMAN GUETSCHOW: Oh, good. 15 THE CLERK: It's from 12:00 to 16 1:00. We're having a Hawaiian theme 17 going-away party. 18 CHAIRMAN GUETSCHOW: Okay. 19 THE CLERK: So of course you're 20 all welcome to stop by. 21 CHAIRMAN GUETSCHOW: Well, thank 22 you. But, you know, I had not said that she 23 is to work between 12:00 and 1:00 anyway. 24 So the only thing I would like to 25 see is a draft of this by tomorrow afternoon,</p>
Page 178	Page 180
<p>1 I like to call the boilerplate stuff that 2 needs to be added. 3 Then you usually send it over to 4 me, and I take a quick look at it. And then 5 you and I discuss any additions or deletions 6 or modifications. Then it goes to the Board. 7 So that's how we usually do this. So the 8 question is: Can you do this so that we 9 meet -- so that I can have a draft by 10 tomorrow evening, late afternoon? 11 MS. TUCKER: Yeah. I think 12 that -- 13 CHAIRMAN GUETSCHOW: What's your 14 situation? 15 MS. TUCKER: I think that I need 16 to lock my door and just work on this -- 17 CHAIRMAN GUETSCHOW: Yes. 18 MS. TUCKER: -- tomorrow and 19 ignore anything else that comes up. I think 20 that -- and I can ask others to try and lay 21 off copying me on incidental things that come 22 leaping into my -- 23 CHAIRMAN GUETSCHOW: Yes. And 24 don't drink too much coffee tomorrow. 25 MS. TUCKER: Tonight. No, I</p>	<p>1 late afternoon, because my thinking is 2 there's no reason for us to get back together 3 tomorrow. 4 You're going to be working on 5 this, and then I take a quick look at it. We 6 make some changes, and then on Friday we get 7 together and hash this out once more. That 8 gives you a little bit more time, too. You 9 can even drink coffee on Friday morning. 10 MS. TUCKER: Yeah. 11 CHAIRMAN GUETSCHOW: Does that 12 make sense? I'm trying to accommodate your 13 schedule is what I'm saying. 14 MS. TUCKER: Right. Yeah, I 15 think that that makes sense. I think that -- 16 yeah, I guess so. My only worry is we meet 17 at 4 o'clock and we have a session like 18 this -- 19 CHAIRMAN GUETSCHOW: On Friday. 20 MS. TUCKER: -- and there's just 21 too much for me to get done on it because -- 22 you know, that's my only worry about it, but 23 I don't know how far along I'm going to be -- 24 it takes a certain amount of time to put this 25 stuff in there, and then it does actually</p>

Page 181

1 take time to rearrange all the boilerplate
2 and put it in there and read it. There's --
3 it's a --
4 CHAIRMAN GUETSCHOW: Okay. So
5 would you prefer for us to meet tomorrow at
6 5:30?
7 MS. TUCKER: Well, I'm thinking
8 that there's no point in canceling the
9 meeting at 5:30 until about 4 o'clock
10 tomorrow. Is that terrible?
11 MR. ADAMS: Well, you know my
12 office is right around the corner, so I don't
13 care.
14 MS. TUCKER: Yeah, you're close
15 and people made accommodation for that. Then
16 by 4 o'clock -- and maybe before, but by no
17 later than 4:00, you're going to know how
18 close we are to that.
19 CHAIRMAN GUETSCHOW: But what
20 you're saying is --
21 MS. TUCKER: I think it's
22 unrealistic to be --
23 CHAIRMAN GUETSCHOW: So what you
24 are really saying is that if we have a
25 discussion on the draft that you are going to

Page 182

1 be preparing, it could take some time and you
2 may need Friday morning to redo the draft.
3 MS. TUCKER: That's what I'm
4 worried about, but I don't know if I'm going
5 to get everything done by 4 o'clock anyway.
6 So let's go with your plan at 4:00 and
7 just -- on Friday and just work to that.
8 Because, I mean, it's already -- it's going
9 to be --
10 CHAIRMAN GUETSCHOW: But that's
11 not -- that doesn't accommodate if we
12 suddenly get together on Friday and we've got
13 all kinds of changes. That's not going to
14 work. Do you see what I'm saying? Because
15 Friday is the drop-dead date. So we do need
16 to move -- we do need to meet tomorrow. So
17 let's simply meet tomorrow at 5:30 on your
18 draft and just leave it at that.
19 MS. TUCKER: Whatever I've got --
20 CHAIRMAN GUETSCHOW: Yes.
21 MS. TUCKER: -- by 5:30.
22 CHAIRMAN GUETSCHOW: Yep.
23 MS. TUCKER: Okay.
24 CHAIRMAN GUETSCHOW: Does that
25 make sense?

Page 183

1 MR. STEWART: That will at least
2 cut down what we might have to redo on
3 Friday.
4 CHAIRMAN GUETSCHOW: Exactly. So
5 does that make sense?
6 MR. ADAMS: Yes.
7 CHAIRMAN GUETSCHOW: All right.
8 Barbara, did you hear what we
9 finally passed out?
10 THE CLERK: Yes. Mr. Chair, that
11 is fine with me. The Notice doesn't need to
12 be changed. I would be happy to be here and
13 let anyone from the public know that we are
14 not meeting.
15 I would like to ask, and I just
16 don't know the answer to this, I've gotten
17 your last three motions -- or three comments,
18 your three -- guidance is what I think you
19 called it.
20 CHAIRMAN GUETSCHOW: Yeah.
21 THE CLERK: You need a motion for
22 that before we --
23 MS. TUCKER: That's a good point.
24 CHAIRMAN GUETSCHOW: My thinking
25 was -- my thinking was that we put in

Page 184

1 terms -- that we say substantively, whether
2 by motion or not, that the Board of
3 Adjustment exercises its authority -- its
4 rulemaking authority under whatever the
5 section is to -- sections of Code.
6 THE CLERK: Yeah. Or you could
7 just have a motion that says that the Board
8 would like the decision to incorporate the
9 findings 1 through 7. You had like seven of
10 them, but the findings that the Board has
11 discussed here in the decision. I guess --
12 MS. TUCKER: (Indiscernible.)
13 CHAIRMAN GUETSCHOW: Why don't
14 you do that.
15 THE CLERK: The Board moves to
16 have the decision incorporate -- and I
17 changed that to the guidance the board has
18 discussed here.
19 CHAIRMAN GUETSCHOW: Yes. Yes.
20 All right. So be it.
21 MR. STEWART: Second.
22 CHAIRMAN GUETSCHOW: Mr. Stewart
23 seconded that, and I don't think we need any
24 further discussion because I think it's
25 obvious that that's what we want to do.

Page 185

1 THE CLERK: Mr. Guetschow.
2 CHAIRMAN GUETSCHOW: Yes.
3 THE CLERK: Mr. Stewart.
4 MR. STEWART: Yes.
5 THE CLERK: Mr. Adams.
6 MR. ADAMS: Yes.
7 CHAIRMAN GUETSCHOW: All right.
8 So have we covered all bases for
9 tonight? If not, since we're going to be
10 here at 5:30 tomorrow, whatever has been
11 glaringly overlooked will be covered
12 tomorrow. We are not like P&Z and simply
13 rubber stamp something that somebody else has
14 written. So with that, having --
15 MS. TUCKER: I have one more
16 thing, too.
17 CHAIRMAN GUETSCHOW: Yes.
18 MS. TUCKER: Barbara, when you
19 said that you didn't have to do a meeting
20 change, what about on Friday?
21 CHAIRMAN GUETSCHOW: Friday, 4
22 o'clock.
23 THE CLERK: I've already done
24 that.
25 MS. TUCKER: Okay. So that

Page 186

1 wasn't the one that you were mentioning that
2 you don't have to do now?
3 CHAIRMAN GUETSCHOW: No, no.
4 THE CLERK: No. The meeting is
5 noticed at 5:30 tomorrow, and it will be
6 noticed for 4 o'clock on Friday.
7 MS. TUCKER: Okay. Okay. Thank
8 you.
9 THE CLERK: Thank you.
10 CHAIRMAN GUETSCHOW: All right.
11 It is then the decision of the chair that we
12 will continue this until 5:30 tomorrow and,
13 if need be, also to 4 o'clock on Friday.
14 Having said that, thank you very much for all
15 your time. While we are still on the record,
16 I want to thank the parties to this for doing
17 an excellent job of briefing and bearing with
18 us during this seemingly endless discussion
19 tonight that hopefully will lead to a
20 decision that everybody can understand and
21 can live with. Having said that, we are
22 adjourned.
23
24
25

	28:4,5,6,13;29:22;33:2; 9,13,18;37:12,21;39:1; 40:7;41:11;42:4,5,22; 44:12,19;45:4,5;46:11; 47:15;48:8,21,24;49:6; 10;50:7,13;51:2,5; 52:11,17;53:3,6;55:1,2, 24;56:1,13,14,17,20; 57:4;58:5,15;59:1,3,7; 60:13,16;61:3,10; 62:19,21;63:1;65:6,7, 22,23;68:22;69:23; 70:1,16;71:10;74:7,8; 81:13,21;84:24,25; 85:19;91:2,3,20,21; 92:6,13,14;98:2,9,14; 100:8;101:11,15,22; 102:3;104:6,11;109:8, 17;110:5,14;111:13, 15;113:18;119:7,12,15, 18;120:6;121:19,23; 122:5,11,18;123:7; 124:19;125:8;126:10, 25;127:4,12,19;128:2, 6,11,16,19,22;129:1,8, 10,18;130:2,20;131:15, 21,25;132:19,23;133:6, 14;134:1,5;136:20; 137:8;138:1,18;139:1, 5,16,22;140:10,14; 144:5,22;145:2,7,20; 146:10,18,23;147:2,5; 150:24;152:6;153:5; 154:8;155:20;156:2, 11;157:1;158:25; 163:24;164:6;166:18; 168:9;172:13;173:10; 174:21;175:14,16,24; 181:11;183:6;185:5,6	31:5,18;33:20;104:6; 122:9;123:16,17; 142:10;144:17,19; 158:6,16;161:7;165:8 addresses (4) 39:3;119:23;120:3; 145:17 addressing (3) 100:9;105:24;137:5 adds (1) 37:15 adequate (1) 45:11 adequately (2) 45:10;70:13 adhere (2) 37:14;108:7 adhering (1) 37:23 adjourned (1) 186:22 adjudicate (4) 171:18;172:1;173:1, 18 adjudication (1) 169:25 ADJUSTMENT (40) 1:6,20;2:3;13:10; 42:6;44:13;49:11; 53:25;56:23;57:20; 58:16;59:19;60:22; 62:11;66:5;72:23; 76:17;78:23;80:11; 82:15;83:7;85:24; 86:20,24;87:9;88:14, 19,20;89:7;90:13,17; 93:10;114:8,22;116:4; 118:16;169:15;171:25; 173:14;184:3 administrative (3) 13:3;71:20,22 adopted (8) 16:15;20:10,20;22:8; 110:4;119:4;121:17; 124:1 advance (1) 24:11 advertised (1) 45:10 advice (7) 28:1;113:8,14,15; 118:11,12;159:9 affect (11) 96:24,25;97:18;98:7; 126:6,8,11,14;160:16; 161:22;174:4 affected (1) 8:14 affecting (3) 97:7;98:10;161:3 affects (5) 100:6;127:10;161:9, 14,17	affirm (1) 66:7 affirmative (1) 57:11 afield (1) 125:20 afternoon (3) 178:10;179:25;180:1 afterwards (1) 46:23 again (14) 34:11;60:19;69:8; 70:15;71:23;72:23; 101:14;102:18;131:24; 154:2;155:7;164:24; 169:23;174:11 against (5) 24:10;27:12,13;97:6; 162:14 agenda (5) 2:18,22;3:4;22:4,23 aggrieved (13) 6:12;7:5;19:20; 47:23;49:13;50:23; 51:13,14,20;53:11; 71:17;72:21;168:23 ago (1) 71:14 agree (8) 26:12;29:5,6;64:5; 70:12;71:10;91:21; 174:7 agreed (1) 136:22 agreement (2) 85:4;174:15 ahead (3) 49:9;73:24;76:20 Alaska (6) 13:1,8;82:6,11,21; 83:15 alcohol (1) 179:11 allegation (1) 175:13 allegations (1) 170:9 alligators (1) 58:3 allow (2) 143:18;144:11 allowed (2) 95:18;135:25 along (4) 17:8,10;41:6;180:23 alternative (3) 72:11;73:1;77:5 altogether (2) 107:10;108:6 always (2) 14:13;74:9 ambiguous (1) 5:13	AMC (17) 15:24;35:9;42:13; 43:1,2;59:1,3,8;60:4, 11,12;62:16,16;85:25; 142:21,21;168:13 ameliorate (1) 152:25 amended (4) 19:22;20:1;54:24; 55:1 amendment (10) 49:24;51:3;54:25; 96:4;112:23;142:13, 23;143:5;150:14;172:4 amendments (5) 112:22;143:19; 171:17,23;172:10 Among (1) 81:13 amount (2) 34:9;180:24 ANCHORAGE (7) 1:6;2:3;12:10,17,18; 13:7;20:8 and/or (1) 76:20 apparently (7) 17:12;23:14;39:17; 40:23;121:4;125:2; 149:8 APPEAL (33) 1:7;3:4,23,24;4:8,10, 14;6:15,19,21,24;8:22; 10:9,18;48:3,16,16; 49:16;50:25;51:1,24; 52:2;53:14;63:18; 71:19,20,22,23;72:22; 74:12,25;93:8;169:24 appealed (3) 4:4;28:10,11 appeals (1) 114:22 appearance (2) 11:7;12:21 appears (3) 40:25;45:15;46:1 appellant (7) 6:24;7:10;33:24; 150:5;164:7,24;168:22 appellants (5) 150:19;163:8,9; 172:25;176:7 appellant's (2) 144:3;173:2 appellee (2) 164:8,22 appellee's (1) 153:18 applicable (3) 13:16;16:7;170:14 applicant (9) 6:25;39:11;72:4; 73:24;116:6;170:22,
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25;171:4;173:8 application (26) 12:12;96:3,15; 102:16,20;121:24; 124:19,20;126:24; 128:7;129:4,18;130:4; 132:11;133:18,19; 138:3;141:9;148:22; 23;160:9,12;161:1; 165:14;166:14;167:12 Applications (2) 95:23;96:1 applied (14) 11:14;13:14;34:12; 107:18;120:4;121:5; 124:15;129:22,24; 132:9;137:23,25; 165:13;166:12 applies (11) 119:9;129:2;130:16; 131:11;140:2,8; 147:20,21;165:24; 166:2;167:15 apply (24) 35:10;37:14;67:19; 69:14;93:19;99:5; 102:11;105:9;106:2,5, 12;108:10;124:15; 128:5,5;133:3,25; 135:16;136:13;143:13; 147:16;148:3,23; 167:11 applying (4) 12:4;16:7;105:18; 121:2 appreciate (1) 30:20 approach (1) 77:14 appropriate (2) 15:10;73:17 appropriately (1) 71:4 approval (15) 8:16;16:8;21:19; 49:7;95:19,21,24;96:2; 130:18;131:13,17,18; 150:10;159:25;166:7 approvals (1) 164:16 approve (6) 19:22;20:1;27:10; 46:2;70:7;150:8 approved (23) 14:23;15:14;17:9,10; 18:4;20:8,13;21:2,22, 22;23:13;56:16;63:8; 94:25;95:4,11;131:2; 149:14,15;150:16,16, 17;159:18 approves (1) 7:9 approving (3)	25:14;99:4;102:10 April (2) 2:5;72:19 architectural (2) 40:3;120:9 area (1) 3:16 areas (2) 119:22;120:2 argument (5) 5:11,14;39:15;123:8; 135:13 around (4) 23:19;98:6;127:7; 181:12 arrived (2) 19:21,23 arrows (1) 107:5 art (1) 26:20 articulate (7) 6:13;47:25;49:14; 50:24;51:23;52:1; 53:12 articulated (1) 149:5 articulation (1) 151:3 aside (2) 17:20;133:23 aspect (4) 10:13;34:22;46:18; 56:4 aspects (3) 29:23;33:20;129:3 Assembly (2) 30:11;97:15 assertion (3) 171:16,21,23 assist (1) 116:21 assistance (1) 114:1 assuring (1) 137:13 attached (1) 39:23 attack (2) 10:17,19 attempts (1) 71:2 attend (1) 179:9 attention (1) 37:17 attorneys (1) 64:23 Attorney's (1) 9:24 August (5) 16:16;20:11,21;22:5, 18	authority (8) 114:13;116:14; 137:19;150:7;172:3,6; 184:3,4 available (1) 68:20 avenue (1) 123:22 avoid (1) 54:12 await (1) 54:5 aware (1) 37:2 away (7) 34:8,18;70:8,14; 153:9,10;154:5 B back (39) 3:25;4:6;8:25;10:2; 14:25;28:15;36:5;50:2; 59:14;64:17;66:9,17; 67:12,17;68:7,13;70:6; 71:5,21;72:13,24;85:5, 10,22;93:8;100:3; 113:23;114:5;120:17; 137:22;144:11;149:11; 152:13;156:14;157:23; 167:9;177:1,21;180:2 backed (1) 79:13 backslide (2) 34:17;149:12 backsliding (18) 33:24,25;34:7;99:23; 104:4,8;137:14; 141:12,21,22;143:22; 144:20;150:18;152:4; 161:4;162:25;163:1; 176:23 balance (2) 19:7;161:15 Barbara (8) 1:24;53:10;90:10; 152:7,13;179:3;183:8; 185:18 base (2) 27:17;28:2 based (20) 7:16;12:1;15:4;16:1; 21:7;25:4;28:9;32:12; 39:12;45:14;63:5; 64:20;67:24;74:3;77:8; 78:2;140:19,20;159:8; 166:21 bases (1) 185:8 basic (1) 32:25 basically (9) 5:10,21;14:7;35:5;	72:17;91:12;108:2; 172:14;174:17 basis (21) 8:22;9:2;10:20;16:5; 23:7;26:16;32:16,22; 55:16;63:18;69:10,11, 16;78:24;80:12;81:19, 23;82:16;83:8;94:12; 113:20 bearing (1) 186:17 become (1) 37:25 bed (1) 54:10 beforehand (3) 11:10;24:16;25:13 begged (1) 63:15 beginning (4) 35:1;50:5;53:24; 109:2 begs (1) 14:21 behold (2) 16:20;17:1 behoove (1) 71:8 belief (1) 58:5 below (3) 80:1;86:4;120:10 benefits (1) 7:1 Bernd (6) 1:21;2:6,11;46:7; 65:18;124:23 best (3) 6:3;164:13,15 better (9) 15:2;58:12;65:10; 70:9,21;76:25;148:12; 153:16;162:20 bewildered (1) 92:22 bewilderment (1) 93:15 beyond (6) 28:21;30:4;97:2,2; 122:22;137:2 bias (1) 12:5 bifurcated (1) 55:23 big (1) 135:20 biggest (1) 141:17 bit (7) 11:22;23:10;28:21; 63:2,9;110:20;180:8 blackboard (2) 93:25;157:24	blah (3) 57:22,22,23 blanche (5) 100:13;161:23; 162:14;163:3;165:21 blending (1) 120:12 block (1) 97:12 BOA (3) 3:4;141:10;171:18 BOARD (68) 1:6,20;2:3;5:17;13:9, 14;16:23;24:20;42:5; 44:12;49:10;53:24; 56:22;57:19,20;58:16; 59:19;60:22;62:10; 66:5;67:18;72:22; 76:17;77:9;78:5,23; 80:6,11;82:15;83:7; 85:24;86:7,20,24;87:5, 8;88:13,19,20;89:7,8; 90:13,16;93:9;100:1; 114:8,17,21,22,22; 116:3;118:16;121:20, 20;124:25;150:21; 169:12,15;171:25; 173:14;175:17;176:5; 178:6;184:2,7,10,15,17 boards (6) 12:15;15:22;79:13; 170:2,11;175:5 Board's (6) 105:23;121:21; 124:5,10,24;125:16 Bob (2) 14:20;56:21 body (4) 7:15;24:7,8;46:13 boilerplate (3) 177:25;178:1;181:1 both (10) 11:7;12:21;53:9; 55:8;88:10;102:15; 105:17;107:25;145:18; 177:23 bothers (1) 110:20 bottom (4) 5:24;6:9,20;52:6 brainstorming (3) 94:7;99:22;102:2 break (5) 85:3;93:3,6,11,12 bridge (3) 14:6;132:6;134:17 bridges (1) 134:4 briefing (4) 118:3;142:16;173:2; 186:17 bring (7) 30:11;40:4;120:25;
--	--	---	---	---

