

VILLAGE OF MARVIN
Board of Adjustments Appeal Hearing
Thursday, October 9, 2008

RE: #08-10544; and #08-10552
(Quasi judicial)

MINUTES
Beginning at 8:03 p.m.

Held at:

Banks Presbyterian Church
10012 New Town Road
Marvin, North Carolina

Board of Adjustment
members:

John Baresich, Chair
Mike Farley, Vice Chair
David Humphries
Jim Siwik
John Bay

For the Board of
Adjustment:

William Brown, Esq.
Melody Graham, Clerk

For the Village of
Marvin:

Bobby Sullivan, Esq.
Parker, Poe, Adams & Bernstein
401 South Tryon Street, Ste. 3000
Charlotte, North Carolina 28202

Bill Duston, Interim Village
Planner

For the Appellant,
Robert Epps:

(Pro se)

For the Parks, Greenways
& Recreation Board:

J. Neil Robinson, Esq.
1125 East Morehead St, Ste. 207
Charlotte, NC 28204

Ray Williams, Chairman, PGR Board

Reported by:

Sally W. Lowrance, CVR

1 PROCEEDINGS

2 (at 8:03 p.m.)

3 MR. BARESICH: My name is John Baresich. I am the chairman
4 here at the Board of Adjustment, and we are here for a
5 special meeting of the Board of Adjustment on October 9,
6 2008 and the time is 8:03 p.m. The first thing I'd like
7 to do is determine that we do have a quorum here. And
8 given that the fact that myself, John Baresich, David
9 Humphries, Mike Farley, John Bay, and Jim Siwik are here,
10 I do determine that we do have a quorum here. So with
11 that, I'd like to move ahead and see if anybody would like
12 to look over the agenda and move for the adoption of the
13 agenda.

14 MR. SIWIK: I move the agenda be adopted.

15 MR. HUMPHRIES: I second that motion.

16 (The Board had a unanimous show of hands.)

17 MR. BARESICH: The motion passes. The next order of business
18 is we are here to hear a hearing of consolidated cases,
19 number 08-10544 and number 08-10552 regarding two parties
20 appealing the same decision of the zoning administrator.
21 And I'd like to move forward with that. The first thing
22 that we do is open the hearing, and if we would, if there
23 are going to be any witnesses that would like to be heard
24 tonight we'd like them to all come up at this time to be
25 sworn in.

1 (Mr. Brown swears in Ms. Whalen, Mr. Epps,
2 Mr. Duston, and Mr. Williams.)

3 MR. BARESICH: And if I could just for clarification, the
4 folks that were just sworn in, if you'd just state your
5 name here.

6 MR. EPPS: I'm Robert Epps, 517 Pacer Lane, Marvin, in Marvin
7 Estates.

8 MS. WHALEN: Anna Whalen, senior planner for the Village of
9 Marvin.

10 MR. DUSTON: I'm Bill Duston, the interim zoning
11 administrator.

12 MR. WILLIAMS: Raymond Williams, Chairman of Parks, Greenways,
13 and Recreation advisory board.

14 MR. BARESICH: Thank you very much. The next order of
15 business in terms of the hearing itself is we'd like to
16 get the testimony from the staff regarding the case here,
17 so if you would like to call your first witness.

18 MR. BROWN: Mr. Chairman, I've talked with the various parties
19 and I think the desire is for the Village to go last and
20 let the appellants make their case at first. I believe
21 Mr. Williams would desire -- there are two separate
22 appeals, as you know, in the consolidated appeal hearing.
23 He is going to present his testimony first and Mr. Epps I
24 think will go second, and then once you've concluded any
25 questions you have of them or any cross-examining we can

1 do that.

2 MR. BARESICH: Okay. And both parties have agreed to this
3 previously?

4 MR. WILLIAMS: We have.

5 MR. ROBINSON: Yes.

6 MR. BARESICH: Thank you. Please go ahead.

7 MR. ROBINSON: Thank you, Mr. Chairman. My name is Attorney
8 Neil Robinson, and it is my pleasure to be here on behalf
9 of the Village of Marvin Parks and Recreation's advisory
10 board. What I would like to do is take a few minutes at
11 the beginning here to outline why we are here and what the
12 issue is that you are here to decide, and give you an
13 outline of what our presentation and case is, which for
14 the most part will be presented by Mr. Williams, the
15 chairman of the Parks and Greenways board. But I think it
16 is helpful for context to discuss first why we are here
17 and then hear what we have to say about that.

18 We are in the unusual position of having to come
19 before this board to request you to set aside an erroneous
20 and void a decision of the Town planner. And the reason
21 that we, the Parks and Recreation advisory board, are here
22 is because that void decision detrimentally affects us,
23 the advisory board, just as much as it does the landowner
24 in question, Mr. Robert Epps. Specifically, the void
25 decision that was ultimately sent out destroys a critical

1 link in the entire Greenway system and therefore
2 substantially and detrimentally impacts the Greenway
3 system as a whole. If I could just briefly point out to
4 the portion of the Greenway we are talking about, this
5 portion right here (indicating) is 1700 feet of this
6 Greenway loop here, and it is a critical hook-up with this
7 loop here. And without this 1700 feet that Mr. Epps has
8 agreed to grant an easement on, this entire trail here is
9 just a dead end unto itself and a dead end as far as the
10 entire Greenway goes well, so that if this part of the
11 Greenway is taken out of the equation you can see how it
12 substantially affects with great detriment the entire
13 Greenway system. So this is Mr. Epps' property here to
14 the right of the easement that he is willing to grant, and
15 these are the two parcels on which he proposes to develop
16 the Elysian Fields equestrian development.

17 Our presence here is a bit unusual in that in some
18 sense we may be viewed as arguing the landowner's case,
19 which we in fact are, and that is precisely because the
20 interests of the Greenway, the Parks and Greenway board,
21 and Mr. Epps, and indeed the Village itself are identical
22 in this case. Now, the decision we are here on tonight is
23 the decision that was ultimately issued by Mr. Duston, who
24 was then the Town planner denying Mr. Epps what is called
25 common law vested rights in his planned development of

1 Elysian Fields equestrian development. It is crucial
2 right off the bat to understand that Mr. Duston actually
3 decided this issue twice. The first time he decided to
4 grant common law vested rights to Mr. Epps, and that
5 decision was reflected in his letter of June 23, 2008,
6 which he drafted the same day he drafted the letter to the
7 advisory board granting them vested rights as well.

8 MR. BARESICH: Has that letter been entered into evidence or
9 do you plan to?

10 MR. SIWIK: I don't have it.

11 MR. ROBINSON: No. Mr. Williams will have all of that
12 evidence. I'm just giving you an outline right now. And
13 that decision that I just referenced granting Mr. Epps'
14 vested rights was reflected in the June 23 letter that he
15 drafted granting those rights. Unfortunately, however,
16 after that decision was made a member of the Village
17 council, specifically Terri Patton, interjected herself
18 into this process, which interjection was outside of the
19 Rules and therefore extralegal or illegal. And by her
20 intervention in her supplying materials to Mr. Duston
21 changed his decision from what he had reached by June 23,
22 changed that to a denial of common law vested rights to
23 Mr. Epps. And as I said, Mr. Duston had already made the
24 decision to grant vested rights to Mr. Epps.

25 We will show here tonight that the sole person who

1 was empowered to make the decision, Mr. Duston, made the
2 correct decision initially granting Mr. Epps the vested
3 rights, and that decision was subverted by the extralegal
4 or illegal intervention of council member Patton.

5 Now, let's talk for a minute about what are common
6 law vested rights. Common law vested rights as the name
7 implies, common law, is a case law or judge-made legal
8 doctrine that holds that when a landowner is developing
9 his property he or she can continue to develop the
10 property and despite a change in a zoning ordinance if
11 four tests are met. And the four tests are set out in the
12 appellate decisions in North Carolina, and I've got one
13 here that by will hand you in a moment, but the elements
14 are these. There are four elements to common law vested
15 rights.

16 The first one is the landowner made expenditures on
17 the project prior to the amendment of a zoning ordinance.
18 And that first element is very important because as we
19 will see a little bit, the dates in this matter are very
20 critical, and it's important to keep one's eye on the ball
21 of the first element being the landowner made expenditures
22 on the project prior to an amendment of the zoning
23 ordinance, not a change in other bodies' Rules but an
24 amendment of the zoning ordinance here in Marvin. The
25 second element is that the expenditures were made in good

1 faith. The third element is the expenditures were made in
2 reliance on the issuance of a government approval, such as
3 a building permit or in this case the approval of a sketch
4 plan. And the fourth element is that the amended zoning
5 ordinance must harm the landowner in some way.

6 And I've got to hand out now a North Carolina Court
7 of Appeals decision. It's Lambeth versus Town of Kure
8 Beach and Kure Beach Board of Adjustment. It's a 2003
9 Opinion. And the reason I picked this Opinion was because
10 it was fairly recent and it clearly and cleanly sets out
11 the legal elements of common law vested rights.

12 MR. BARESICH: Could you first please hand a copy to the clerk
13 so that it can be entered as Exhibit 1.

14 MR. ROBINSON: Yes. (Complies.) And as you can see from that
15 Decision I just handed you, the four elements are clearly
16 set out as I just stated. And again, the number one
17 element of amendment to a zoning ordinance is usually
18 important because as we'll see, that's where Ms. Patton
19 got the train off the track of her lack of knowledge of
20 the legal requirements are.

21 Another critical date and event in this process is
22 that the Village of Marvin received a letter from the
23 Department of Water Quality, or DWQ, dated March 17, 2008
24 that advised that DWQ was imposing 200 foot buffers in the
25 Six Mile Creek basin. There was at that time and still is

1 no Marvin ordinance requiring 200 foot buffers but rather
2 100 foot buffers, which is what Mr. Epps had always
3 contemplated and planned on. And on March 17, 2008 the
4 Village received a letter from DWQ stating that it was
5 mandating 200 foot buffers. And so that March 17, 2008
6 date can effectively be viewed as the amendment to the
7 March ordinance at that point, or perhaps a day or so
8 later, because presumably the letter got to Marvin a day
9 or so after it was dated.