121:19;129:22;134:7; 147:24 bringing (2) 39:11,25 brings (2) 18:13;148:17 broad (3) 33:3,10;34:12 broader (1) 29:9 brought (5) 18:1,31;16:63;15; 107:15;168:22 brush (3) 33:3,10;34:12 bucks (1) 75:5 build (11) 6:14,22;8:20;29:18; 48:2,15,16;50:25; 51:23;52:1;53:13 building (6) 19:7;30:4;40:17; 49:15;128:3;179:13 built (1) 63:17 bunch (1) 108:24 burden (1) 72:3 business (8) 3:3,3;22:2,10,13; 24:13,17;164:25 buys (1) 153:7	67:14,19,23;69:2; 72:22;75:20;76:10,15, 23,24;77:3,25;79:25; 81:12;87:6;88:10; 96:24,25;100:13; 101:25;105:19;110:14; 113:1;117:21;121:3; 123:23;125:17,17; 127:20;133:5;149:21, 22;150:19,21;151:5, 13;152:7,13;158:8,23; 160:15;165:2,4;167:8; 169:23;175:1;178:8,9, 20;180:9;186:20,21 canceling (1) 181:8 capable (2) 67:10;68:2 capital (2) 58:25;116:2 capture (1) 128:17 care (2) 48:19;181:13 carried (1) 28:10 carries (1) 25:25 Carrs (1) 138:7 cart (2) 23:20;26:10 carte (5) 100:13;161:23; 162:14;163:3;165:20 Case (68) 3:6,24;4:4,16,5;6; 7:7,21,22,25;8:2,14; 9:20;10:3;12:23,25; 13:3,8,8,17;15:17; 24:3;28:15;32:5;54:8; 58:12;63:21;73:7,10, 23;74:20,20;79:15,18; 81:8;82:7,11,13,21; 83:15;85:4;86:2,16,23, 23;88:13,16,21;89:9; 90:16,17;92:20;93:1,8; 95:21;96:23;118:18, 19;119:3;121:5,6; 122:21,21;129:13; 169:8,14,16,17,18 cases (3) 3:20;6:12;74:13 caused (1) 19:24 caveats (1) 150:25 CCRs (5) 169:20;171:17,19, 24;175:4 center (8) 110:23;111:1;112:6, 8,10;129:20;158:12;	159:6 certain (2) 14:4;180:24 certainly (5) 23:24;24:15;53:6; 70:10;159:12 cetera (2) 89:8,8 Chair (21) 1:21;2:6;25:25; 29:16;30:10;43:23; 53:18,23;54:19;56:9; 58:15;61:16;63:1; 64:17;83:1;90:21; 117:6;145:23;179:6; 183:10;186:11 CHAIRMAN (442) 2:1,12,16;3:13,21; 9:15;13:25;15:19; 21:13,15,24;22:14,18, 21;23:2,13;24:6,18,23; 25:3;26:5,9,13,24;28:5, 12;29:20;30:8,16,19; 32:7;33:7,14;34:21; 37:19;38:12,18,20; 39:4;40:8;41:12;42:14, 18;43:3,12,18,22;44:2, 6,8,17,21,24;45:2,17; 46:8,24;47:5,13;48:20, 23;49:1,5,9,17,22;50:2, 11,15,20;51:4,7,19,25; 52:5,10,13;53:1,5,8,21; 54:1,23;55:5,9,18,21; 56:2,10,15;57:3;58:4,9, 24;59:2,4,10,16;60:2,5, 10,19,21;61:7,13,17, 22;62:3,9,18,22;63:22; 64:9,12,15;65:3,8,15, 19,24;68:25;69:25; 70:11;71:7,11;73:19; 75:12,16;76:5,8;77:15; 78:4,8,11,18,21;79:3,7; 80:4,8,18,22;81:3,10, 16,23;82:3,8,25;83:3,5, 18,22;84:2,5,9,19,21; 85:1,20;86:11;87:2,11, 16,20,22;88:1,7,11,15, 23;89:5,14,18,22,25; 90:4,9,22,25;91:3,23; 92:2,7,10,15;93:7;94:8, 17;95:13;96:12;98:8, 13,19,25;99:16,19; 100:2,5,22;101:1,4,20, 23;102:4,9,19,22,24; 103:3,16,19,25;104:18, 25;105:3,13,19;106:6, 15,23,25;107:7,19; 108:4,15,18,25;109:14, 25;110:7,10,16;111:6, 18;112:8;113:3,7,11, 13,22;114:20,24;115:3, 10,14,18,24;116:2,13, 16,23;117:13,25;	118:14,23;119:10,13, 17,21;120:7,22;121:8, 14,25;122:7,12;123:6, 10,15;125:6,19; 126:16;127:2,6,9,16; 128:23;129:9,15,25; 130:9,23;131:5,8,22; 132:8,12;133:1,4,24; 137:7;138:15,22; 139:6,10,12,18;140:4, 7,12,16,19,21,24; 141:3,15,18;142:6,9, 25;143:23;144:4,15, 25;145:5,12,16,21,24; 146:3,14,20;147:7; 148:25;151:25;152:12; 153:10,15,20,24; 154:10,14,17,21;155:1, 4,13;156:7,14,16,22; 157:6,11,19;158:1,5, 10,14,18;159:14,21; 160:14,17,23;161:5,11, 19;162:3,17,21,24; 163:5,13,22;164:4; 165:5;166:4,8,24; 167:7,14,23;168:2,5, 14,17;169:4,20;170:4, 13,20;171:1,7,11,15, 22;172:8,16,20;173:13, 17;174:7,10,14,20; 175:6,10,15,19,22,25; 176:8,12,15;177:3,7,9, 13,15,20;178:13,17,23; 179:2,5,10,14,18,21; 180:11,19;181:4,19,23; 182:10,20,22,24;183:4, 7,20,24;184:13,19,22; 185:2,7,17,21;186:3,10 Chair's (1) 64:14 challenged (1) 73:18 chance (1) 71:4 Change (6) 98:22;100:6;161:9, 14,17;185:20 changed (2) 183:12;184:17 changes (4) 2:21;35:8;180:6; 182:13 chapter (1) 95:15 Charter (1) 12:17 check (1) 159:24 checked (1) 36:6 checking (1) 176:6 chips (1)	74:2 circle (1) 159:12 circulation (1) 100:15 circumstances (2) 6:8;74:11 City (5) 9:23;13:6,9;79:16; 82:13 claim (3) 136:24;137:1,10 clamp (1) 123:11 clarification (1) 69:24 clarify (1) 55:13 clarity (3) 43:25;118:6,8 clause (2) 42:21,22 clear (7) 44:22,23;54:14,15; 70:23;84:6;117:21 clearly (3) 40:13;68:21;98:3 Clerk (75) 1:24;2:7,9,11,13,15, 17;30:9,10,18;42:20; 43:6,23;44:3,7,23; 46:9;48:10;53:18,22; 54:18,19;55:4;56:6,8, 11,13;59:13,18,19; 60:3,7,11,15,20;61:15, 18,24;62:5,10;65:14, 17,18,20,22;83:1,4; 84:19,20,22,24;90:20; 92:8,9,11,13;145:23, 25;146:5;152:15; 154:4;179:6,12,15,19; 183:10,21;184:6,15; 185:1,3,5,23;186:4,9 clerk's (1) 54:5 clients (1) 74:10 close (3) 46:14;181:14,18 closed (2) 46:21;144:8 closer (1) 39:12 code (82) 5:9,11,13;11:5;12:3, 10,19;25:18;30:22; 32:8,19,24;36:1,5; 41:22;45:10;65:1; 67:19,25;68:19,20,21; 69:13,15,21;76:21; 79:12,13;82:4,9,21; 83:14;89:16,23;90:1,7, 19,91;13:98;7,15,17,
---	---	---	--	---

C

calculating (1)
140:13
calculation (2)
140:18;166:21
call (11)
2:8;23:6;47:25;48:1;
53:9;56:6;103:25;
147:20;151:1;157:1;
178:1
called (7)
23:12,15;29:4;97:20;
106:18;118:24;183:19
calling (1)
21:19
calls (1)
33:24
came (9)
4:14,23;5:7,9;10:1,1;
112:12;133:19;169:13
can (72)
5:12;7:10;10:13,18;
14:17;15:9;18:14;
25:17,24;36:19;38:11;
50:10;54:12,16;56:20;
59:14;64:22;66:6,9,13;

18;110:6;112:20; 113:21;114:13,14,18; 117:16;119:20;124:6; 125:16;132:2;135:21; 136:5,12;138:14; 139:10,11;140:2; 143:4;145:6,7;146:6, 16,25;147:5,6,14,20, 21;149:19,20;150:6; 152:17;154:22;166:17; 170:7,8;172:5,11; 184:5 codified (1) 119:20 coffee (3) 178:24;179:1;180:9 cohorts (1) 83:6 combined (1) 47:15 coming (2) 136:1;177:21 comma (9) 35:12,13,13;83:9; 88:13,19,20;140:25; 157:15 comment (2) 47:12;130:8 comments (3) 12:6;63:25;183:17 COMMISSION (77) 1:7;3:5;4:3,6;7:8,16, 21;8:5,11,18;9:1,6,22; 15:25;16:8;18:24; 19:25;20:9,11,21;21:2; 27:7;32:11;33:4;35:4, 10;36:22;38:4;39:8,21; 41:1,16;42:8,24;44:14; 47:9;49:12;52:21; 58:20;59:22;60:25; 62:13;63:7,64;19;66:2, 8,10,18,24;67:19; 70:18;71:16;77:23; 85:13;88:21;90:18; 91:9,11,17;92:19; 93:14;97:6,22,25;99:5; 102:11;106:14;112:14; 114:7;126:5,7;132:1; 134:6;147:18;168:24; 169:6;171:25 Commissioner (2) 111:13;125:12 commissions (5) 12:15,20;14:10; 170:3,12 Commission's (5) 78:25;82:17;83:10; 97:3,16 commonly (1) 3:7 Community (1) 3:18 comparison (1)	12:3 complaints (1) 27:8 complete (1) 93:21 completely (1) 149:23 compliance (69) 35:15;40:2;42:25; 48:4;58:22;59:25;60:8, 11;61:1,12,14;62:16; 89:11,15,19,23;90:1,6, 6,19;100:6;103:4; 130:16;131:11;135:11, 11,21;143:6,11; 144:12;145:1,8,9,10, 11,13;146:9,12,13,13, 16,19,22;148:7,17; 149:10,13;151:21; 152:10,20,25;153:25; 154:2,5,18,20,21,24; 155:11;157:17;161:10, 17;162:8;165:24; 166:2;167:6;168:12; 170:8;176:24 compliant (1) 143:20 complicated (2) 32:2;174:6 complications (1) 7:3 complied (3) 45:15;47:9;63:12 complies (8) 14:5;33:5;41:20,22; 42:3,12;67:7;172:4 comply (15) 10:20;68:4;69:13; 78:13;142:13,23; 145:3,4,5;146:6; 149:18,19;152:17; 155:5;172:11 components (2) 146:24,25 comport (1) 49:18 con (1) 163:16 concept (3) 112:7,9,12 concepts (2) 6:3;69:5 concern (4) 74:1;75:18;111:9; 137:4 concerned (4) 56:3;72:5;155:21; 157:22 concerns (4) 14:3;63:15;71:12; 85:3 concise (1) 125:24	conclude (3) 63:6;77:22;169:23 concluded (7) 5:21;66:1;86:21; 87:9,13;89:8;90:14 concludes (6) 6:18;52:20;78:23; 80:11;82:16;83:8 concluding (3) 37:18,21,25 conclusion (26) 5:7,10,20;19:1;36:2, 2;56:23;58:17;59:20; 60:23;62:11;65:5;66:6; 75:20;76:10;77:21; 78:2,6,12;80:5;81:19; 84:12,14;86:18;87:12; 130:12 conclusions (15) 16:2;32:13;61:1,8; 62:1,14;64:8,21,22,25; 65:1;76:21;77:18;80:3; 86:3 conclusory (1) 37:20 condition (1) 146:11 conditional (1) 131:17 conditions (10) 14:6;17:6,20;97:7; 98:1;119:9;131:17,25; 145:10;152:10 conduct (1) 100:12 conducted (3) 12:8;13:12;44:14 conducting (1) 45:8 confined (1) 129:14 conflate (1) 143:2 conflict (4) 3:22;113:21;121:21; 124:4 conflicts (2) 3:10;125:1 conform (3) 34:2,3,3 conformance (20) 34:9;39:12;60:14,18; 61:4;98:12,16;100:20, 21;119:4;126:11; 129:23;130:3;132:2; 135:7;137:13;139:2; 153:11;161:24;162:14 conformed (2) 34:15,19 conforming (2) 130:14;135:10 conformity (13) 11:24;18:14;33:21;	98:24,24;123:5;134:7; 137:15;138:14;139:3, 9;149:23;166:17 confronted (1) 4:17 confused (1) 165:7 confusion (1) 129:1 connected (1) 36:16 connection (1) 107:13 consent (4) 22:4,22;55:2;173:23 consider (14) 3:23;4:11;72:15; 92:4,25;94:10;106:14; 114:9;124:8;147:18; 148:4;168:8;169:7; 175:13 consideration (11) 9:19;15:17;64:14; 67:17;96:8;107:23; 128:9;165:15;167:13; 169:8;170:12 considerations (10) 31:6,11;69:5;93:19; 103:14;125:21;155:19; 157:5,7;167:2 considered (9) 22:7;85:16;103:11, 21,22;148:6;175:18,21, 23 considering (4) 16:7;17:23;30:25; 71:24 consistent (8) 13:12;88:22,24;89:1, 3,4,6,12 constituted (2) 11:16;68:15 Constitution (1) 12:16 construct (1) 17:9 constructed (1) 73:11 construction (7) 12:2;13:2;18:18; 115:12;116:9,20; 176:24 contact (1) 9:23 contained (2) 155:19;156:18 continue (2) 173:18;186:12 contrary (1) 118:11 controversial (1) 56:4 conundrum (1)	5:19 converted (1) 159:10 copying (1) 178:21 corner (1) 181:12 corrections (1) 109:11 correctly (1) 94:15 cost (21) 35:14,16;39:13;75:4; 103:4,6,9;108:16; 130:1,16;131:10; 135:17;138:22,24; 140:21,22;151:13; 165:23;166:1,15,21 Council (3) 13:9;79:17;82:13 Counsel (6) 30:12;51:8;54:8; 75:19;83:20;117:20 country (1) 36:12 couple (6) 11:14;14:3;61:18,19, 20;141:13 course (8) 4:19;8:10;24:16; 71:3;74:14;83:3; 151:18;179:19 Court (46) 4:5,5,8,12,14,17,20, 23;5:4,7,8,19;6:2,10, 18;7:15;8:25;9:3,18; 10:12;19:17;33:1; 41:20;42:9;44:15;45:6; 47:10,19,20;51:18; 52:20;63:17;71:18; 75:9;169:10,14,16; 170:6;171:6,8,9,12,14, 16;173:1,9 courts (1) 79:14 Court's (4) 10:21;19:17;78:13; 82:9 covenants (2) 169:19;170:1 cover (2) 168:19;176:3 covered (15) 18:10,20;141:25; 158:2;160:18;161:20; 162:22;176:2,4,6,13, 16;177:10;185:8,11 crack (1) 177:12 craft (1) 85:21 crafted (1) 38:2
---	---	---	---	---