10 So the sequence of events which there will be more
11 detail of those in our presentation but I just want to hit
12 a few highlights of the sequence of events. And the first
13 one is Mr. Epps obtained his sketch plan approval on
14 January 15, 2008, which was a good two months before
15 March 17, 2008. And that approval was granted by Village
16 council in a unanimous vote, approving his plan as
17 submitted with the 100 foot buffers. As Mr. Duston refers
18 to in his letters concerning common law vested rights,
19 which we'll get to, he references the March 17, 2008
20 letter advising of the 200 foot buffers.

21 Sometime after March of 2008, Mr. Epps found out
22 about this new requirement via vis-a-vis the March 18,
23 2008 letter, and he filed a petition with the Village of
24 Marvin for the granting of vested rights to be
25 grandfathered from the new, 200 foot buffer effective in

1 March. And the same day, the advisory board, the Greenway
2 advisory board, filed their petition for vested rights as
3 well.

4 The next thing that happens, on June 23, 2008,
5 Mr. Duston drafts the letter granting Mr. Epps common law
6 vested rights and sends that letter to Attorney Anthony
7 Fox simply for approval of the verbiage of the letter. I
8 think it's going to be crystal clear that Mr. Duston is
9 the only person empowered to make the decision on vested
10 rights, not Attorney Fox or anybody else, and he simply
11 submitted that letter to Attorney Fox for approval of the
12 verbiage he used. Unfortunately, due to the intervening
13 July 4 holiday, that letter sat on Attorney Fox's desk for
14 some several weeks. And also unfortunately, in a July 8,
15 2008 Village council meeting, the issue of vested rights
16 to Mr. Epps and to the Greenway was brought up at that
17 council meeting.

18 And under questioning from Ms. Patton, and we have
19 the transcript here and the tape as well, Mr. Patton
20 indicated that he was likely going to grant -- I'm sorry,
21 Mr. Duston indicated he was likely going to grant Mr. Epps
22 common law vested rights. In fact, two weeks ago or two
23 and a half weeks ago, he had drafted a letter to that very
24 effect. He had already made his decision. It was
25 evidenced by the letter and under questioning from

1 Ms. Patton he said it looked like that was going to be
2 favorable. As is demonstrated from the transcript of that
3 meeting, Ms. Patton was adverse to the granting of vested
4 rights to Mr. Epps and I think it's fairly clear in that
5 transcript that she is adverse to that. And in that
6 conversation that was had at the Village meeting, she
7 proposes that the operative date be July 1, 2007 instead
8 of March 18, 2008 or March 17, 2008 when the Village
9 received the DWQ letter. And that is because in that
10 letter, DWQ advised that it had been imposing 200 foot
11 buffers effective July 1, 2007. And there's some reading
12 of the letter where you could read it and say that they
13 also said that somebody would have to have common law
14 vested rights prior to July 1, 2007 as well.

15 On that point, first of all, DWQ has absolutely
16 nothing whatsoever to do with the granting of vested
17 rights. As I said earlier, that's a case law judge-made
18 doctrine that is applied by the courts, and in practice it
19 is first applied, as I said earlier, by a town planner, in
20 this case Mr. Duston, and then from there it goes to this
21 board on an appeal and then North Carolina Superior Court
22 for an appeal and then North Carolina Court of Appeals,
23 North Carolina Supreme Court or U.S. Supreme Court, if it
24 got that far. But in nowhere in the process is DWQ
25 involved with determining who has vested rights or what

1 the legal standards are or anything, so to the extent that
2 their March 17 letter could be read to say somebody had to
3 have common law vested rights before July 1, 2007, that's
4 just totally wrong as a matter of law. And they have no
5 more power to say what the law is than anybody else who is
6 not a judge or this board on an appeal.

7 And if you think about it, not only is it wrong
8 legally, but when you think about what they are saying,
9 they being Ms. Patton as she reads the DWQ letter, she is
10 saying that Mr. Epps had to have common law vested rights
11 by July 1, 2007, which is an absolute, illogical
12 possibility because nobody knew that DWQ was changing
13 their rule effective July 1, 2007 until they did it. And
14 so the only way Mr. Epps could have known anything about
15 it was to have read the minds of something that hadn't
16 even happened yet. And he also was completely -- it was
17 completely impossible for him to have done that, which
18 shows the illogic of it, because one of the elements of
19 it, as I mentioned earlier, element 4, is that the amended
20 ordinance is a detriment to the owner.

21 Well, not only did that 200 foot buffer not apply
22 to Mr. Epps on July 1, 2007, but he absolutely had no
23 concern about it at that point because the Village of
24 Marvin was not imposing 200 foot buffers at that point.
25 And in fact, that point came on March 17, 2008. So not

1 only is the date of July 1, 2007 legally wrong but it's
2 like trying to prove a null hypothesis. There is no way
3 that anybody could have gotten vested rights prior to that
4 date. It's a nonsensical argument when you look at it
5 just for a moment.