create (1) 134:18 creates (3) 97:5;151:19;160:19 creating (1) 44:1 criteria (25) 16:8,9;34:14;48:18; 55:14;103:24;104:1,2; 105:7;106:21;107:21; 119:16;150:10,15,17; 151:8,9;156:10,17,21, 23,25;157:2,10,12 critical (2) 34:20;136:21 cross (1) 84:10 crucial (7) 6:6,6,17;30:22; 32:20;51:8;69:14 current (2) 12:1,25 cut (2) 97:15;183:2	16,19;8:6,12,17;11:25; 13:18;15:25;16:6; 19:17,21;20:1;21:1; 25:4;26:23;27:10; 32:11,17,23;51:18; 64:7,19;66:7,23,24; 67:23;69:18;71:15,25; 72:9,15,20,25;74:3,6; 85:9;86:16,23;87:1; 88:13;89:6;90:1,6,16, 18;93:1,21;94:13; 114:4;163:16;173:19; 177:23;184:8,11,16; 186:11,20 decisions (5) 15:22;58:22;59:23; 62:6;153:8 declarations (2) 169:19;170:1 deemed (12) 29:12;94:25;95:4,11; 135:9,9,11;149:15; 150:17;155:3,5;159:18 defect (1) 20:4 defense (1) 136:21 deficiency (2) 17:16;25:22 deficient (4) 37:5;42:3;63:21; 70:4 definitely (2) 70:12;160:13 definition (3) 45:20;46:12;48:8 definitively (1) 6:1 degree (7) 15:13;98:9;105:8; 106:11;147:15;148:2; 165:2 deletions (2) 2:21;178:5 deliberation (4) 56:25;59:21;62:12; 70:22 deliberations (3) 58:19;60:24;95:6 demand (1) 137:19 Department (20) 9:8,23;21:12;27:25; 28:2;34:23,25;35:6; 36:25;39:23,24;40:24; 69:12;118:22,24,25; 119:25;123:20,25; 124:4 Department's (3) 36:17,18;96:19 dependency (1) 169:7 described (1)	112:12 deserve (1) 71:4 design (3) 18:9;144:8;148:16 designed (1) 84:14 despite (1) 71:2 detail (3) 94:11;103:13;159:17 details (1) 31:3 determination (3) 150:20,22;172:9 determinations (2) 66:13;68:18 determine (3) 10:10;36:16;79:25 determined (5) 130:17;131:12; 166:1,6,10 determining (5) 11:15;105:8;106:10; 147:15;148:2 devastates (1) 151:20 Development (1) 3:18 devise (1) 71:3 difference (1) 17:4 different (16) 20:14;22:11;26:8; 36:13;38:9;47:2;61:19; 69:4;70:19;117:16; 130:15;143:3;147:19; 159:5;163:2;176:20 difficulties (1) 148:8 difficulty (1) 45:20 dig (1) 115:4 diminish (1) 143:20 dinking (1) 136:1 direct (2) 113:24;175:12 directed (1) 28:17 directing (1) 9:22 direction (23) 29:12;36:21;38:9; 41:25;58:7;67:15;70:5, 18;74:24;85:8;93:13; 98:23;101:15;109:10, 12,18;111:16,21;112:3, 20;113:17;146:22; 158:4	directly (3) 3:17;14:11;76:10 director (2) 3:18;39:18 director's (1) 130:13 directs (2) 12:11;37:13 disadvantage (2) 6:25;7:6 disappeared (1) 29:11 disapproved (1) 75:22 discern (2) 17:5;19:21 discover (1) 6:2 discuss (5) 4:7;46:15;70:6; 93:12;178:5 discussed (12) 13:3;24:5;33:21; 34:15,16;37:6;41:18; 72:10;85:6;107:17; 184:11,18 discussing (2) 63:3;68:10 discussion (34) 4:25;11:16;22:12; 23:10,25;24:12;29:10, 14;31:20;34:5,10,11; 37:1,9;39:6;45:1,3,6; 49:3;69:19;77:6;88:5; 91:24;99:25;101:12; 105:23;107:3;116:25; 141:14;158:25;159:2; 181:25;184:24;186:18 discussions (1) 67:14 dispensation (1) 179:8 disposing (1) 32:20 dispute (7) 169:2,18;170:6,10; 171:18;172:1;174:2 disputes (2) 169:25;175:4 disputing (1) 118:4 distilled (1) 30:3 distinction (1) 95:7 district (1) 169:9 divides (1) 19:8 dock (2) 19:3,5 document (11) 14:7;58:21;59:23; 60:17;61:4,10,13;62:2, 4,15;79:14 documents (1) 27:15 dog (2) 149:22;150:22 dollar (2) 39:25;120:4 dollars (1) 151:14 done (16) 5:17;10:4;18:19; 21:9;31:22;66:11,15; 69:13;74:16;92:23; 93:22;95:9;114:4; 180:21;182:5;185:23 door (4) 122:25;123:1; 164:23;178:16 dot (1) 84:11 double (1) 57:11 doubt (1) 15:15 down (21) 43:6;50:10;51:9; 52:16;54:3;69:16;94:2; 95:8;101:25;106:9; 112:13;120:10;123:12, 23;124:18;125:18; 127:21;131:10;134:24, 25;183:2 downtown (1) 110:24 draft (6) 177:22;178:9; 179:25;181:25;182:2, 18 drafted (1) 36:4 drafting (1) 36:10 drafts (1) 22:2 drainage (1) 120:14 dramatic (1) 98:11 drastic (1) 100:14 drawbacks (1) 7:2 drawn (1) 64:8 dress (1) 159:22 drink (2) 178:24;180:9 drop (3) 65:4;95:8;106:9 drop-dead (1) 182:15
D			
damned (1) 73:25 date (2) 95:18;182:15 daughter (1) 3:16 day (6) 20:9,11,21;21:3,4; 54:17 days (1) 54:6 de (1) 164:15 deal (3) 29:8;74:21;122:6 dealing (1) 98:21 dealt (4) 28:25;29:7;30:6; 63:13 Dean (2) 30:12;130:6 December (1) 10:21 decide (5) 4:18;67:3;76:24; 108:20;150:21 decided (2) 4:20;72:3 decides (2) 76:18;85:25 deciding (1) 31:9 decision (69) 4:3,9,12,15,23,24; 5:24;6:19,23;7:6,7,14, 			

dropped (4) 61:25;62:6;65:13; 84:13 druthers (2) 66:21;68:6 due (7) 13:4,11,19;45:24; 68:15;73:17;74:17 during (4) 11:16,18;31:17; 186:18 Dwayne (7) 1:22;2:9;31:15; 44:10;46:9;120:18; 154:3	engineers (1) 30:1 ensure (1) 152:9 entered (1) 15:16 entertain (1) 42:1 entire (21) 9:20,20;10:3;30:23, 25;35:21;56:5;97:18; 122:15;126:6;127:10; 129:6,7;132:21;138:3; 140:2,5,25;155:16,17; 166:22 entirely (3) 20:14;22:23;72:23 entitle (2) 102:17;103:8 entitled (3) 10:6,6;16:19 entrances (2) 18:11,21 enumerated (3) 157:10,12;167:2 envision (1) 113:16 equity (2) 6:4,7 erroneous (1) 38:9 error (1) 68:14 especially (1) 33:22 essence (3) 9:19;28:22;29:9 essential (1) 13:18 essentially (1) 75:22 essentials (1) 13:13 establish (6) 80:21,22;81:4;82:3, 18;83:12 established (1) 150:10 establishment (3) 94:24;95:17;143:2 establishments (4) 40:13;52:23;96:2; 148:19 esteemed (4) 51:7;54:8;75:19; 83:20 et (2) 89:8,8 even (15) 21:3;26:20;36:23; 46:15;59:13;77:17; 84:12;100:19;112:11; 121:2;122:21;123:16,	17;172:24;180:9 evening (6) 2:2;9:14;54:9,11; 63:3;178:10 event (1) 108:8 everybody (3) 8:12;9:13;186:20 evidence (29) 15:3,4;17:23;19:12, 13;22:25;27:11;32:22; 45:14;67:25;69:15; 79:20,23;80:2,13,23; 81:2,5;82:19;83:12; 86:15,20,21;87:14,19, 20,22;90:15;170:7 evidentiary (2) 6:22;15:11 ex (1) 12:19 exactly (6) 72:16;100:9;129:15; 152:18;160:20;183:4 example (4) 18:8;97:10;133:7; 151:2 exceed (2) 35:16;103:6 excellent (1) 186:17 exceptional (1) 148:8 exclude (1) 125:3 excluded (1) 124:21 exclusively (2) 122:13;123:21 Excuse (1) 56:5 exempt (1) 40:14 exemption (7) 124:21;127:25; 165:12;167:10,16,20, 20 exempts (2) 128:9;165:15 exercise (4) 114:12;115:19; 116:4,12 exercised (1) 117:11 exercises (3) 118:3,17;184:3 existed (2) 132:7;138:2 existence (2) 166:13;170:10 existing (12) 40:2,15,16;67:5; 94:24;95:17;129:4; 137:5;143:20;145:10;	146:11;148:19 expand (1) 123:12 expansion (8) 35:12;40:1;95:15; 99:8;102:14;103:6; 106:8;147:17 expedited (1) 72:17 expeditious (1) 73:13 experience (1) 23:7 explain (2) 33:12,15 explanation (1) 54:2 explicit (1) 125:10 Extend (1) 168:2 extends (2) 172:3,7 extent (6) 35:12;99:7;102:13; 106:8;118:10;126:10 exterior (12) 39:14;96:24;100:6; 120:13;123:3;129:16; 134:2;140:5,9,11; 160:15;161:3 eye-opener (1) 52:24 eyes (1) 53:7	106:18;135:15,22; 136:15;143:10,14; 148:24;149:21;160:5 facts (6) 15:17;19:24;25:20; 30:4;67:21;93:20 failure (1) 13:16 fair (12) 11:2;13:13;26:19; 45:22;55:16;68:16; 70:17;78:16,22;79:1; 92:21;138:5 fairly (2) 12:9;35:22 fairness (3) 32:25;63:16;138:9 fall (1) 74:2 familiar (1) 24:20 far (8) 46:1;56:3;70:21; 123:23;125:20;155:20; 167:10;180:23 farther (2) 54:21;175:8 fashion (4) 67:6;125:23;133:5; 144:19 fast (1) 137:24 faulty (7) 111:16,20;112:3; 113:5,7,15;158:3 favor (2) 72:10;92:1 favored (2) 58:10;77:7 favours (2) 5:22,22 feasible (1) 125:22 federal (11) 144:18;169:2,9,14, 16,18;171:5,7,12,16; 173:8 feel (6) 28:16;31:24;58:13; 65:9;73:2;75:8 feels (1) 72:21 feet (1) 28:15 felt (2) 28:19;30:5 few (1) 54:6 field (1) 142:17 fifth (4) 99:2,3;102:5,6 figure (4)
E			F	
earlier (4) 17:22;27:2;63:2; 107:17 easier (1) 77:9 easily (1) 67:23 economic (1) 7:1 effect (7) 95:18;96:11;98:11; 100:14;111:5;122:15; 153:6 effects (6) 128:2,11,13;165:16, 17;167:17 either (11) 3:22;13:5;27:10; 30:7;42:2,2;66:7; 69:16;108:22;145:9; 155:21 element (1) 13:19 elements (8) 18:9,18;69:20; 143:20;144:24;145:3; 146:5;152:16 else (12) 29:18;41:13,16; 102:1;107:11;110:17; 139:13,19;141:4; 168:19;178:19;185:13 embodied (1) 91:12 empower (2) 171:18,24 enable (2) 122:16,17 end (7) 9:14;60:9;72:19,19; 117:19;118:9;134:24 endless (1) 186:18 ends (1) 53:20	entirely (3) 20:14;22:23;72:23 entitle (2) 102:17;103:8 entitled (3) 10:6,6;16:19 entrances (2) 18:11,21 enumerated (3) 157:10,12;167:2 envision (1) 113:16 equity (2) 6:4,7 erroneous (1) 38:9 error (1) 68:14 especially (1) 33:22 essence (3) 9:19;28:22;29:9 essential (1) 13:18 essentially (1) 75:22 essentials (1) 13:13 establish (6) 80:21,22;81:4;82:3, 18;83:12 established (1) 150:10 establishment (3) 94:24;95:17;143:2 establishments (4) 40:13;52:23;96:2; 148:19 esteemed (4) 51:7;54:8;75:19; 83:20 et (2) 89:8,8 even (15) 21:3;26:20;36:23; 46:15;59:13;77:17; 84:12;100:19;112:11; 121:2;122:21;123:16,	17;172:24;180:9 evening (6) 2:2;9:14;54:9,11; 63:3;178:10 event (1) 108:8 everybody (3) 8:12;9:13;186:20 evidence (29) 15:3,4;17:23;19:12, 13;22:25;27:11;32:22; 45:14;67:25;69:15; 79:20,23;80:2,13,23; 81:2,5;82:19;83:12; 86:15,20,21;87:14,19, 20,22;90:15;170:7 evidentiary (2) 6:22;15:11 ex (1) 12:19 exactly (6) 72:16;100:9;129:15; 152:18;160:20;183:4 example (4) 18:8;97:10;133:7; 151:2 exceed (2) 35:16;103:6 excellent (1) 186:17 exceptional (1) 148:8 exclude (1) 125:3 excluded (1) 124:21 exclusively (2) 122:13;123:21 Excuse (1) 56:5 exempt (1) 40:14 exemption (7) 124:21;127:25; 165:12;167:10,16,20, 20 exempts (2) 128:9;165:15 exercise (4) 114:12;115:19; 116:4,12 exercised (1) 117:11 exercises (3) 118:3,17;184:3 existed (2) 132:7;138:2 existence (2) 166:13;170:10 existing (12) 40:2,15,16;67:5; 94:24;95:17;129:4; 137:5;143:20;145:10;	146:11;148:19 expand (1) 123:12 expansion (8) 35:12;40:1;95:15; 99:8;102:14;103:6; 106:8;147:17 expedited (1) 72:17 expeditious (1) 73:13 experience (1) 23:7 explain (2) 33:12,15 explanation (1) 54:2 explicit (1) 125:10 Extend (1) 168:2 extends (2) 172:3,7 extent (6) 35:12;99:7;102:13; 106:8;118:10;126:10 exterior (12) 39:14;96:24;100:6; 120:13;123:3;129:16; 134:2;140:5,9,11; 160:15;161:3 eye-opener (1) 52:24 eyes (1) 53:7	106:18;135:15,22; 136:15;143:10,14; 148:24;149:21;160:5 facts (6) 15:17;19:24;25:20; 30:4;67:21;93:20 failure (1) 13:16 fair (12) 11:2;13:13;26:19; 45:22;55:16;68:16; 70:17;78:16,22;79:1; 92:21;138:5 fairly (2) 12:9;35:22 fairness (3) 32:25;63:16;138:9 fall (1) 74:2 familiar (1) 24:20 far (8) 46:1;56:3;70:21; 123:23;125:20;155:20; 167:10;180:23 farther (2) 54:21;175:8 fashion (4) 67:6;125:23;133:5; 144:19 fast (1) 137:24 faulty (7) 111:16,20;112:3; 113:5,7,15;158:3 favor (2) 72:10;92:1 favored (2) 58:10;77:7 favours (2) 5:22,22 feasible (1) 125:22 federal (11) 144:18;169:2,9,14, 16,18;171:5,7,12,16; 173:8 feel (6) 28:16;31:24;58:13; 65:9;73:2;75:8 feels (1) 72:21 feet (1) 28:15 felt (2) 28:19;30:5 few (1) 54:6 field (1) 142:17 fifth (4) 99:2,3;102:5,6 figure (4)