6 After the Village council meeting of July 8, as I
7 referenced, on July 9 Ms. Patton had a meeting with some
8 members of the Village and Attorney Fox was present as
9 well to discuss Mr. Duston's decision-making authority,
10 and Mr. Fox advised her that that was not an appropriate
11 matter for her to be discussing. She then said, "Well, I
12 want to submit materials to him," and she did two days
13 later on July 11. She submitted to Mr. Duston materials
14 that she contended supported her argument of July 1, 2007.
15 And after the letter had been sitting on Mr. Fox's desk
16 for several weeks and after Councilwoman Patton illegally
17 injected herself into the process, Mr. Duston bowed to
18 that intervention and changed his mind and issued the
19 letter on July 28, 2008, denying Mr. Epps common law
20 vested rights.

21 And again, it is important to keep in mind, as the
22 transcript shows from the testimony at the Village council
23 meeting, when Mr. Duston first made his decision, he took
24 in all the pertinent information and the pertinent dates
25 and got it correct the first time. But unfortunately,

1 when Ms. Patton interjected with her erroneous, legal
2 argument, he either bowed to the pressure from her or
3 bought her argument or both and he changed his mind.

4 Now, I said at the beginning that the decision
5 denying common law vested rights was void. At the very
6 least, it is invalid but more properly it is void. That
7 is because not only is it legally erroneous, the decision
8 denying common law vested rights, but the very
9 intervention of Councilwoman Patton, which was outside the
10 rules, was a violation of due process and that reason
11 alone justifies setting aside the decision that was a
12 direct product of that illegal process. The thrust of
13 what happened is that the process was corrupted.

14 Mr. Epps submitted his materials to Mr. Duston for
15 the application of common law vested rights, and the Rules
16 were that somebody such as a legally-disinterested party
17 such as Ms. Patton cannot then come in and interject
18 herself into the process. If she had material that she
19 contended was relevant to the issue, she should have
20 submitted it to this board or she should not have
21 intervened on Mr. Duston's decision, rather let him make
22 his decision as he was supposed to by himself, and if she
23 didn't like it, she could appeal to this board. But
24 Mr. Epps played by the rules. He submitted his material.
25 As I said, it was granted initially. Then came Patton

1 with her erroneous argument. Then it was denied. But he
2 had no knowledge whatsoever that Councilwoman Patton had
3 injected herself into the decision-making process. He
4 didn't have a chance to rebut her erroneous argument at
5 that time, and that is the second ground of violation of
6 due process on behalf of Mr. Epps.

7 Now, in terms of what we are asking this board to
8 do tonight, we are simply asking for this board to put us
9 back in the position that we were in before the illegal
10 intervention by Ms. Patton, and that is where Mr. Duston
11 was where he granted Mr. Epps common law rights, we are
12 simply asking that the corrupted part of the process, or
13 the cancer part if you will, be cut out and let the
14 original unfettered decision of Mr. Duston stand. And if
15 this board sees fit to grant that relief, then whomever
16 feels aggrieved by that Decision can then appeal it if
17 they have legitimate grounds. But if the intervention had
18 not occurred, we would not be here tonight. And we are
19 here tonight to simply ask you to cut out the violation of
20 due process that happened and restore us to where we were
21 before the intervention occurred and put us back in that
22 status quo.

23 And I want to make just one more point about that.
24 The Greenway was granted common law vested rights on this
25 exact same issue. And the Greenway tomorrow could take

1 Mr. Epps' property and do exactly what he wants to do with
2 it. The absurdity of the situation is that as we stand
3 right now, Mr. Epps is denied that common law right and so
4 the very owner of the property can't do now what the
5 Greenway could do. And I think that absurdity itself
6 points out the aberration in the process of where we are
7 now. And as I said, had the process been allowed to play
8 out legally, we wouldn't be here, but there was the
9 intervention and we have to come here to correct that.
10 Thank you.

11 MR. SULLIVAN: Mr. Chairman, before he puts on this first
12 witness, can I just raise one point just as a --

13 MR. BARESICH: Well, you will have your opportunity to cross-
14 examine.

15 MR. SULLIVAN: I was just talking in the eye toward looking at
16 time, it sounds like they're going to be focusing a lot on
17 putting on information about the nuts and bolts of how
18 Mr. Duston got to his decision. And my understanding of
19 the law, and your attorney can advise you, is that you are
20 going to review that decision of what the law calls
21 de novo which means you're just starting from scratch.
22 And you can hear it, you can make your own decision
23 without any deference to what Mr. Duston said. So he
24 decided that they didn't have vested rights. If they
25 think that's wrong then they can put on evidence to show