39:25;71:1;120:4; 142:5 filed (1) 112:22 final (1) 147:12 finally (2) 72:2;183:9 find (23) 3:9;16:13;25:17; 31:2,3,8,14;35:4;37:4; 38:22;42:2,6,10,23; 44:13;52:19;57:6; 58:16,20;124:14; 151:4;160:8;164:23 finding (7) 16:2;18:7,8;19:4; 32:13;33:4;158:22 findings (75) 15:11,12;16:1,4,9, 19;18:6;19:11,15; 23:11,15,16,21;24:25; 25:5;26:2,3;27:9,22; 29:1,4,10;30:4;32:10, 12,15;33:4;42:10,24; 43:21;57:6;58:20; 59:22;60:25;61:8;62:1, 14;63:20;64:5,7,20,25; 76:6,6,20;77:8,17,21; 78:3,24;79:20,21,24, 24;80:12,13,14,24,24; 81:5,6,20,24;82:16,19, 20;83:8,13,13;84:11; 86:3;113:1;117:17; 184:9,10 finds (10) 49:11;53:25;56:23; 57:20;59:19;60:22; 62:11;88:19;121:21; 150:9 fine (4) 82:12;151:9;176:1; 183:11 finger (1) 38:23 first (25) 3:9;5:11;10:15; 24:12;28:11;30:23; 31:5;40:22;41:21;42:7, 17;46:10;73:6;94:22, 23;95:8;108:23; 109:11;113:14,18; 114:11;122:6;128:24; 141:8;156:4 fit (2) 99:1;104:3 fits (1) 6:3 five (22) 103:11,14,16,17,20, 21;104:1;106:15; 150:25;152:10,25; 156:9,17,20,22,24;	157:3,4,6,9,11;167:2 fix (1) 48:13 fixed (1) 136:9 flags (1) 18:3 flat (3) 110:8,11,13 fleshes (1) 70:19 flexibility (3) 153:2,3,7 flexible (10) 153:19,22;154:7; 155:8,9,9;157:14,15; 167:3,4 focus (5) 10:12;12:7;37:17; 38:1;91:18 focused (1) 14:22 focusing (2) 30:1;79:22 foggiest (1) 20:22 follow (3) 13:16;113:23;118:12 following (7) 17:3;22:4;57:21; 85:14;114:9;127:14; 141:10 footprint (1) 40:15 force (8) 77:24;117:10;119:1, 1;121:11,16;124:2; 126:1 forestalled (1) 74:13 forged (1) 73:24 form (1) 8:19 formal (1) 20:4 formalize (1) 94:3 format (2) 52:9;55:15 formulate (2) 37:10;80:9 forth (1) 103:5 forum (3) 46:20;49:25,25 forward (2) 69:2;152:1 found (6) 14:4,18;15:5;74:25; 86:18;146:19 four (1) 168:23	Fourth (2) 96:13;167:21 framework (10) 30:25;153:19,22; 154:7;155:8,9;157:14, 15;167:3,4 frankly (2) 74:7;93:17 freedom (1) 100:11 fresh (1) 71:5 Friday (14) 54:9,10;180:6,9,19; 182:2,7,12,15;183:3; 185:20,21;186:6,13 friendly (1) 51:3 front (4) 2:18;19:8;32:6; 144:23 fulfill (1) 11:12 full (1) 136:8 fully (2) 142:13,23 fundamental (1) 45:7 further (16) 37:9;41:18;55:10,24; 113:24;144:12;145:1; 146:13,21;154:17,19, 24;155:11;157:17; 167:5;184:24	185:11 goal (1) 39:24 God (1) 136:3 goes (16) 36:7;37:17;58:8; 99:2,12,24;120:17; 122:22;134:1,3,4,19, 20;135:24;137:2;178:6 going-away (2) 179:9,17 Good (21) 2:1;12:25;14:16; 15:9;48:13;62:4;65:7; 70:18;71:5;73:9,9; 83:21;90:7;98:21; 145:20;165:2,3; 168:18;177:13;179:14; 183:23 gospel (1) 40:24 grandfather (2) 148:19;156:3 grandfathered (19) 95:11;100:19; 131:11;132:17;137:6; 142:11,20;143:4,17; 149:11;150:13;154:13, 15;155:11;157:17; 159:17;165:24;166:2; 167:5 granted (1) 95:19 great (1) 131:6 greater (3) 111:5;148:15,17 guess (13) 7:10;14:2;37:12; 46:11;76:4;81:8;100:9; 108:19;117:19;138:1; 162:6;180:16;184:11 guesswork (1) 67:9 Guetschow (448) 1:21;2:1,6,11,12,16; 3:13,21;13:25;15:19; 21:15,24;22:14,18,21; 23:2;24:6,18,23;25:3; 26:5,9,13,24;28:5,12; 29:20;30:8,16,19;32:7; 33:7,14;34:21;37:19; 38:12,18,20;39:4;40:8; 41:12;42:14,18;43:3, 12,18,22;44:2,6,8,17, 21,24;45:2,17;46:8,24; 47:5,13;48:20,23;49:1, 5,9,17,22;50:2,11,15, 20;51:4,7,19,25;52:5, 10,13;53:1,5,8,21;54:1, 23;55:5,9,18,21;56:2,9, 10,15;57:3;58:4,9,24;	59:2,4,10,16;60:2,5,10, 19,21;61:7,13,17,22; 62:3,9,18,22;63:22; 64:9,12,15;65:3,8,15, 18,19,24;68:25;69:25; 70:11;71:7,11;73:19; 75:12,16;76:5,8;77:15; 78:4,8,11,18,21;79:3,7; 80:4,8,18,22;81:3,10, 16,23;82:3,8,25;83:3,5, 18,22;84:2,5,9,19,20, 21;85:1,20;86:11;87:2, 11,16,20,22;88:1,7,11, 15,23;89:5,14,18,22, 25;90:4,9,22,25;91:3, 23;92:2,7,9,10,15;93:7; 94:8,17;95:13;96:12; 98:8,13,19,25;99:16, 19;100:2,5,10,22; 101:1,4,20,23;102:4,9, 19,22,24;103:3,16,19, 25;104:18,25;105:3,13, 19;106:6,15,23,25; 107:7,19;108:4,15,18, 25;109:14,25;110:7,10, 16;111:6,18;112:8; 113:3,7,11,13,22; 114:20,24;115:3,10,14, 18,24;116:2,13,16,23; 117:13,25;118:14,23; 119:10,13,17,21;120:7, 22;121:8,14,25;122:7, 12;123:6,10,15;125:6, 19;126:16;127:2,6,9, 16;128:23;129:9,15, 25;130:9,23;131:5,8, 22;132:8,12;133:1,4, 24;137:7;138:15,22; 139:6,10,12,18;140:4, 7,12,16,19,21,24; 141:3,15,18;142:6,9, 25;143:23;144:4,15, 25;145:5,12,16,21,24; 146:3,14,20;147:7; 148:25;151:25;152:12; 153:10,15,20,24; 154:10,14,17,21;155:1, 4,13;156:7,14,16,22; 157:6,11,19;158:1,5, 10,14,18;159:14,21; 160:14,17,23;161:5,11, 19;162:3,17,21,24; 163:5,13,22;164:4; 165:5;166:4,8,24; 167:7,14,23;168:2,5, 14,17;169:4,20;170:4, 13,20;171:1,7,11,15, 22;172:8,16,20;173:13, 17;174:7,10,14,20; 175:6,10,15,19,22,25; 176:8,12,15;177:3,7,9, 13,15,20;178:13,17,23; 179:2,5,10,14,18,21;
G				
gap (1) 135:10 Gates (3) 30:12,15;130:7 gaveled (1) 46:21 general (3) 99:14;135:5;150:6 gentlemen (1) 2:2 germane (1) 109:9 gets (3) 51:9;143:21;164:17 gist (1) 118:13 given (8) 7:17,24;8:12,14; 10:14;48:13,15;69:11 gives (5) 5:4;36:21;87:5; 143:14;180:8 giving (3) 92:18;113:16;114:6 glaringly (1)				

180:11,19;181:4,19,23; 182:10,20,22,24;183:4, 7,20,24;184:13,19,22; 185:1,2,7,17,21;186:3, 10 guidance (22) 71:6,8;76:19,22; 77:11,13;85:13;86:25; 87:5;91:17;92:18,25; 109:15,18;113:20; 114:6,6;119:3;141:9; 162:4;183:18;184:17 guidelines (1) 8:24 guiding (1) 119:2 guys (1) 78:17	15,16,22;7:5;8:1;9:4, 11,12;11:2,13,18;12:8, 14;13:12,22,24;17:3, 14,24;18:2;21:20;25:9; 26:19,21;28:17,18; 29:9;31:17;32:3;39:6; 42:8;44:14;45:8,21,22, 25;46:4,13,14,18,19, 21;47:1,17;49:25;50:1, 5;52:9,21;53:14,17,19; 55:15;56:24;57:22; 58:17;59:20;60:23; 62:12;68:7,14,15,23; 69:1,6;70:25,25;74:23; 78:16,22;80:3;96:8; 107:25;109:4,4; 111:23;112:13;120:20; 124:23;134:12,16; 160:11 hearings (1) 74:13 held (4) 4:21;17:3;68:15; 128:3 help (5) 47:16;81:12;85:23; 106:21;134:21 helpful (2) 44:4;152:21 helps (1) 59:12 hereby (1) 81:15 Here's (4) 27:13,14;38:24; 106:21 Hey (2) 9:11,24 high (1) 20:24 highlight (1) 7:1 himself (1) 17:13 history (1) 6:1 hit (1) 73:5 hold (5) 9:3,11,12;42:8;52:21 holding (2) 5:16,22 holds (1) 119:23 hope (2) 43:3;86:7 hopeful (1) 36:4 hopefully (6) 72:18,19,21;73:16; 93:20;186:19 horse (2) 23:20;26:10	hours (1) 93:3 How's (2) 82:9,22 I idea (3) 20:22;94:17;121:6 identical (5) 16:20;17:2,22;21:8; 27:4 identified (1) 112:4 identify (1) 83:11 ie (1) 32:21 ignore (1) 178:19 illustrate (3) 42:12,25;97:10 immediately (2) 71:17;94:20 impact (2) 136:4;148:15 impartial (7) 11:2;12:20;13:15; 26:19;45:23;55:16; 68:16 impartiality (2) 13:18,21 implemented (1) 18:10 implicated (2) 107:22;108:24 implicates (1) 105:15 implication (1) 11:1 implied (1) 12:8 important (8) 7:13;18:11,21;28:20; 29:23;36:15;69:24; 125:15 importantly (1) 112:11 impose (2) 98:1;148:14 imposed (3) 37:3;131:25;176:25 imposition (1) 151:17 impression (3) 25:9;39:7,9 improvements (3) 40:4;120:12,15 inappropriate (4) 109:10,15,19,19 inappropriately (1) 119:8 Inasmuch (3)	145:7;146:7;152:17 incidental (1) 178:21 include (6) 16:1;32:12;55:8; 64:20;104:15;139:25 included (2) 86:25;117:8 Includes (1) 160:10 including (2) 140:25;166:22 incomprehensible (1) 19:2 inconsistent (2) 120:8;136:19 incorporate (4) 63:25;120:23;184:8, 16 incorporated (1) 96:9 incorporates (1) 31:1 incorrect (2) 126:5;130:14 increase (1) 111:4 increased (1) 11:24 indeed (2) 40:9;42:7 independent (3) 115:19;116:4;118:17 indicate (1) 11:9 indicated (1) 91:7 indicates (1) 96:23 indiscernible (25) 48:9;53:16,17;56:5; 79:16;82:11;86:10; 98:3;109:7,20;118:22; 119:19;122:23,25; 127:13;132:9;134:2,4; 143:18;144:9;151:6; 155:24;156:12;172:19; 184:12 influence (2) 74:6;165:2 influenced (1) 173:20 inhibited (1) 170:7 initial (1) 6:23 initially (4) 9:9;10:10,16;32:5 innocent (1) 21:10 input (3) 7:18;8:4;49:14 insert (1)	47:24 install (1) 17:10 instead (2) 20:17;161:6 instructed (3) 106:1;163:18;164:2 instruction (1) 76:19 insufficiency (1) 63:24 insufficient (19) 19:19;57:17,18,22; 66:3;77:24;80:17,19; 81:4,20;82:18;83:11; 86:14,19,22;87:14,17, 18;90:14 intend (5) 64:10;91:6,19,25; 116:12 intended (1) 98:4 intending (1) 77:6 intent (10) 13:23;63:8;148:11; 151:9;153:6,17;155:7; 156:15;157:8;166:25 intention (2) 91:15;93:22 interesting (2) 5:6;52:19 interior (74) 39:14;40:9,11,12; 96:15,20,24,25;97:4,7, 13,14,19;98:4;100:5, 12,20;119:24;122:11, 13,14,22;123:2,21; 124:9,17,22;125:3; 126:3,6,9,14,20,20,25; 127:2,9,22,25;128:14; 129:17;139:25;141:1, 24,25;160:12,16,21,25; 161:9,10,14,14,16,17, 23;162:7,7,15;163:9, 10,10,12,16,21;164:3; 165:13,17;166:23; 167:11,18,21;168:8,11 interior-only (4) 128:9;162:9;165:15; 167:16 internally (2) 46:16;136:18 interpret (4) 55:14;57:8;76:21; 114:14 interpretation (26) 6:3;40:20;41:4; 46:17;101:18;107:21; 115:12;116:9,20; 117:3;121:12,22; 124:5,10,11,13,14,25; 125:1,16;127:23;
H				
half (1) 75:5 hand (1) 120:8 handle (3) 3:19;85:12,17 handled (1) 75:23 handling (2) 73:14;170:18 happen (5) 71:3;135:1,22; 164:12,13 happened (3) 70:20;73:25;160:20 happens (1) 75:2 happy (1) 183:12 hardship (1) 148:9 harried (1) 9:13 hash (1) 180:7 Hawaiian (1) 179:16 hazard (1) 151:18 head (1) 127:20 heading (1) 104:5 hear (4) 8:10;10:15;64:24; 183:8 heard (11) 27:7,14;42:21;43:7; 48:2,6,14;77:12; 107:14;111:12;124:18 hearing (87) 3:4,4;16,19,21;5:5,				

130:15;141:10;142:18; 151:11;163:18 interpreted (1) 142:16 into (24) 11:22;12:13;25:15; 31:2;36:5;12;37:10; 50:3;79:3;122:20; 123:9;129:22;132:20; 24;134:7;135:20; 144:6,13;148:17; 151:23;159:2;161:3; 169:7;178:22 introduce (1) 143:24 introduced (1) 138:12 introduction (1) 67:3 invalid (6) 108:3,8;109:22; 168:25;173:25;177:5 involve (3) 127:3,11;179:11 involved (6) 12:23;30:23;92:20; 96:20;113:20;123:20 issue (43) 6:2;16:17;17:18; 28:24;30:2,3;34:1,16, 20;44:11;70:2;85:14; 86:15;88:10;103:9,10; 104:4;108:12,17; 110:21;113:4;116:6; 122:17;126:18;133:9; 142:11,18;143:22,25; 144:3;152:4;163:6; 168:22;169:13;170:17; 173:24,24;176:6,13,16, 17,18,20 issues (33) 29:11;31:16;34:2; 63:4;70:20;86:22; 87:14;88:9,11;90:15; 91:10,19;92:19;93:23; 97:4;103:11,20,21; 115:20;116:5;118:18; 120:19,21;133:22; 137:8,14;138:2; 149:18;161:25;166:12; 168:23;174:25;175:3 item (3) 108:5;144:7,16 items (6) 85:15;94:20;138:12; 145:8;146:7;152:19	118:19;122:9;140:8 job (2) 70:13;186:17 John (1) 34:10 joined (1) 30:12 Jones (1) 1:24 Jr (1) 1:22 judgment (4) 115:9,19;116:5; 118:17 judicial (3) 6:11;47:22;79:14 Julia (12) 53:10;80:10;85:23; 92:3;93:24;98:25; 104:7;113:25;142:10; 152:22;158:1;179:8 July (8) 10:1,2,4;20:9,13,17; 23:9;25:9 June (1) 9:5 jurisdiction (3) 170:11;173:15;174:5 justice (3) 6:4,6;36:20	laid (1) 75:10 land (4) 24:19;170:2,11; 175:5 landscape (2) 133:8;151:20 landscaping (2) 120:14;133:7 language (9) 5:25;14:4,13,18; 15:10;144:10;152:7, 15;165:4 large (6) 40:13;52:22;94:23; 95:17;143:1;148:19 larger (1) 149:25 last (17) 9:6;11:18;53:19; 65:4;103:12;104:2; 120:20;147:11;155:14, 18;156:5,8,16;157:9; 167:1;169:12;183:17 late (2) 178:10;180:1 later (8) 18:15;25:15;27:18; 41:11;67:14;123:16; 158:24;181:17 latitude (8) 101:19;153:9;154:9, 11,13;155:10;157:16; 167:4 laundry (1) 85:15 law (32) 12:23,25;61:1,9; 62:1,14;64:21;65:1,12; 76:21;77:18,19;78:7; 82:7,11,21;83:15; 84:12,13;115:13; 116:10,21;117:10,21; 119:1;121:11,12,16; 124:2;126:1;130:12; 164:11 laws (1) 13:16 lawyer (2) 26:14;36:12 lay (1) 178:20 lead (1) 186:19 leads (1) 84:15 leaping (1) 178:22 least (4) 24:24;45:25;47:8; 183:1 leave (5) 16:24;121:15;	125:15;141:7;182:18 leaves (1) 70:9 leaving (1) 54:9 led (4) 7:20;9:21;10:5; 101:6 left (3) 25:8;28:24;158:2 legal (5) 115:19;116:5,6; 118:3,17 legislative (1) 6:1 length (1) 41:19 lengthy (1) 72:12 less (1) 149:12 letter (1) 149:6 level (2) 6:23;174:19 light (4) 4:10;19:16;67:13; 86:2 lighting (1) 28:24 liked (1) 56:21 likely (1) 6:25 limit (5) 125:23;135:2,24; 136:7;176:23 limitation (15) 103:9,10;108:10,11, 17;132:3,16;137:3,23; 138:19,21,23,24; 166:11,15 limited (35) 69:6;95:19,20,23; 96:4;97:8;99:4;102:10; 106:1;122:24;126:22; 128:8,14;130:18; 131:13,18;132:2; 134:19;138:11,17,20; 142:12;159:19,24; 160:7,9,11;165:16,17; 166:6,10,14,15;167:12, 17 limits (1) 164:5 list (2) 85:15;103:13 listed (1) 19:15 listen (1) 15:3 listening (1) 30:15	litany (2) 27:8;106:4 litigation (4) 144:18;170:22; 171:4;173:7 little (10) 11:22;15:15;23:10; 28:21;36:11;96:14; 110:20;113:24;135:19; 180:8 live (1) 186:21 lo (2) 16:19;17:1 loading (2) 19:3,5 lock (1) 178:16 long (6) 10:14;18:15;35:22; 36:24;71:24;98:6 look (52) 4:25;5:6,8;7,23;9:4; 10:8;11:3;12:9,14,18; 14:10;16:12,14,17,18, 22;18:7;21:7;23:8; 32:1;34:24;35:25;36:7; 39:19,22;40:5;41:2; 66:4;67:13;71:5;79:14; 87:3;96:18,18;98:2; 99:3;101:14;102:8; 105:16;106:1;115:15; 120:10;145:15;147:10, 13,13;160:24;167:9; 170:17;176:9;178:4; 180:5 looked (13) 2:20;5:19;11:8,20; 12:4,22,23;13:10;14:9, 14;32:4;120:19;141:19 looking (23) 4:12;6:20;7:7;10:24; 11:23;13:20;15:23; 18:25;19:4;40:10;47:3, 4;57:1;72:1;87:4; 105:7;111:1;115:15; 120:9;147:4;152:1; 162:15;174:11 looks (1) 73:15 losing (1) 137:24 lot (10) 14:19;28:8;34:6; 36:8;45:6;56:21;70:10, 20;109:9;110:24 loud (1) 110:22 low (1) 20:24 lower (2) 7:15;174:18 LRE (33)
J	K			
jeez (4) 125:12;134:21; 158:12;173:3 Jerry (3)	keen (2) 67:5,7 keep (2) 129:13;174:21 keeping (1) 82:1 Keiner (2) 13:6,6 K-e-i-n-e-r (1) 13:6 kept (1) 128:12 key (5) 33:22;34:1;98:7; 131:15;161:22 kind (14) 11:11;14:18,19;30:5; 41:4;76:23;97:17; 99:22;113:2;133:22; 151:11;158:22;159:23; 162:1 kinds (3) 17:25;18:3;182:13 Kodiak (2) 79:16;82:13	ladies (1) 2:2		
	L			