1 that they did have vested rights, but the nuts and bolts
2 of how Mr. Duston reached his decision, and we disagree a
3 lot with what Mr. Robinson said is how it happened, I mean
4 it isn't really relevant. The issue is does he have
5 vested rights or not? And just in the interest of, if the
6 Board wants to hear about that time line of how Mr. Duston
7 made his decision, then certainly we'll put on evidence of
8 that as well. But our point is that's not really
9 relevant. The issue is does he satisfy the requirements
10 for vested rights. And if he does or does not, that
11 really kind of solves or settles the issue. So I feel
12 like a lot of what Mr. Robinson forecasts he's going to
13 put evidence on, which is people explaining the process of
14 how Mr. Duston reached his decision, really isn't relevant
15 and I would just suggest that --

16 MR. ROBINSON: Mr. Chairman and Mr. Brown, I would just add
17 that a violation of due process is relevant 100 percent of
18 the time and that is hugely relevant here because as I
19 said earlier, we have two grounds for the decision here.
20 One is it was legally erroneous. But the second ground is
21 the process was corrupted and it was a violation of due
22 process, and that is highly relevant and it always is
23 because it is a constitutional right of every citizen in
24 this country.

25 MR. WILLIAMS: Mr. Chairman --

1 MR. BARESICH: I'm sorry. Let me just deal with my counsel
2 here for a second.

3 MR. BARESICH: We will let the lawyers talk here for a second.

4 MR. BROWN: It seems to me, Mr. Chairman, based on what I have
5 heard so far, one observation is that was a little bit
6 more than a presentation of forecast of what your evidence
7 was. There was a closing argument in there. So we need
8 to try to restrain ourselves and get that evidence in the
9 record before we get the horse out of the chute. I'm
10 hoping that every piece of evidence that you talked about
11 factually gets in the record so that we can substantiate
12 the comments you made. Otherwise, you were testifying and
13 weren't under oath. So let's hope we've got the factual
14 backup to what we've just heard. So one caution for the
15 Board is, that was intended to be a legal forecast of
16 evidence. I don't think you can take anything that
17 counsel has said as true until you actually hear evidence
18 that you're satisfied says what's it's intended to say.

19 MR. ROBINSON: I agree 100 percent. I was just making an
20 opening statement, and in a court of law, an opening
21 statement is not evidence so I didn't intend it to be
22 evidence.

23 MR. BROWN: Secondly, if you have concerns about the areas
24 which you think they are going to begin to present
25 evidence on, you certainly can raise an objection of

1 relevancy. You can raise an objection whenever you think
2 an evidentiary objection is needed. The Board can either
3 act on it or let it in and you can at least preserve your
4 objection for the record. I think we're just going to
5 have to treat the evidence as evidence. I do think the
6 posture that this matter is in, it is an appeal from the
7 determination of the zoning administrator. The applicants
8 have the burden to establish proof to override or reverse
9 that determination. That can be substantive issues, it
10 can conceivably be procedural issues. And we just need to
11 hear what the evidence is, and if counsel has got a
12 particular problem with a piece of evidence, raise your
13 objection and this board will take it.

14 MR. ROBINSON: Yes, sir. And for the record, procedural is
15 due process, just so we're all on the same page on that.

16 MR. BARESICH: Okay. Your next witness?

17 MR. WILLIAMS: Gentlemen, thank you for being here tonight to
18 hear this. It is an extremely important matter I have
19 been working on for something like --

20 MR. SIWIK: Will you, for the record, say who you are, please?

21 MR. WILLIAMS: I'm Raymond Williams. I live at 1408 Waxhaw-
22 Marvin Road, and I'm chairman of the Parks, Greenways, &
23 Recreational Advisory board for the Village of Marvin.

24 MR. BARESICH: Thank you. Please go on.

25 MR. WILLIAMS: As I was saying, I've been working now for

1 approximately five years trying to put in some parks and
2 greenway system for the Village of Marvin. It is received
3 the support of every mayor and council member that I have
4 served, and there have been a number of them. It's an
5 ongoing process. I believe it is very, very important for
6 the future development of Marvin and, indeed, for this
7 region. We're setting an example for many other small
8 municipalities in this area. That statement is just to
9 give you an idea of how important I regard this matter.

10 My colleague talked about the Greenway system, and
11 I just want to emphasize his comments here. The stretch
12 of Greenway we're talking about runs along the border of
13 the Elysian Fields alongside a creek. But there are two
14 other pieces involved in this process, and that is a piece
15 of the Marvin Loop that runs along the northern edge of
16 Elysian Fields and another piece that runs across the
17 personal property, the residence of Marissa and Robert
18 Epps. So we actually talking about three pieces of the
19 Greenway system.

20 Why are these so critical? The Marvin Loop runs
21 around the heart of Marvin, Marvin School Road, Joe Kerr
22 Road, Marvin Road, and New Town Road. When completed, it
23 will be a 3.6 mile paved surface suitable for walking,
24 pushing strollers, and riding bikes. What's so important
25 about this stretch here is that when you look at the map,

1 it is the only piece that runs north-south through the
2 northern part of Marvin where we can build a natural
3 surface trail, suitable for hikers, joggers, and horses.
4 Cast your minds back to the last time you looked at the
5 seal of Marvin, there is a horse on that seal. The
6 equestrian endeavors in this community are very important.
7 So a loss of this stretch here would completely destroy
8 the possibility of that north-south loop and linking to
9 additional trails that will run along Six Mile Creek and
10 eventually to Mecklenburg County. I have two maps that
11 I'd like to pass out to you.