12:2;95:3,11;100:18; 19,21;129:7;131:1,12; 132:7,20,22;133:10; 135:8;138:3;142:11, 14,20,22;143:17; 149:11;150:13,13; 154:15,16;155:11; 157:17;159:17;161:23; 162:8;165:25;166:3; 167:5 LREs (1) 100:16 luck (1) 177:13 lump (1) 105:20 lumped (1) 107:11 lumping (1) 107:3 Lundgren (1) 13:1 luxury (1) 54:7	many (4) 63:12;74:10;91:10; 115:4 material (5) 86:15,22;87:15; 88:12;90:15 matter (19) 14:21;30:11,23,25; 32:20;38:10;41:24; 45:8;53:3;58:14;66:9; 85:11,22;86:1;112:11, 24;129:21,24;170:15 matters (4) 12:21;115:11;116:8; 123:4 maximum (1) 39:10 may (23) 11:14;12:3;21:14; 34:23;48:21;49:8;63:7; 74:2;94:25;95:18; 96:13;115:18;116:4; 126:7;127:3,10; 130:12;146:12;154:24; 155:12;157:18;167:6; 182:2 maybe (13) 17:15;48:3;50:9; 67:14;77:16;86:8; 127:19;141:6;142:4,6; 152:23;162:19;181:16 mean (42) 18:7,12,13,15,16,17, 23;19:10;32:18;33:8; 50:17;69:2;77:4;81:8; 90:2;106:13;109:4; 112:24;113:2;118:2, 12;121:2;122:19; 123:23;125:3,20; 138:5,9;142:19;145:3; 146:19;149:7;151:1; 159:1;162:5;165:19; 169:13,15;170:5; 172:18;175:11;182:8 meaning (3) 35:25;36:14;39:7 meaningful (2) 6:11;47:22 meaningless (1) 6:21 means (5) 18:22;52:25;116:7; 130:21;131:3 meant (2) 50:18;176:22 meet (12) 38:4,7;45:23;48:17; 146:25;150:15;151:8; 178:9;180:16;181:5; 182:16,17 meeting (9) 2:4,4;3:1;22:4; 55:14;181:9;183:14;	185:19;186:4 meetings (1) 34:19 meets (1) 150:9 Members (6) 1:20;23:15;25:11; 63:7;66:21;144:8 memo (35) 38:2;39:20,23;96:18; 101:17;104:13,15,19; 107:8,16,22;108:3,7, 23;109:16,16;111:22; 113:19;117:10,23; 118:19;119:23;120:2; 121:1,3;122:9;123:25; 124:4;125:2;126:1,2; 130:13;159:13;161:20; 164:18 memorandum (6) 34:25;39:17;40:6; 102:3;118:25;139:14 memory (1) 94:14 mentioned (2) 27:1;37:7 mentioning (1) 186:1 merchants (2) 8:1,2 merely (1) 146:17 merit (1) 101:12 merited (1) 101:16 merits (1) 170:6 met (6) 13:21,24;16:10;21:3; 34:15;46:3 method (1) 23:18 middle (3) 40:10;146:1,8 might (9) 11:21;76:25;98:20; 109:3;114:10;124:8; 143:7;159:19;183:2 military (1) 90:5 million (2) 75:5;151:14 mind (10) 11:10;18:2;21:10,10; 26:17;69:22;93:17; 96:16;97:11,15 minds (1) 25:12 minimize (1) 7:2 minor (2) 34:9;64:13	minute (2) 50:4;51:20 minutes (3) 2:25;21:5;22:16 misapplied (1) 124:12 misapplies (3) 119:8,16;124:6 misinterpreted (1) 174:18 Misinterprets (1) 121:23 misled (1) 34:24 misnumbered (1) 103:2 missed (4) 146:1,8;158:13,15 missing (5) 22:15;23:15;61:20; 105:4;166:19 misspoke (1) 50:19 mistaken (1) 70:4 mitigating (2) 135:22;136:14 Mitigation (7) 103:18;106:18; 135:15;143:9,14; 144:7;149:21 mitigations (2) 103:20;147:20 model (1) 139:5 modification (2) 52:25;177:5 modifications (7) 11:21,24;146:15; 169:1;174:1,4;178:6 modifier (3) 144:14;155:23,25 modify (1) 52:22 monetary (1) 176:23 monumental (1) 68:3 moot (1) 29:12 more (19) 9:17;18:17;44:4; 62:7;70:10,20;71:19; 83:2;85:2;93:21;96:14; 111:1;112:11;134:22; 139:19;175:12;180:7, 8;185:15 Moreover (1) 47:21 morning (2) 180:9;182:2 most (3) 17:24;70:11;172:25	mostly (1) 8:1 motion (73) 20:15,15,17;21:18, 21,22;23:9,12;24:2,3, 10,11,15,25;25:10,25; 27:23;28:9;42:1,16; 43:11;46:2,23;48:3; 49:8;50:21;52:15;53:9, 11,24;54:20,22,25; 55:11,22;56:4,18,19; 57:1,4,14;62:20,24; 64:1,16;65:13,17,25; 66:14;68:8,10;70:8; 75:21;76:9;77:1,10; 80:9;81:18;82:14; 83:19;84:6,7;85:21; 90:10,11;91:6,16,19; 92:16;114:11;183:21; 184:2,7 motions (11) 11:11;25:14;43:6,24; 44:4;46:5;54:3,13; 57:19;58:11;183:17 move (25) 34:18;42:5;44:12; 58:16;76:10;98:6; 101:25;144:25;145:9, 11;146:8,11,12,21; 152:1,20;153:9;154:5, 11,13;155:10;157:16; 159:15;167:5;182:16 moved (2) 57:20;75:6 moves (9) 98:11;100:18,20; 123:4;151:21;161:23; 162:7,13;184:15 moving (5) 28:21;29:13;98:16; 137:15;144:11 much (16) 5:10,14;11:23;25:11, 12;30:17;44:7;67:8; 70:9;118:4;123:12; 126:14;137:25;178:24; 180:21;186:14 Municipal (18) 1:24;11:5;12:10,19; 20:10,20;41:7;45:9; 93:9;104:16,23; 113:21;117:9;119:20; 143:4;163:19;170:11; 179:12 MUNICIPALITY (2) 1:6;2:3 must (25) 6:2;10:9,10;17:22; 23:3;36:6;37:4;52:21; 71:9;72:6;109:12; 111:7;145:2,3,4,5,8; 146:6,8,10,15,25; 152:16,20,20
M				
ma'am (1) 179:5 Madam (8) 2:7,17;30:9;54:18; 56:6;65:17;84:19;92:8 main (1) 31:5 maintain (7) 139:2,9;145:9,10; 146:10;152:20;166:17 maintaining (1) 137:15 maker (1) 24:9 makes (4) 8:12;33:4;62:7; 180:15 making (3) 11:25;54:14;114:11 Mall (11) 3:8;8:2;35:8;97:13, 13,18;111:2,4;112:17, 19;159:7 malls (1) 14:14 mandate (3) 10:2,11;126:8 mandates (1) 41:22 mandating (1) 5:15 manner (12) 12:5,12;15:23;35:11; 58:13;67:21;72:17; 95:25;99:7;102:13; 106:7;123:14				

muster (2) 31:10;83:19	142:14,24;145:3; 146:6,23,24;147:2,20, 21;148:21,21,23; 152:16;160:10;169:24; 176:24		16;120:8,24,25;122:2, 5;123:22;124:8,8; 128:24;130:6;135:23; 139:15,16,19;141:5,17; 142:19;143:3,15; 148:10;149:18;157:22; 159:5,8,9,15;160:13; 162:20;165:21;166:18; 169:11;185:15;186:1	otherwise (4) 57:11;74:25;132:15; 136:10
myself (1) 24:20		O		ought (1) 65:11
N	Next (10) 19:3;54:17;67:2; 81:18;92:17;124:7; 141:17;154:2;157:21; 159:15	oath (1) 12:14		out (53) 3:10;14:15;15:7; 16:24;18:1;26:25;28:6; 18:35;4,10;41:9;68:21; 70:20;71:1;74:25; 75:10;76:15;78:17; 81:12;85:23;94:9; 98:12,16,24;99:6; 100:19,21;102:12; 104:2;106:3;110:22; 111:19;113:4;115:4; 118:15;121:3;123:4; 125:15;136:16,17; 141:7;142:5;144:1; 146:12;147:16;148:3; 151:21;161:24;162:8; 13;164:19;180:7;183:9
narrow (1) 63:13	nexus (3) 27:21;33:17;64:6	objection (3) 8:15;47:25;48:19		outlined (1) 14:6
necessarily (7) 36:16;64:22;103:20; 121:2;122:13,19; 151:19	nicely (2) 91:22;145:17	objections (6) 6:14;49:15;50:24; 51:23;52:1;53:13	one-step (1) 76:1	outside (4) 18:24;136:10; 163:19;170:10
necessary (5) 15:13;19:6;63:10,19; 170:16	night (2) 58:1;177:11	observation (1) 26:17	only (32) 3:3;6:10;7:10,23; 8:17;9:14;17:4;35:19; 38:16;47:21;60:13; 63:13;77:8;79:22;88:4; 92:21;95:18;96:16,20; 98:23;120:19;136:5; 137:25;140:8;150:8; 160:12;166:12;172:3, 7;179:24;180:16,22	over (14) 32:2;46:6;70:15; 71:23;74:10;136:4,9; 138:7;169:10,19,25; 171:19;175:4;178:3
need (86) 18:18;23:6;24:24; 25:8;41:2,10;43:13,14; 52:8;53:2,9;67:3,11; 69:3;70:6,15;74:3; 75:18,19,24;76:9; 77:22;80:10;81:11; 83:10;84:7;85:15,21, 23;88:18;92:25;93:2, 12;94:10,12;101:21; 103:12;104:15;108:11; 109:22;110:12,17; 111:18;113:19;114:1; 115:3;119:21;120:1; 122:21;123:11;125:22, 23;128:24;133:10; 136:9;139:13;141:4,7; 143:23;144:24,25; 145:18;152:1,3,8,23; 159:22;160:23;162:3, 20;163:6;165:20; 168:19;170:21;172:2; 173:18;177:11,24; 178:15;182:2,15,16; 183:11,21;184:23; 186:13	noncompliant (3) 137:6;138:2;166:12	observing (1) 41:14	onto (1) 24:4	overall (1) 149:13
needed (1) 26:22	nonconforming (7) 95:1,4,12;129:3; 132:6;133:14;159:18	obvious (4) 94:9,20,22;184:25	obse (2) 13:16;41:13	overlooked (1) 185:11
needs (20) 8:19;11:6;15:11; 60:16;69:18;73:14; 77:20;78:6;84:12;85:5, 8;89:6;91:11;93:19; 124:15;137:12;144:18; 150:21;153:13;178:2	nonconformity (1) 153:4	occasion (1) 4:2	observer (1) 21:10	overstate (1) 27:1
negative (4) 43:8,17,19;57:12	none (3) 2:23;3:12;77:6	occurred (4) 9:5,15;15:20;23:8	observing (1) 41:14	overstating (1) 27:5
negotiable (2) 29:25,25	nonjurisdictional (6) 170:2;172:15,23; 173:11;175:5,17	o'clock (7) 180:17;181:9,16; 182:5;185:22;186:6,13	obvious (4) 94:9,20,22;184:25	own (4) 40:19;66:23;71:15; 72:9
neither (1) 5:25	Nope (1) 50:7	O'Dell's (1) 39:20	obvious (4) 94:9,20,22;184:25	owner (1) 7:23
new (34) 3:3;9:19;12:13;15:3; 32:3;36:5;40:1,17; 67:17;72:20,25;96:2; 120:13;129:23;134:18; 135:21;137:16;138:13;	nor (1) 5:25	off (11) 27:17;29:13;75:5; 97:12,15;117:7; 127:20;164:4,5,6; 178:21	opened (3) 53:7;122:25;123:1	P
	Nordstrom (6) 3:7;17:8,11;73:20; 74:20;75:8	offer (1) 33:2	operating (3) 73:11,21;74:5	P&Z (77) 15:22;25:11;31:4; 48:5;50:22;51:11; 53:11,25;72:8,9,14,20, 25;73:15;74:13;75:23; 83:17;85:5,22;86:1; 89:9;93:19;95:3; 100:22,24;105:17; 106:1;113:25;114:9, 14,17,17;116:19;119:3, 25;122:14,16,17; 123:20;124:15;125:22; 131:13;133:20;135:25; 136:7,17;138:16; 148:4,21;149:8;
	normal (1) 54:4	offered (3) 17:13,17;163:19	opponents (3) 8:1,19;72:4	
	north (2) 17:8,11	offers (1) 141:10	opportunity (23) 6:13,22;7:17,24;8:3, 13,15,20;9:13;19:20; 45:11;47:24;48:1,6,14, 15;50:24;51:16,21,22; 53:12;68:17;69:7	
	Northern (2) 18:9,17	office (3) 9:24;54:5;181:12	opposition (1) 8:21	
	nose (1) 21:12	often (3) 21:17;24:3;129:19	order (26) 2:24;5:2,3,9;2; 10:21;11:12;19:17; 33:1;41:20;44:16,17, 19;45:7;47:9,19;48:5; 63:17;78:13;82:9;94:1, 3;108:20;112:24; 122:8;170:6,9	
	noted (1) 39:22	old (5) 3:3;36:11;120:13; 129:23;147:6	ordinance (1) 119:5	
	notes (4) 43:4;54:16;112:25; 157:23	once (11) 72:24;94:1;110:11; 114:3;130:17;131:12; 166:7,7,8,9;180:7	ordinances (4) 31:12;115:13;116:9, 20	
	notice (2) 134:22;183:11	one (77) 6:16;10:23;15:7; 17:22;19:3;25:23;27:2; 28:10,11;30:24,24; 32:3;33:3;34:1,3,19; 43:25;47:16,24;49:21; 52:24;60:6;61:24;63:4; 64:13;73:5;74:6;83:2, 23;84:3,7;85:2;86:18; 94:10;96:13;99:13; 101:16;105:1,11; 110:19;112:3;117:3,7,	ordinary (1) 28:7	
	noticed (3) 20:5;186:5,6		original (2) 54:25;96:5	
	notwithstanding (1) 95:15		originated (1) 39:16	
	nowadays (1) 97:20		Others (7) 1:23;15:8;170:25; 171:1,5;173:8;178:20	
	number (2) 71:13;176:19			
	numbers (3) 5:2,3;74:10			
	nut (1) 33:22			

150:19,21;153:2; 155:8;159:25;160:3,4, 8;161:24;162:15; 163:11;166:7,14; 167:3;168:7,11; 171:18;173:1,14,19,25; 174:4;175:5,11,18; 176:24;185:12 P&Z's (4) 124:25;131:24; 172:2,6 P2d (3) 13:2,7;79:17 Pacific (1) 13:2 package (1) 38:8 packet (2) 70:2,19 pad (2) 14:14;111:12 page (24) 5:1,1,3,3,4,23;6:9,10, 20;20:6,7;25:24;35:2, 7;36:8;39:21,22;40:7, 8,9;47:18,19;52:5,7 Pages (5) 1:12;4:13;37:23,24; 125:21 panoply (1) 117:8 paragraph (3) 5:24;40:11;94:21 paramount (1) 75:11 paraphrase (1) 5:12 parcel (1) 132:24 part (32) 12:5,14;34:5;45:16; 66:9;67:9;107:15; 111:2,3;112:17,18; 132:23;133:10,12,15, 17;134:7,8,9,20; 136:23;137:16,18; 145:25;147:2;152:24; 154:3;156:19;158:8; 159:6,7;164:10 parte (1) 12:19 partially (1) 90:13 Participating (1) 1:23 particular (10) 15:23;35:25;36:14; 37:1;54:8;73:7;77:12; 91:18;94:1;142:3 particularly (1) 21:7 parties (10) 6:13;7:17;49:13; 50:23;51:13,14,20; 53:12;164:16;186:16 partitions (1) 98:6 Parts (4) 139:1,8;140:10; 166:16 party (6) 7:5;19:20;47:23; 71:17;179:9,17 pass (1) 83:19 passed (11) 16:21;20:7,12,16,16, 18;22:7;28:16;41:6; 76:6;183:9 passes (4) 31:10;65:25;91:16; 92:16 passing (1) 41:8 past (3) 58:10;66:11;86:8 pause (1) 56:25 paused (1) 52:18 peculiar (1) 148:7 pedestrian (3) 17:7;19:9;120:11 pendency (6) 169:9;170:21;171:4; 173:7,20;174:3 pending (4) 68:9;144:18;169:18; 171:12 People (8) 14:15;29:23;69:2,7; 109:5;125:4;175:11; 181:15 per (1) 144:12 perceived (1) 123:19 percent (55) 35:16;37:22;38:22; 39:3,5,9,25;40:21; 103:6,8,9;108:9,11,16; 120:1,4;123:14,18; 128:25;129:2,7,21; 130:16;131:10,19; 132:3,5,16;133:3,22; 134:10,16;135:23,24; 136:5,8,16,25;137:3,5, 18,22;138:12,18,21; 139:21,24;140:14,18; 148:1;165:23;166:1, 11,15,20 perhaps (4) 22:12,15;63:9;151:8 period (2) 82:1;172:1 permitted (1) 98:23 perspective (1) 32:1 petition (1) 14:16 petitioner (5) 17:12,15;136:22; 137:9;164:2 phase (1) 92:17 phone (1) 30:15 phrase (2) 51:6;58:13 phrased (2) 43:16,19 pick (3) 141:11;158:24; 162:20 picked (2) 130:7;159:9 pictures (1) 27:16 piece (1) 166:19 place (10) 6:24;15:15;21:19; 26:4;45:13;46:22; 74:18,22,23;96:6 places (4) 11:14;110:23; 111:24;112:2 plain (1) 5:25 Plan (66) 3:8;19:23;20:2; 95:19,21,24;96:1,4,5, 14;97:9;99:14;106:2, 13;112:22,23;122:24; 124:20;126:15,22; 127:3,4,11;128:8; 130:18;131:12,13; 132:20;134:19;137:16; 142:12,20,22;143:4,5, 17,18,19;148:16; 149:14,22;150:6,8,8,9; 159:24;160:8,9,11; 162:12;165:14,25; 166:3,6,10;167:12; 171:17,23;172:4,7,9, 10;174:1,4;177:5; 182:6 planned (2) 40:17;169:1 PLANNING (115) 1:7;3:5,16,18;4:3,6; 7:8,15,21;8:5,11,18; 9:1,6,8,22,23;12:11; 14:10;15:5;18:24; 19:25;20:8,10,20;21:2, 11;24:20;27:6,24,24; 28:1;36:17,22;38:3; 39:8,18,20;40:24;41:1, 15;42:7,23;44:13;47:8; 49:11;57:21;58:19; 59:21;60:24;62:13; 66:2,8,10,17,23;67:12, 18;70:17;71:16;77:23; 78:25;82:17;83:9; 85:13;86:25;88:21; 90:17;91:8,11,17; 92:18;93:14;96:19; 97:3,6,16,21,24; 112:14;114:7;117:20; 118:22,23,25;123:19, 25;124:3;126:4,7; 130:13;131:16,20,23; 132:1;134:5;135:4,6; 137:11,19;138:6,11; 143:12;150:4;153:8; 157:14;164:9,11,12,14, 14;168:24;169:6,14; 171:24 plans (4) 95:1;99:4;102:10; 165:25 plant (1) 166:14 platting (1) 74:13 play (3) 132:24;135:20; 151:23 pleas (1) 172:25 please (9) 2:7;44:11;48:23; 56:7;62:9,25;100:13; 146:4;179:8 pleasure (1) 59:18 plural (1) 16:4 plus (1) 18:5 point (15) 8:8;22:6;38:14;42:7; 47:7;55:25;70:5;71:20; 98:15;107:9;120:25; 165:7;168:20;181:8; 183:23 points (2) 42:6;122:2 policy (2) 5:21;51:18 poorly (2) 36:4;38:2 portion (7) 16:18;35:20;55:22; 56:18;63:3,13;65:4 portions (1) 40:12 position (7) 3:19;9:10;70:21; 76:25;96:19;137:10,11 positions (1) 8:4 positive (3) 43:8;57:1;58:10 possibility (1) 63:6 possible (4) 18:10;22:23;71:20; 72:23 possibly (2) 70:4;72:2 postpone (1) 70:24 potential (1) 7:2 potentially (2) 135:12;162:13 power (8) 66:19;110:23;111:1; 112:6,8,10;158:12; 159:6 powers (1) 66:4 practicable (1) 148:8 practical (1) 91:7 preamble (2) 118:15;155:22 precisely (1) 26:6 prefer (1) 181:5 prepare (2) 8:21;15:22 prepared (3) 21:11;39:19;177:6 prepares (1) 7:8 preparing (1) 182:1 present (2) 7:24;68:9 presentation (3) 9:16;10:19;69:11 presented (8) 17:24;19:12,14;22:3; 25:21;27:25;68:1; 69:15 preserve (2) 6:11;47:21 presumably (5) 2:19;7:9;16:15;25:4; 105:24 presume (1) 22:5 pretty (6) 14:7;25:11,12;29:6; 34:11;73:22 previous (2) 3:1;28:9 previously (1) 63:23
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<p>primarily (2) 120:5,10</p> <p>principles (1) 143:3</p> <p>print (1) 116:7</p> <p>prior (4) 4:2;138:2;166:12,13</p> <p>pro (1) 163:16</p> <p>probably (4) 15:9;62:7;115:7; 163:11</p> <p>problem (5) 23:4;43:13;65:6; 112:19;122:3</p> <p>problematic (1) 41:7</p> <p>problems (1) 151:20</p> <p>procedural (1) 30:11</p> <p>procedurally (1) 55:3</p> <p>procedure (4) 13:17;32:8;54:4; 71:19</p> <p>procedures (1) 46:22</p> <p>proceed (3) 2:24;65:10;74:15</p> <p>proceeded (2) 9:9;74:24</p> <p>proceeding (4) 16:3;23:18;32:14; 35:22</p> <p>proceedings (3) 16:4;41:25;73:21</p> <p>process (23) 12:11;13:4,10,11,19; 26:21;45:24;49:14; 53:16;68:16;71:13,23; 72:12;73:15,18;74:17, 22;75:1,7,25;76:1; 96:4;160:9</p> <p>processed (1) 95:25</p> <p>processes (1) 74:9</p> <p>produced (1) 32:22</p> <p>prohibition (5) 97:23;123:19;168:4, 6,7</p> <p>prohibits (1) 122:14</p> <p>project (64) 18:13;39:12;42:12; 43:1;63:8,14;97:8; 106:12;122:16;126:4, 7;127:10;129:3,6,14, 16;130:17,20;132:10; 133:18,19,20;134:8,9,</p>	<p>18;135:13,14,18,19; 136:2,10,24;137:17,18; 138:13;139:1,8,8; 140:3,5,23,25;142:22; 144:24;145:4;146:6, 21,23,25;147:17,23,25; 149:9,24,25;150:14; 151:14;152:16;161:8; 162:12,13;166:16,22; 168:12</p> <p>projects (6) 128:10;164:11,13, 15;165:16;167:17</p> <p>project's (8) 60:14,17;61:4,11,12, 14;62:15;135:6</p> <p>prominent (1) 19:8</p> <p>promote (1) 19:6</p> <p>promulgated (3) 109:23;110:6;117:15</p> <p>prong (1) 143:16</p> <p>prongs (1) 142:19</p> <p>proper (4) 68:5;81:11;93:1; 174:16</p> <p>properly (2) 110:4;121:17</p> <p>properties (1) 148:15</p> <p>property (2) 7:24;169:25</p> <p>proportion (1) 106:5</p> <p>proportional (3) 143:13;147:22,22</p> <p>proportionality (10) 110:21;111:4; 132:24;135:15;136:13; 151:12,15,16,23;159:1</p> <p>proportionate (8) 35:11;99:7;102:13, 15,19;105:11;106:8,20</p> <p>proposal (2) 12:12;14:23</p> <p>proposals (2) 7:1;52:22</p> <p>proposed (16) 21:1;42:12,25;61:11, 14;62:15;99:9;142:22; 143:5;146:15;147:17; 148:16;150:13;172:4, 10;177:22</p> <p>proposed' (1) 35:14</p> <p>protect (1) 132:17</p> <p>provide (37) 6:12;7:18;8:4;16:5; 32:15,16;42:24;43:20;</p>	<p>45:12;47:23;49:13; 50:25;58:20;59:22; 60:25;61:8;62:13;64:6; 68:5;71:8;73:17;78:16; 79:1;91:16;116:19; 119:2;132:5;153:18; 154:8,11,12;155:7,10; 157:13,16;167:2,4</p> <p>provided (15) 28:8;45:15;49:12,12; 50:22;51:12,20;53:11, 25;57:6;70:3;101:18; 109:12;133:21;154:5</p> <p>provides (4) 58:7;109:17;113:20; 167:16</p> <p>providing (2) 69:7;92:24</p> <p>provision (5) 108:7;121:24;126:2; 127:22,24</p> <p>provisions (18) 5:9,12,13;32:19,24; 69:21;77:2;89:17; 91:13;95:14;98:7; 115:13;116:10,21; 124:6;137:12;151:12; 161:22</p> <p>public (71) 4:15,18,21;5:5,15,16, 21,22;7:5,25;9:11,12; 13:24;15:3;17:24;18:1; 21:20;28:17,18;29:9; 30:6;34:6,7;42:8; 44:14;45:8,11,20,22, 25;46:4,12,14,18,19, 20,20,21;47:1;48:5; 49:25;50:1,5;51:18; 52:9,21;53:14,16,19; 55:15;56:24,24;57:22; 58:17;59:20;60:23; 62:12;68:23;69:1,5,10; 70:24,25;74:17,21,22; 96:8;100:14;151:17; 160:10;183:13</p> <p>public's (2) 75:8,10</p> <p>pulled (2) 22:7;28:19</p> <p>pulling (1) 34:8</p> <p>purpose (1) 132:5</p> <p>purposes (3) 49:15;64:1;86:1</p> <p>pursuant (3) 66:6;85:25;118:15</p> <p>purview (1) 97:3</p> <p>push (1) 164:24</p> <p>put (29) 3:15;38:23;54:10;</p>	<p>76:15;82:13;93:24; 94:1,2;96:3;98:21; 99:1,21,22;101:25; 104:9,10;125:21; 126:17;135:2;136:22; 137:2;142:2;144:21; 159:24;161:3;176:5; 180:24;181:2;183:25</p> <p>puts (2) 135:12,14</p> <p>putting (4) 23:20;26:9;142:3; 153:16</p> <p>puzzling (1) 14:5</p>	<p>181:2</p> <p>reading (2) 28:14;140:2</p> <p>reads (1) 95:14</p> <p>ready (3) 65:16;84:16,17</p> <p>real (2) 37:13;54:11</p> <p>realizing (1) 17:16</p> <p>really (28) 7:6,13;8:2,8;9:18; 10:10;29:2;30:1,22; 32:20;35:5;46:24; 66:20;67:2,10;73:13, 25;74:5;108:10;111:3; 133:11,17;135:1; 138:8;145:22;147:11; 175:7;181:24</p> <p>rearrange (1) 181:1</p> <p>reason (8) 54:2;58:25;59:6; 67:7;68:6;96:17; 164:23;180:2</p> <p>reasonable (2) 16:5;32:16</p> <p>reasoning (1) 5:5</p> <p>reasons (3) 16:6;32:17;161:15</p> <p>recall (2) 39:15;66:15</p> <p>received (6) 109:10;111:15,20; 113:15;118:11;158:3</p> <p>recess (1) 93:4</p> <p>recognizing (1) 23:14</p> <p>recommendation (2) 9:7,8</p> <p>recommendations (1) 86:4</p> <p>reconcile (1) 47:17</p> <p>reconsider (1) 10:3</p> <p>reconsideration (2) 85:6;88:24</p> <p>reconsidering (1) 86:2</p> <p>reconstruct (1) 145:18</p> <p>reconstruction (6) 35:13,17;95:16;99:8; 102:14;103:7</p> <p>record (59) 3:15;4:13;6:14,22; 7:11,12;8:21;9:20; 11:4;16:3;20:23,25; 25:25;32:6,14;35:3;</p>
Q				
<p>qualifies (1) 122:23</p> <p>quick (2) 178:4;180:5</p> <p>quickly (1) 38:23</p> <p>quite (5) 3:1;38:11;63:2;74:7; 77:16</p> <p>quorum (1) 2:15</p> <p>quote (2) 35:9;79:16</p> <p>quoted (1) 99:18</p>				
R				
<p>Rack (9) 3:7;17:9,11;73:10, 20;74:5,19;110:23; 112:15</p> <p>raft (1) 92:19</p> <p>raise (1) 114:2</p> <p>raised (6) 18:2;115:20;116:5; 118:18;120:19;176:7</p> <p>ramifications (1) 123:2</p> <p>rang (1) 30:13</p> <p>rather (11) 33:9,10;66:17;68:12; 94:22;104:17;111:2; 122:14;123:12;142:2; 144:1</p> <p>read (21) 14:3;18:6;20:13; 25:6;29:15;32:9;35:23; 36:23;53:19;59:14; 62:8;73:6;82:15;83:2; 90:11;94:21;136:20; 152:13;161:12;165:18;</p>				