12 MR. BARESICH: Please enter them into evidence with the clerk,
13 please. And if they are two maps, should they be labeled
14 separately, Mr. Brown?

15 MR. BROWN: Yes.

16 MR. WILLIAMS: The first map shows you at the upper extent,
17 the portions of the Greenway that would be on the Epps'
18 property.

19 MS. GRAHAM: This will be Exhibit 2 the Epps' easement.

20 MR. WILLIAMS: And Exhibit 3 is a map showing more of a total
21 Greenway system. It is not -- doesn't include everything,
22 but it is close enough for our consideration tonight. It
23 will give you an opportunity to see where the Epps'
24 easements fit in with the rest of the Greenway system.

25 As you can see, the Epps' property isn't a

1 significant portion. The part along the creek that would
2 be a horse trail or multi-purpose, natural surface trail
3 is about 1700 feet, a third of a mile. There is no other
4 way around that area other than that easement because
5 everything on either side of that property is pretty much
6 built out. The only place we have in the northern part of
7 Marvin to put trails is along the banks of creeks.

8 Now, Marvin's ordinances right now and at the start
9 of this process mandate a 100 foot streamside buffer.
10 That means 100 feet on each side of the street for a total
11 of 200 feet in width. There are limited activities that
12 are allowed to occur within that streamside buffer. It's
13 divided up into three sections with -- I won't go into all
14 those minor details -- but equestrian and hiking trails
15 are part of the uses that are permitted in those buffers.

16 The reason we're here tonight and why the DWQ
17 ruling is so critical is the buffer that they mandate is
18 200 feet. That is 200 feet on each side of the creek for
19 a total of 400 feet. But their mandate is for undisturbed
20 buffers. That means nothing can be touched. It is still
21 open to question as to whether a landowner having property
22 within that buffer would be allowed to mow his grass. We
23 don't know. We don't have an answer to that. But the
24 comments by the representatives of DWQ, when asked, "What
25 is the definition of undisturbed," their answer is that

1 undisturbed means undisturbed. It cannot be touched. In
2 an undisturbed buffer, we can't put a greenway. We can't
3 put a trail. That's why it is so critical to us, and
4 that's why earlier this year, Parks and Greenways board
5 applied for common law vested rights for its parks and
6 greenways plan so that we would not be subjected to the
7 DWQ 200 foot buffer.

8 The next item I have for you -- I guess this will
9 be Exhibit 4 -- and this is a time line of crucial
10 occurrences in this process. And what I would like to do
11 is take you through this time line. Amazingly enough, the
12 time line for this particular situation starts back in
13 2002. In 2002, the federal government and the government
14 of North Carolina developed a system called NPDES,
15 National Pollution Discharge Control System -- no,
16 National Pollution Discharge Elimination System and
17 Stormwater, Phase 2.

18 MR. SULLIVAN: I'm sorry, I've just got to, for the record, to
19 object to this. To the extent that Mr. Williams doesn't
20 establish this information comes from his personal
21 knowledge we just object to anything in here that he
22 doesn't substantiate in his testimony. I just wanted to
23 make that clear.

24 MR. ROBINSON: We would also move that this is an illustrative
25 exhibit and not a substantive exhibit. His testimony is

1 that the evidence. His illustrative exhibit is not
2 anything other than illustrative.

3 MR. BROWN: Mr. Chairman? As I understand your motion, you
4 don't intend this to be submitted for the truth or
5 accuracy or anything else?

6 MR. ROBINSON: Well, I will submit that everything on there is
7 true and accurate, but the document itself was prepared
8 simply as a guideline as to what those matters are.

9 MR. BROWN: Thank you. So just on that point, you can
10 certainly look at this as an overall view, I suppose, but
11 in terms of deciding credibility, reliability,
12 truthfulness, validity, evidence of anything, we're going
13 to have to rely solely on what Mr. Williams's testimony is
14 going to be.

15 MR. WILLIAMS: Mr. Chairman, the purpose of this is that -- as
16 you can see, it is a lengthy document. There are a lot of
17 events. My sole purpose is that when I get through with
18 giving my evidence, you will at least be able to go back
19 and keep it in chronological order. But this is not a
20 document that is going to allow you to make a decision.
21 It's not intended for that. It's so you can keep track of
22 a very convoluted process.

23 MR. BARESICH: Let's get moving.

24 MR. WILLIAMS: Marvin required they must develop a stormwater
25 control system. What that amounts to is putting in place

1 six criteria. One of them is illicit discharge
2 identification and processing. Several are educational.
3 But the final one is stormwater -- postconstruction,
4 stormwater management. What that means is that after a
5 development is completed, there must be in place a plan to
6 deal with stormwater coming from that development. And
7 that plan must have capability of showing how the water is
8 going to be stored in detention ponds, the length of time
9 over which it will be disseminated into the creek, and the
10 whole idea is to minimize the amount of solid matter
11 contained in the water that flows into the creek.