39:21;43:25;47:18; 48:2;16:49;16:50:25; 51:23;52:1;53:13; 54:15;55:13;63:17; 64:5;65:11;70:24;74:4; 80:16;81:8;82:14; 86:15;22:87:14,21,23, 24,25;88:2,4,5,8;90:15; 93:8;110:25;111:24, 25;112:3;124:12; 125:4;148:5;149:5; 163:25;186:15 red (1) 18:3 redo (2) 182:2;183:2 reduced (1) 36:19 Reeves (1) 9:16 r-e-f (1) 59:24 refer (3) 24:24;32:19;93:23 reference (7) 20:19;59:25;62:6; 96:7;101:16;115:1; 144:12 references (2) 11:6;68:19 referred (5) 3:7;13:5;14:25;15:1; 31:16 referring (6) 5:1,2;26:6;69:8,9; 143:25 refers (2) 31:10;40:21 reflect (5) 58:22;62:19;65:12; 69:19;78:22 regarding (6) 41:14;127:22;141:5, 9;170:21;171:3 regardless (1) 38:7 regular (1) 2:4 regulation (5) 15:21;72:14;114:19; 117:15;124:1 regulations (1) 41:8 reiterate (2) 175:4;177:21 relate (4) 19:12,13;115:12; 116:8 related (4) 3:20;25:17;39:13; 176:22 relates (2) 32:10;42:1	relating (3) 22:16;23:11;104:16 relationship (13) 79:19,23;80:12,21, 23;81:4;82:4,18;83:12; 105:24;164:11,19; 170:23 relaxation (1) 148:13 relevant (1) 170:7 relied (1) 125:2 remains (1) 38:6 remake (1) 49:7 remand (16) 44:18,19;66:9,22; 76:18;77:1,7,11;78:6; 81:15,17,17;86:10,12; 116:22;160:2 remanded (1) 86:24 remanding (3) 68:17;174:25;175:3 remands (4) 88:16,20;89:9;90:17 remedies (2) 86:10;126:8 remedy (9) 73:9,10;74:14;76:1, 11;78:9,12;84:15;85:3 remember (10) 16:22;27:15;32:9; 36:11;56:21,22;68:8; 72:16;110:3;129:17 reminder (1) 95:3 remodel (11) 98:5;100:12,20; 135:16;139:4,7; 147:17,23;166:16,22; 168:12 remodeled (3) 139:8;140:23,25 remodeling (12) 35:14;40:10,11,14; 95:16;99:9;102:15; 122:13,15;123:21; 126:3;139:25 remodels (1) 122:11 remote (3) 170:12,14,15 removal (2) 96:1,15 remove (2) 38:3;143:19 removed (2) 28:23;164:17 rendered (1) 7:14	rendering (4) 90:1,5,18;156:4 renovation (7) 35:13;40:12;95:16; 99:8;102:14;148:20; 166:16 renovations (1) 156:4 reopen (2) 68:23;70:25 reopened (1) 45:12 reorder (1) 113:1 repair (1) 40:12 repeat (2) 50:18,20 repeated (1) 64:17 repeating (1) 57:15 rephrase (4) 48:22;50:10,16,18 rephrased (1) 48:4 rephrasing (1) 51:17 represented (4) 15:12,16;74:10;75:3 reproduced (1) 54:17 request (4) 26:3;43:23;65:4; 179:7 requesting (1) 68:22 require (7) 4:15;96:14;100:16; 127:1;142:12,21;143:5 required (33) 4:19;5:5;6:7;8:9; 9:19;39:10;42:9;44:15; 72:15;82:4,8,20;83:14; 95:21,23;96:2,15; 117:15;127:5;130:19; 131:14,17;134:8; 137:17;138:13;139:2, 9;143:12;159:25; 161:10;166:7,11,17 requirement (5) 11:12;47:1;96:7; 107:8;148:14 requirements (22) 13:11,22;25:18;37:3; 38:5,7;41:8;42:11; 43:1,45;9,24;46:4; 61:5;63:12;67:20,24; 69:20;98:15,17;100:7; 126:11;161:18 requires (8) 15:21;32:9,25;63:18; 67:8;97:8;126:21;	134:6 requiring (1) 97:7 Resolution (58) 3:6;7:20;10:5,9,11, 25;16:13,15,18,21,23, 25;17:6,20;20:6,16; 21:1,18,21;22:3,3; 25:15;27:3,3,19;28:3; 31:4,9;33:19;37:5; 38:16,21,24;39:1,2; 41:15,19,22;42:2; 57:21;63:24;66:16,25; 67:6;77:22;78:25; 82:17;83:10,11,16,17; 87:23;88:3,4;91:9; 164:17;168:25;173:25 resolutions (3) 17:5;27:2;66:14 resolve (3) 164:7,9,21 resolves (1) 6:1 respect (3) 15:14;63:19;122:22 respond (1) 14:10 response (2) 17:15;57:23 rest (3) 29:3;120:21;165:18 result (3) 17:14;72:12;148:7 retail (7) 40:13;52:22;94:24; 95:17;142:24;143:1; 156:3 return (1) 85:25 reverse (1) 66:7 Review (51) 3:8;6:12;47:22; 69:12;97:9,16,17,25; 99:14;100:23,25; 106:2,13;115:25; 119:24;122:14,17,24; 124:20;126:4,8,15,23; 127:3,4,11;128:8; 129:2;130:18;131:13; 132:20;134:20,21; 135:5;137:16;143:18; 150:6;153:20,23,24; 155:8;157:15;160:8, 10,11;161:24;165:14; 166:6,10;167:3,12 reviewed (1) 35:8 reviewing (5) 79:25;133:18;150:7; 168:12;169:8 reviews (2) 133:20;150:5	right (86) 6:11,19,20;16:14; 22:6,11;28:21;38:16, 17,24;41:17;43:9; 44:21;47:22;49:12,13, 22;50:6;54:18;55:7,9, 23;56:2,17;59:8,11; 61:23;62:22;65:5,15; 67:16;73:17;75:5,9,10; 76:7;82:1,25;83:19,24; 84:6;87:11;90:9;93:7, 25;97:17,22,23,25; 100:23;104:13;106:24; 107:19;108:18;110:14, 17;117:13;121:18; 122:3;125:6,7;134:10; 136:11;139:22;140:6, 15;142:15;143:7; 144:23;148:25;152:19; 154:25;155:15;157:10; 158:24;159:1,12; 160:13;170:19;177:3; 180:14;181:12;183:7; 184:20;185:7;186:10 risk (1) 74:15 roads (1) 134:3 Robert (2) 2:13;63:15 Robinson (1) 26:1 Roebuck (2) 97:11,19 role (1) 72:8 roll (2) 2:8;56:7 row (1) 139:5 rubber (1) 185:13 rule (8) 4:2;39:9;57:9;120:1; 128:25;132:16;133:3; 151:3 rulemaking (14) 104:16,24;107:9,15, 24;108:2,7,22;109:24; 117:9;119:5;121:6; 163:19;184:4 rules (2) 13:17;117:1 rummy (2) 145:19;173:21 runs (1) 71:17
S				
sad (3) 74:19;75:2,7 Sadly (1)				

74:8 safety (4) 100:14;120:11; 133:21;151:18 same (10) 12:12;19:1;40:15; 95:25;96:3;147:11,13; 160:8;171:10;175:13 sanctioned (1) 41:5 sat (1) 14:9 satisfies (3) 10:11;82:24;148:11 satisfy (1) 82:22 saved (1) 154:1 saw (3) 11:20;115:1;129:8 saying (28) 16:12;27:17;44:9; 46:3,25;47:17;57:16; 68:14;76:3;78:23; 100:5,18;104:22; 105:6;107:6;109:1,5; 118:15;133:16;150:19; 162:11,16;172:15; 175:9;180:13;181:20, 24;182:14 schedule (1) 180:13 scheduled (1) 2:4 scope (1) 115:25 Scrivener (1) 145:13 searched (1) 20:24 searching (1) 174:16 Sears (4) 3:8;35:8;97:11,19 second (25) 40:11;42:21,22; 44:25;46:23;48:25; 49:7,19;52:18;55:22; 56:18,19;60:6;62:23; 84:7,8;87:17;91:1,2,4; 95:13,20;119:6; 143:16;184:21 seconded (2) 84:10;184:23 seconding (2) 42:15;45:3 secondly (3) 5:14;40:23;41:21 secret (1) 4:20 section (19) 32:10;35:20,21;36:3, 7,24;37:3;79:12;94:13,	18;101:2;115:15; 116:7,17,19;148:11; 155:17;165:10;184:5 sections (9) 30:22;31:11;36:13; 69:14;79:13;98:21; 142:12;153:1;184:5 Seeing (2) 2:23;136:3 seem (2) 90:12;105:17 seemed (4) 11:9,25;79:10;143:2 seemingly (1) 186:18 seems (18) 8:9;11:13;18:5; 19:14;25:1,21;28:2; 41:3,18;77:19;78:7; 108:21;116:11;117:19; 118:5;141:16;143:10; 169:22 send (10) 66:17;67:11;68:6,12; 72:13;85:9,22;114:4; 149:11;178:3 sending (3) 70:6;71:21;174:23 sense (16) 47:6;48:11;55:6; 61:6;62:7;85:18;86:5; 94:4;108:9;151:15; 160:1;172:12;180:12, 15;182:25;183:5 sent (5) 4:5;8:25;67:17;85:5; 149:6 sentence (40) 18:16;36:14;40:20; 53:20;60:9;94:19,19, 22,23;95:8,14,20,22; 96:13;97:5;99:3,3; 102:5,6;103:10,12; 104:2;126:17;141:8, 23;142:3;144:7; 147:12,12;155:15,18; 156:6,8,17,18,19; 157:9;167:1,22;172:2 sentences (7) 6:17;35:24;36:15,18; 94:14;141:6;177:24 separate (8) 36:13;66:12;94:14; 104:4;106:16;107:9; 108:5;149:17 separately (1) 101:21 September (2) 101:17;118:20 series (1) 93:18 serve (2) 168:3,6	served (1) 24:19 serves (1) 94:15 session (1) 180:17 set (11) 22:15;32:6;35:10; 99:6;102:12;103:5; 106:3;133:23;147:16; 148:3,20 seven (7) 35:23;36:13,18; 37:24;94:14;141:6; 184:9 seventh (1) 103:10 several (4) 12:6;15:8;63:4; 91:14 shall (28) 12:20;15:25;16:2,4, 8;32:11,13,15,15; 35:10,15;64:19;94:25; 95:25;99:5;100:23; 102:11;103:5;104:4; 105:9;106:11,14; 147:16,18;148:3; 150:8;175:17,20 share (4) 21:14;118:7,9;130:7 shedding (1) 4:10 shopping (1) 129:20 short (1) 72:7 short-circuit (1) 71:14 shortcut (1) 106:19 shortcuts (1) 71:18 show (1) 124:12 showed (2) 12:5;31:24 shows (2) 20:25;22:17 side (5) 17:8,11;19:8;158:2; 167:19 sidewalk (7) 17:7,9,18;134:6,25; 136:23;138:8 sidewalks (1) 137:13 signage (3) 17:8,10,19 signed (1) 21:13 significant (3) 25:22;94:11;126:21	significantly (1) 148:14 signs (1) 7:9 similar (2) 74:11;110:23 simple (8) 14:20;33:3;38:1; 45:7;72:18;126:17; 144:23;174:21 simplify (1) 174:8 simply (42) 9:3;21:11;22:15; 24:4;25:13;28:7;41:6, 9;63:25;67:11,17;68:9, 24;69:6;70:14,17; 71:15;72:12;73:24; 75:20;76:1,10;81:18; 85:22;94:2;103:13; 114:3,5;118:18; 121:15;141:8;143:25; 145:17;146:21;155:18; 169:5,5;170:14,21; 174:15;182:17;185:12 singular (1) 30:3 sit (1) 93:15 Site (77) 3:8;19:22;20:1;40:4, 18;95:1,19,20,24;96:1, 4,5,14;97:9;99:4,14; 102:10;106:1,13; 112:21,23;122:24; 124:20;126:15,22; 127:3,4,11;128:8; 130:18,22,25;131:4,12, 13;132:20;133:8,8,8, 16;134:19,23;137:16; 142:12,20,22;143:5,17, 17,19;144:8;148:16; 149:22;150:6,8,8,9; 159:24;160:7,9,11; 162:12;165:14,25,25; 166:3,6,10,14;167:12; 171:17,23;172:4,7,9, 10;177:5 sites (2) 14:14;129:11 sitting (2) 24:9;92:22 situation (5) 74:12;97:18,21;98:1; 178:14 situations (1) 97:1 six (1) 35:23 slash (1) 130:18 slow (1) 52:14	slowly (1) 58:18 small (3) 35:19;116:8;135:21 solution (4) 72:6;162:7,9;164:8 solutions (6) 162:15;163:10,12, 17;168:8,11 somebody (7) 107:14;125:14; 135:12,14;149:9,22; 185:13 somehow (4) 86:9;107:21;112:12; 173:25 someone (2) 63:6;75:3 someplace (3) 86:6;102:1;109:6 sometime (1) 72:24 somewhere (3) 104:8;108:12;114:25 soon (1) 37:15 sorry (10) 19:19;25:20;30:9; 42:19;79:9;84:1;103:2; 119:12;152:22;156:11 sort (14) 14:12;15:9;94:6; 100:12;108:20;111:13; 112:19;121:3;142:18; 143:15;144:10;151:7; 169:13;176:19 sound (2) 90:7;117:6 Sounds (4) 65:7;114:16;115:8; 116:11 space (1) 97:19 spaces (2) 97:8;161:1 speak (6) 7:18;29:3,23;30:6; 46:10;58:18 speaking (3) 91:5;110:1,2 speaks (2) 14:19;29:2 special (2) 160:3;179:7 specific (5) 16:9;58:7;69:19; 93:23;159:20 specifically (4) 25:19;41:23;119:22; 155:14 specifics (1) 15:13 speech (1)
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10:14 spelled (2) 68:20;104:2 spend (1) 117:23 spent (3) 39:11;63:2;118:4 spite (1) 27:11 spoken (1) 63:23 spread (1) 173:24 Spring (1) 34:10 springs (1) 21:9 staff (15) 22:2;28:8;29:12; 38:8;70:2;19;74:24; 109:11;16;111:3,16; 112:15;125:9;160:5; 163:18 staffs (1) 109:13 staff's (1) 71:2 Stallone (1) 149:6 stamp (1) 185:13 standalone (3) 56:19;142:7;155:23 standard (5) 22:1;24:17;64:18; 121:3;148:3 standards (26) 31:11;33:5;35:10,15; 37:14;40:3;86:9,12; 99:6,15;100:15; 102:12;103:5,24; 105:9;106:3,4,11; 120:9;135:5;142:13, 23;147:15;148:20; 160:10;176:25 start (11) 60:8,20,21;86:17; 87:3;111:19;113:4; 117:7,18;118:14;124:9 started (6) 14:20;53:24;59:24; 71:13;78:17;88:17 starting (4) 5:4;39:21;71:22; 94:9 starts (4) 35:2,3;98:10,16 State (6) 12:16;13:1;57:5,9; 171:9,14 statement (10) 37:15,18,20,22;38:1; 52:20;96:10,23;131:6;	144:23 statement's (1) 37:16 states (3) 35:9,19,20 stating (2) 173:7;176:20 status (1) 12:1 statute (1) 5:25 step (3) 28:15;113:23;124:7 Stewart (128) 2:13,14;3:13,14; 10:22,23;26:13,16; 27:20;31:13,14;33:11, 16;38:13,15,19;42:15, 17;43:16,20;44:25; 45:2,18,19;47:2,4; 48:12;49:3,18,20,24; 50:4,8,12,22;51:13,16, 22;52:4,8;54:20;55:1, 12,20;56:11,12;57:7; 64:2,4,10;65:20,21; 68:11,12;73:3,5;75:14, 15;81:25;83:23;84:3,8, 9,18,22,23;89:10,16, 20;91:24,25;92:11,12; 94:6,16;96:6;98:20; 99:11;101:7,9,13; 104:14,20;108:1; 109:21;110:9,19; 111:8,23,25;112:6,16; 115:5,9,11,17;120:17; 123:13;126:13,22; 129:5,12;130:21; 131:1;132:4,10,14,21; 133:2;134:13;135:17; 136:11;138:4;140:1,6; 152:23;153:13;157:4; 158:19;159:4;171:9; 172:14;174:17;183:1; 184:21,22;185:3,4 stick (2) 109:1;117:5 sticking (1) 161:7 still (11) 12:25;73:22;77:20; 78:12;79:10;123:13, 18;150:7;153:13; 157:21;186:15 stood (3) 15:7;66:18;150:16 stop (1) 179:20 stopping (1) 96:17 store (1) 97:13 straightforward (1) 14:8	streamline (1) 141:7 strict (7) 143:6,11;148:6; 151:10;152:9,25; 153:25 strictly (6) 17:14;39:13;126:3; 149:19,19;151:7 striking (1) 35:5 strong (1) 11:1 struck (3) 23:5;73:6;77:19 structure (6) 40:1,2,16,17;95:5; 151:4 structures (1) 95:2 struggle (1) 25:24 stuck (2) 21:12;160:4 stuff (8) 29:4;39:14,14; 129:23,23;177:25; 178:1;180:25 stuffed (1) 36:9 subissues (1) 176:21 subject (7) 58:14;98:17;119:24; 126:4;169:1,17;174:2 subsection (3) 95:24;99:5;102:11 subsections (1) 153:1 subsequent (1) 143:19 subsidiary (1) 37:25 substance (1) 17:21 substantial (4) 13:15;80:1;81:2; 156:3 substantially (1) 27:4 substantively (3) 110:1,2;184:1 substitute (2) 66:23;71:15 substituting (1) 72:8 sudden (3) 150:12,14,18 suddenly (2) 97:12;182:12 suffice (1) 48:18 sufficient (14)	16:5;18:19;19:18; 32:16;42:11;57:17; 58:21;59:23;61:25; 62:2,3,15;64:6;80:17 suggest (2) 57:5;152:9 summarized (1) 92:6 summary (1) 99:25 summed (1) 91:22 summer (1) 72:20 summing (1) 14:4 Superior (15) 4:5,5,8,12;8:24;9:3, 18;10:12;33:1;42:9; 44:15;45:6;47:10; 71:18;75:9 supplement (2) 66:14,25 supplementation (1) 16:25 supplemented (2) 16:24;66:16 supply (1) 23:16 support (8) 12:16;21:5;27:10,22; 29:24;64:11;91:6; 151:5 supported (6) 16:3;32:14;67:25; 80:1;81:1,7 supposed (5) 105:18;106:2;121:4; 148:4;149:4 sure (32) 3:2;12:24;15:12; 18:7,23;21:3;24:22; 27:9;30:14;34:24; 36:23;37:2;40:22; 42:20;43:7;48:5;54:13; 61:21;67:9;69:4;92:21; 95:6;120:15;122:20; 147:4;152:18,21; 153:3;158:21;160:20; 162:10;176:13 surface (2) 9:2;47:8 surprising (1) 17:25 surrounding (1) 148:15 sworn (1) 12:15	table (5) 24:4,12;28:23;41:24; 75:5 taboo (4) 97:5;125:14;160:20; 161:16 tabs (1) 115:4 tackled (1) 159:13 tail (2) 149:21;150:22 talk (16) 11:6;18:14;38:10; 41:10;69:7;92:4;93:22; 108:11;119:22;120:1; 142:4;143:7;158:21; 163:9,11;169:3 talked (16) 31:21;33:1;34:10; 77:3,4;91:14;102:6; 110:24;117:4;141:13; 143:9;153:19;155:22; 158:19;160:1;163:8 talking (25) 11:21;15:20;20:4; 25:19;38:15;79:11; 99:11,13;100:10; 101:3;111:21;112:4; 115:5,20,23;117:23; 120:18;123:24;124:17; 143:21;155:14,16,17, 18;162:1 talks (3) 38:21,22;108:9 taped (1) 43:9 task (1) 68:3 technicality (1) 64:14 telephone (2) 30:12,13 telling (2) 30:20;170:16 tells (3) 31:4;48:13;143:12 tend (1) 15:14 ten-minute (1) 93:4 term (5) 20:19;34:17;116:6; 121:10;134:17 terms (8) 4:10;18:3;38:16; 72:18;91:18;105:22; 140:12;184:1 terrible (1) 181:10 terribly (1) 67:4 Terrific (1)
		T		
		T200 (1) 99:20		

44:24 test (5) 11:15;14:5,17,25; 79:22 testify (1) 69:3 testimony (7) 27:14;28:18;34:6,7; 45:13;46:19;69:10 tests (1) 13:14 theme (1) 179:16 thereby (1) 8:4 therefore (1) 88:16 thinking (12) 26:21;57:18;73:3; 105:6;107:4;110:22; 147:9;149:3;180:1; 181:7;183:24,25 Third (1) 95:22 though (5) 17:2;32:5;77:17; 84:13;152:8 thought (6) 75:4;78:17;111:7; 149:8;160:17;176:22 thoughts (2) 10:16,22 three (9) 6:6;56:16;65:25; 92:16;122:2;165:11; 183:17,17,18 three-quarters (1) 36:8 throwing (2) 41:9;64:24 thus (1) 70:20 Tie (1) 79:3 tied (2) 32:23;67:22 tie-in (1) 101:8 ties (2) 104:19,20 times (2) 91:14;141:13 tinkered (1) 16:23 tinkering (2) 63:9;67:5 title (2) 150:11;170:2 together (8) 67:22;80:10;105:16, 20;107:3;180:2,7; 182:12 told (4)	32:2;136:17;163:17; 173:3 tomorrow (16) 43:15;177:16; 178:10,18,24;179:8,25; 180:3;181:5,10; 182:16,17;185:10,12; 186:5,12 tonight (10) 2:19,24;3:4;4:11; 41:25;43:13;177:14; 178:25;185:9;186:19 took (7) 9:10;21:19;35:6; 46:22;93:11;121:11; 123:23 top (5) 52:19;60:20,22; 117:7;127:20 torpedoes (1) 73:24 total (1) 93:15 totally (4) 19:18;92:22;146:16; 160:21 Towards (15) 6:9;9:14;18:13; 34:18;39:11;40:2; 137:15;145:1,9,11,12; 146:8,11;152:20;153:4 town (1) 129:20 track (2) 50:3;79:10 traffic (3) 14:15;30:1;134:22 transcribing (1) 43:10 transcript (10) 9:5;20:14;23:8;25:6; 31:20;54:5;112:1,2; 125:9;158:11 treated (2) 110:22;112:15 treating (1) 159:6 trial (1) 13:13 triangle (1) 133:9 triangles (2) 133:17;134:23 tribunal (1) 79:25 tried (2) 11:3;12:7 triggered (2) 100:25;161:25 triggers (1) 126:15 trouble (1) 54:11	troubles (2) 14:13;34:22 troubling (5) 14:18;15:6;37:13; 40:20;164:18 true (11) 40:14;58:9,11;96:22; 106:25;132:13;135:10; 145:8;146:7,15;152:18 truly (2) 15:16;73:8 trusty (1) 36:1 try (10) 37:10;50:16;60:7,19; 68:13;71:3;158:24; 163:3;174:10;178:20 trying (15) 16:13;29:16,18;40:3; 47:6;52:15;54:3;71:1; 113:22,23;129:13; 151:2;164:7;177:18; 180:12 TUCKER (275) 43:5;47:11,14;50:9, 17;51:10,14;52:3,6; 53:15;55:7;57:8;59:12; 64:12,13,16;76:4,7,12; 78:1,5,10,15,19;79:2,5, 9;80:5,16,20;81:1,7; 82:6,24;83:16,21,25; 86:6,13;87:7,12,19,21, 24;88:3,9,12,17,25; 89:12,21,24;90:2,8,24; 92:5;95:10;99:10,17, 20;100:3,17,24;101:2, 5,10,24;102:7,18,21, 23;103:1,15,18,23; 104:9,12,22;105:1,5, 14,21;106:7,17,24; 107:1,12,20;108:13,16, 19;109:3;111:10,17, 20;112:2,10,18;113:6, 9,12;114:10,21;115:1, 7,22;116:1,3,14,18,24; 117:14;118:2,21; 120:24;121:9,18; 122:4;123:22;125:11; 126:19,24;127:8,14,18; 128:4,7,13,17,21; 130:5,11,24;131:3,7,9, 20,23;133:12,15;134:3, 11,15;135:19;136:12; 137:21;138:16,20,24; 139:4,7,11,15,20; 140:17,20,22;141:2,11, 16,22;142:8,15;143:1; 144:2;145:14;147:1,3, 9;149:1;153:12,17,22; 154:1,6,12,16,19,23; 155:2,6,25;156:5,9,13, 15,20,24;157:3,8,13, 25;158:3,7,11,17,21;	159:11,16,23;160:15, 19,25;161:6,13,21; 162:5,19,22;163:1,7, 15,23;165:9;166:5,9, 20,25;167:8,15,25; 168:3,7,10,15,21; 169:11,22;170:5,19,24; 171:3,13,20;172:6,17, 22;173:12,16,22;174:9, 13,23;175:7,20;176:4, 10,14,18;177:4,8,11, 14,17;178:11,15,18,25; 179:3;180:10,14,20; 181:7,14,21;182:3,19, 21,23;183:23;184:12; 185:15,18,25;186:7 turn (4) 5:23;75:19;94:13; 123:11 turned (2) 25:15;36:12 twice (1) 29:17 two (48) 6:5;8:10;10:15;17:5, 6;27:2,21;30:21;32:19, 24;36:19;42:6;43:24; 44:4;47:15;48:2,17; 55:14;62:8;67:21;69:4, 14,21;72:2;76:6;77:8, 19;78:2;89:16;91:13; 93:3;94:5;95:7;105:16, 25;107:5;119:22; 120:2;122:1;123:24; 142:12,19,19;143:2; 149:17;159:5,8;165:23 two-step (1) 75:25 two-thirds (1) 28:22 type (1) 55:15 typical (2) 22:13;24:13 U ultimate (8) 79:21,24;80:14,24; 81:6;82:2,20;83:14 unable (1) 80:2 unbiased (1) 12:9 under (34) 6:7;21:12;31:6,6; 35:8;39:7,8;95:24; 99:4;101:2;102:10; 104:9,10,13,14;108:14; 114:13;116:15,16,18; 128:8;135:3,5;141:23; 142:3,17;144:6; 147:21;150:10,15,17;	165:14;167:13;184:4 underpinning (1) 35:21 understandable (1) 138:10 understood (5) 30:14;57:13;67:24; 69:4;127:24 undo (1) 149:23 undoes (1) 149:10 undue (1) 148:9 unfair (3) 6:24;74:16,17 unquote (1) 35:14 unrealistic (1) 181:22 unusual (5) 22:9;24:1,14;26:2; 73:22 up (44) 11:10;14:4;25:11,12; 26:18;29:8;30:11; 31:17;32:6;35:1,6,3;15; 64:18;66:22;69:16; 72:25;73:13;75:20; 76:9;77:21;79:13; 81:11;91:22;93:1,18, 20;99:23;111:11; 117:2;119:5;120:25; 121:7;130:7;133:20; 135:12;141:12;145:15; 147:24;158:24;159:10, 22;162:20;167:9; 168:22;178:19 upgrade (1) 135:25 upgrading (1) 133:10 upon (6) 33:4;56:24;94:12; 140:19,20;166:21 upstairs (1) 130:8 urged (1) 36:24 urgent (1) 172:25 use (9) 19:6;24:19;34:18; 39:24;134:17;136:14; 170:2,11;175:5 used (7) 45:21;50:5;64:23; 116:6;125:14;129:19; 138:7 useful (3) 4:9,22;95:2 uses (2) 95:1;132:6
--	---	---	--	--

using (3) 68:18;123:14;148:24	23,24;65:16;69:16; 84:16,17;91:19;92:1,4	what's (12) 29:25;33:22;37:13; 73:3;81:25;105:3; 109:9;125:4;131:15; 170:23;176:22;178:13	160:12,15,16,21;161:3; 165:2,13;166:23; 167:11,21;177:16,19; 178:16;179:23;182:7, 14	78:25;82:17;83:9; 85:13;86:25;88:21; 90:18;91:8,11,17; 92:19;93:14;97:3,6,16, 21,24;112:14;114:7; 117:20;126:5,7; 131:20,23;132:1; 134:6;135:4,6;137:12, 19;138:6,11;143:13; 150:4;153:8;157:14; 164:9,12,14,14;168:24; 169:6,15;171:24
usual (2) 23:17,18	voted (2) 23:12;27:12	wherever (3) 58:6,8;117:17	worked (5) 28:16;55:3;76:22; 129:19;177:25	117:20;126:5,7; 131:20,23;132:1; 134:6;135:4,6;137:12, 19;138:6,11;143:13; 150:4;153:8;157:14; 164:9,12,14,14;168:24; 169:6,15;171:24
usually (4) 54:6;177:22;178:3,7	votes (1) 7:9	whole (28) 15:18;22:11;24:8,8; 32:4;33:23;34:20;38:9; 54:10;66:8;71:13; 94:21;106:13;117:23; 130:17,20,21,23,24; 131:4,11;147:25; 149:10;162:8,13; 164:1;165:24;166:2	working (5) 3:16,17;75:4;177:18; 180:4	Zoning's (2) 57:21;131:16
V	voting (5) 27:13;57:10;58:1; 64:1,11	Who's (3) 90:25;164:2,7	works (2) 75:1;151:16	0
vagaries (1) 74:21	W	widest (1) 173:23	world (1) 120:16	00 (1) 83:25
valiant (1) 71:2	wag (2) 149:21;150:22	William (1) 1:22	worried (1) 182:4	029 (2) 83:25;84:2
valid (2) 109:5;130:3	Wait (3) 50:4;51:19;130:5	wing (2) 134:18,20	worry (4) 53:2;117:22;180:16, 22	1
value (1) 63:5	waiting (3) 52:11,14;54:7	wipe (2) 136:16,16	worth (2) 122:20;123:8	1 (9) 1:12,14;19:16; 118:19;126:1;158:2; 165:12;176:13;184:9
vantage (1) 8:8	walk (1) 70:8	wiped (1) 164:19	Wow (1) 179:2	1.35.010 (1) 12:15
various (2) 5:9;64:22	walked (1) 70:14	wish (8) 2:21;38:14;55:25; 62:20;64:2;75:13; 85:14;93:13	write (6) 50:10;52:15;124:18; 125:17;127:21;131:10	1:00 (3) 179:9,16,23
vehicular (1) 120:11	walkway (2) 18:11,20	within (4) 40:15;128:3,12; 163:25	writing (2) 51:8;52:14	10 (56) 6:20;35:16;37:22; 38:22;39:3,5,9,25; 40:21;103:6,8,9;108:9, 11,16;120:1,4;123:14, 18;128:25;129:2,7,21; 130:16;131:10,19; 132:3,5,16;133:3,22; 134:10,16;135:23,24; 136:5,8,16,25;137:3,5, 18,22;138:12,18,21; 139:21,24;140:14,18; 148:1;165:23;166:1, 11,15,20
verb (1) 155:23	wallowing (1) 71:1	without (7) 6:21;19:8;31:2; 52:25;62:8;135:3; 170:5	wrong (11) 11:15;22:11;36:21; 53:10;81:25;110:2,6,8, 11,13;117:24	10,000 (1) 28:15
verbiage (1) 174:16	wants (2) 114:17;179:4	woefully (1) 37:5	wrongly (1) 22:6	100 (4) 86:13;101:9,10,13
verifying (1) 144:10	way (55) 5:18;6:10;16:16; 18:19;20:5;21:17;22:1, 9,13;23:19;24:13,17; 29:15;46:1;47:2,14,15, 21;53:20;54:2,24;57:9; 65:10;67:3;73:12,13; 74:6;75:1,23;76:8; 82:1;85:12,12;87:4; 94:9;97:10;107:23; 109:1,14;110:12; 113:25;114:5;118:15; 127:7;136:19,20; 138:7;141:8;151:16, 24;152:4,24;153:16; 175:2;176:20	word (3) 125:14;172:21,23	Y	11 (1) 20:13
versa (2) 97:1;160:16	ways (2) 5:19;163:2	worded (1) 152:4	year (1) 9:6	11th (5) 20:9,17;21:19;23:9; 25:9
versus (2) 13:1,6	weak (1) 29:6	wording (3) 72:16;81:11;122:3	years (3) 71:14;72:2;74:11	12:00 (3) 179:9,15,23
vice (2) 96:25;160:16	Weaver (6) 39:18;41:5;102:3; 107:8;139:14;140:8	words (16) 6:6;7:4;43:10;51:11; 61:19,20,25;62:8; 64:21;65:12;67:22; 75:24;77:19;84:13; 97:4;126:17	Yep (1) 182:22	130 (4) 35:24;119:12; 141:10;147:12
view (9) 23:4;35:6;36:18,22; 41:7;63:23;85:11,16; 140:1	Weaver's (3) 40:5;101:17;118:19	wordsmith (2) 80:10;90:12	Z	130A (4) 59:5;61:1;119:11; 141:6
viewed (1) 40:24	weeds (1) 11:22	work (43) 14:24;21:17;26:20; 39:13,25;70:10;86:7; 89:20;96:14,16,24,25, 25;97:14;119:24; 125:3;126:6,20,20,25; 127:10,23,25;141:1; 144:5,13;148:8;	zero (4) 65:25;83:23;84:4; 92:16	
viewing (1) 46:25	week (1) 179:1		ZONING (91) 1:7;3:5;4:3,6;7:8,15, 21;8:5,11,18;9:1,6,22; 12:11;18:24;19:25; 20:8,10,20;21:2;27:7, 24;36:22;38:4;39:8,20; 41:1,15;42:8,23;44:13; 47:8;49:11;58:19; 59:21;60:24;62:13; 66:2,8,10,18,24;67:12, 18;70:18;71:16;77:23;	
views (2) 37:7;68:7	welcome (2) 30:18;179:20			
violate (2) 171:17,23	well-crafted (1) 33:19			
virtually (6) 16:20;17:1,21;21:8; 23:11;28:25	weren't (1) 133:17			
vision (1) 151:19				
VOA (2) 130:12,14				
voice (3) 8:3,15,20				
voiced (1) 37:7				
VOLUME (1) 1:14				
vote (17) 23:21;24:10,15,25; 25:16;26:4,56:7;57:10,				

134 (1) 25:24	21.30.090B (4) 115:6,17,25;118:16	104:10,13;141:23; 144:7,7,14;170:17; 177:4;180:17;181:9, 16;182:5;185:21; 186:6,13	9 9 (7) 4:13,13;5:23;6:10; 47:19;52:5,7 927 (1) 79:17 933 (1) 79:17
14th (1) 11:19	21.30.095 (2) 66:6;85:25	4:00 (2) 181:17;182:6	
17 (1) 47:18	21.30.100 (1) 87:4	406 (1) 13:7	
18 (1) 52:19	21.50.200 (2) 101:8;150:4	41 (3) 40:7,9,9	
186 (1) 1:12	21.50.320 (18) 35:11;42:13;43:2; 60:6,12;62:17;99:6; 102:12,16,20;103:5; 105:9;119:8,9;142:21; 143:6;147:16;168:13	5	
1963 (1) 13:8	21.55 (1) 60:4	5 (10) 5:3,4;19:16;102:8,9, 23;103:1;105:12; 155:23;156:1	
1979 (1) 13:3	21.55.100 (1) 98:22	5:30 (7) 181:6,9;182:17,21; 185:10;186:5,12	
1981 (1) 79:17	21.55.130 (24) 12:10;35:9,19;40:21; 42:13;43:2;58:23;59:1; 121:22;124:5;126:12; 142:21;143:11;144:6; 147:21;153:7,18; 155:7;156:2;157:9; 167:1,24,25;168:13	50 (4) 60:1,5,5;125:21	
2	21.55.130A (5) 60:3,12;62:16;94:11; 130:15	50.130 (1) 25:19	
2 (10) 10:21;118:20; 120:12;124:3;126:2; 142:11,18;143:25; 176:16,20	21.55.130G (1) 147:10	50.320 (6) 31:1,7;32:21;33:6; 41:23;67:20	
20 (1) 4:14	21.55.320 (1) 59:9	55 (2) 60:1,2	
200 (1) 135:3	26 (1) 2:5	55.130 (6) 25:19;31:6;33:6; 35:6;155:15;156:17	
2001 (11) 12:3;94:25;130:13; 131:2;132:7,18; 149:16;154:25;155:12; 157:18;167:6	29 (3) 35:2,7;39:21	55.130A (4) 30:24;32:21;41:23; 67:20	
2009 (12) 39:23;101:17;102:2; 104:13,14;108:3; 109:16;118:20;121:1; 123:25;124:3;159:13	296 (1) 20:7	6	
2014 (7) 7:20;16:21,25;17:3; 21:9;27:3;66:15	2nd (1) 101:17	6 (3) 102:22;103:4;108:14	
2015 (4) 4:1;10:21;71:25; 169:17	3	603 (1) 13:2	
2016 (9) 16:16;17:6,20;20:9; 27:3,7;39:2;41:14; 66:25	3 (7) 18:8,8;104:7;120:3, 14;176:17,19	628 (1) 79:17	
2016-0023 (1) 3:6	3.60.065 (1) 12:19	7	
2016-0029 (1) 83:17	31 (1) 39:22	7 (5) 105:6;106:9;144:7, 13;184:9	
2016-029 (4) 3:6;10:7;42:2; 168:25	320 (11) 61:2;105:15,18; 106:3,4,11;119:11; 135:16,21;147:14; 148:23	8	
2016-1 (3) 3:5,24;93:9	378 (1) 13:7	8 (5) 12:3;16:16;20:7; 94:25;174:12	
2017 (2) 2:5;72:1	4	889 (1) 13:2	
21 (2) 59:25;170:2	4 (18) 1:14;19:5;102:7;	8th (7) 20:11,21;22:19; 154:24;155:12;157:18; 167:6	
21.10.304 (3) 15:24;64:18;79:12			