12 Marvin applied for a permit and received the permit
13 on September 12, 2005. So Marvin, from that point, was
14 responsible for controlling the stormwater
15 postconstruction throughout its own municipality.
16 September, 2006 the first sketch plan was discussed by
17 Mr. Epps with then-planner Karen Dunn. 2007, February
18 22nd, three live and three dead heelsplitter mussels were
19 found in Six Mile Creek close to Marvin Road. This took a
20 small army of people 17-and-a-half hours to do but they
21 found it. And hence, here we are today. March 29th, the
22 first engineering approach to Marvin on behalf of Elysian
23 Fields and a month later Karen Dunn resigned. Not, in
24 itself, not a great relevance except as you go through
25 this document, you'll find out eventually that Elysian

1 Fields had to deal with four different planners over this
2 process, every one of them causing delays in the process
3 as each of those planners came up to speed on what was
4 going on in the Village at the time.

5 April 15th -- I beg your pardon, that is an error
6 -- May the 15th of 2007, if you would correct that on your
7 document, Elysian Fields recognized that its original
8 concept, which was for an equestrian subdivision, was not
9 going to fly. The necessary ordinances and text changes
10 that would have been required in Marvin to allow that to
11 take place efficiently had been promised by Karen Dunn but
12 nothing had happened. So Mr. Epps took the only approach
13 left to him at that point, which was to modify his plan
14 slightly and present a buy right, large tract subdivision
15 plan which matched the existing Marvin ordinances. And
16 that he did.

17 June 2007, Jonathon Edwards hired as planner,
18 another change, another set of delays while we bring the
19 planner up to speed and get him to understand the
20 ramifications of everything that is going on in Marvin.

21 July 1, 2007, by the time you leave here tonight,
22 that date is going to be ringing through your heads.
23 There are dates that we remember. For me, September 3rd,
24 1939 start of World War II. As Americans, we remember
25 December 7, 1941. February 19, 1948, another auspicious

1 date in history. September 11, 2001, and finally July 1,
2 2007. Hey, their impact is pretty severe if you are
3 someone living near one of these creeks.

4 DWQ starts to mandate a 200 foot buffer for creeks
5 in the Six Mile basin. There is one problem with that
6 mandate as far as Marvin is concerned. Marvin was still
7 in possession of its stormwater permit. Therefore, DWQ
8 had absolutely no authority to impose any buffers at all
9 within Marvin at that point. The only time that DWQ could
10 start to impose that 200-buffer rule would be if Marvin
11 decided to give up its stormwater permit for some reason.
12 This is a critically important point. So all references
13 to July 1, 2007 being a critical date are irrelevant. It
14 was not a critical date.

15 July 10th -- I don't have it in this particular
16 document -- but on July 10th, a letter was drafted but
17 never sent to DWQ asking that Marvin be exempted from its
18 stormwater permit, ten days after the imposition of 200
19 foot buffers by DWQ. Curious coincidence, July 31st, the
20 Village council votes to ask for exemption from that
21 stormwater permit. So 30 days after DWQ starts to mandate
22 a 200 foot buffer, Marvin suddenly says, "Well, we're
23 going to have 200 foot buffers too by giving up our
24 stormwater permit."

25 One of the problems with this, from a legal point

1 of view, is that at no point was there any public
2 discussion other than a brief item in the Council meeting
3 of giving up that stormwater permit. There was no
4 planning board action. There was no public hearing. It
5 was just something that was done at a council meeting,
6 apparently almost on a whim. The end result of that is at
7 some point, DWQ will start to mandate their 200 foot
8 buffers in Marvin. That constitutes a change in the
9 Marvin zoning ordinances.

10 MR. SULLIVAN: I'm sorry. I have to object again just to the
11 extent that Mr. Williams is making legal arguments. He is
12 here as a fact witness, and he is testifying about things
13 that it's not clear that he has personal knowledge of,
14 which is not allowed. I would argue he needs to keep his
15 testimony to facts and he needs to keep it to things that
16 he is personally aware of, because otherwise it's just
17 speculation or hearsay that he has heard from somewhere
18 else.

19 MR. ROBINSON: I would submit that virtually everything he is
20 saying is on personal knowledge and he is not limited in
21 the manner that opposing counsel suggests.

22 MR. BARESICH: What specific item are you objecting to?

23 MR. SULLIVAN: Well, for example, I think that he suggesting
24 -- making legal arguments in terms of suggesting that the
25 Council did certain things illegally or saying that the

1 July 1, 2001 date has no legal significance, and that's
2 really more of an argument for the lawyers to make. And
3 then in terms of him talking about council meetings, if he
4 was there for these council meetings, if he could just say
5 so just so we're clear that he's talking about things that
6 he personally saw or is aware of just so it's clear that
7 what he's talking about is personal knowledge or what's
8 not.

9 MR. BARESICH: Okay, Mr. Williams, as you go through this, if
10 you would refrain from making particular judgments as to
11 the Council unless they are reflected specifically as your
12 personal beliefs.

13 MR. WILLIAMS: I think everything I've said so far,
14 Mr. Chairman, has been my personal belief.

15 MR. BARESICH: Just make sure that --

16 MR. WILLIAMS: I know of no other way.

17 As a consequence of the Council vote on July 31st,
18 several forms went back and forth and the last that was
19 heard was when Marvin submitted SWU 266, a form required
20 by DWQ that was the final step in Marvin relinquishing its
21 stormwater permit. Nothing else then was heard from DWQ
22 until January 3rd -- I'm sorry, March 3, 2008. So there
23 was no indication given of the completion of this process
24 or the start of DWQ's mandate for buffers.

25 MR. FARLEY: Could I ask you a question, Mr. Williams?

1 MR. WILLIAMS: Sure.

2 MR. FARLEY: How do you know that DWQ did not receive any of
3 this until March?

4 MR. WILLIAMS: I have been, with the help of Ms. Graham and
5 Ms. Whalen, through the documents in their office.

6 MR. FARLEY: Okay. So do you have anything from DWQ stating
7 that that's a fact?

8 MR. WILLIAMS: Do I have anything from them saying that they
9 didn't send anything?

10 MR. FARLEY: That they did not receive it?

11 MR. WILLIAMS: No. I'm not suggesting that they didn't
12 receive it. I'm only suggesting that we did not get a
13 response. We know later on, as everything unfolds, that
14 indeed, yes, they did receive it.

15 MR. FARLEY: Okay. All right. Okay.

16 MR. WILLIAMS: Are you okay, Mr. Farley?

17 MR. FARLEY: Yeah.

18 MR. WILLIAMS: Okay?

19 MR. FARLEY: Okay.

20 MR. WILLIAMS: Moving on to January 15th and the Elysian
21 Fields sketch plan was approved by the Village council. I
22 was at that meeting. It is personal experience and others
23 and I have some of the minutes of that meeting.

24 MR. BROWN: Mr. Williams, have these been certified by the
25 clerk as true and accurate copies of the official minutes

1 of the meeting at this point?

2 MR. WILLIAMS: At this point, no, they have not. They were
3 taken from the minutes on the Town web site, and I'm sure
4 that Ms. Graham could, at some point, certify them.

5 MR. BROWN: Counsel, do you have any thought on that?
6 Evidentiary-wise the statute requires certified copies of
7 official actions. What's your intent?

8 MR. SULLIVAN: We don't have any problem with it. That's
9 fine. Those are the minutes, right? We don't have any
10 objection to that.

11 MR. BARESICH: Okay. Would you please stipulate that the
12 minutes here are not the actual certified minutes but that
13 the opposing counsel understands that?

14 MR. SULLIVAN: Certainly. I will stipulate that they are not
15 certified. I will take Mr. Williams at his word that
16 these are the true minutes and that's fine with me.

17 MR. BARESICH: And I would just ask that they be reviewed.

18 MR. BROWN: Let's just go with the stipulation.

19 MR. SULLIVAN: Okay.

20 MR. WILLIAMS: And you'll see that the items starting on the
21 top of the first page is the discussion of the Elysian
22 Fields sketch plan. It was approved unanimously with all
23 members of the Village council present. And later on in
24 the proceedings, not part of that document, the proposal,
25 the sketch plan, was lauded by the Council members as

1 being something that fitted very, very well with the
2 Marvin land use plan and that was an example of what
3 Marvin was striving to create. On March the 3, 2008 --

4 MR. SULLIVAN: Before we move on, I'm sorry, someone told me
5 that there was a staff report that was part of these
6 minutes concerning this application, and I wonder if we
7 have a copy of that just so we have everything from these
8 minutes that relates to Elysian Fields that will be in the
9 record.

10 MR. WILLIAMS: I think I have that somewhere, Bobby, if you
11 will just bear with me.

12 MR. SULLIVAN: If Mr. Williams can't put his hands on it right
13 now, I'm fine. If he wants to wait until after he's
14 finished, that's fine. I don't want to hold up the show.
15 Just as long as before the hearing is closed, if we can
16 get those in.

17 MR. WILLIAMS: I have the document in question. I only have
18 one copy of it.

19 MR. BARESICH: Is there anything in particular you would like?

20 MR. SULLIVAN: I just want to make sure that as far as Elysian
21 Fields was concerned that everything was in there.

22 MR. BARESICH: It was entered then so that will be Exhibit
23 Number 6.

24 MR. HUMPHRIES: Excuse me, what is this document?

25 MR. WILLIAMS: It is additional information that came from

1 Jonathon Edwards, who was the planner for the Village of
2 Marvin at the time, that was presented to the Council to
3 give them the information necessary to make a decision
4 about the sketch plan approval. So that would typically
5 contain any questions that the planner had about that
6 particular development that he had not been able to deal
7 with and wanted the Council to take up.

8 MR. BROWN: If you look at the first sentence of the minutes
9 that have been handed you, it references this memo and it
10 actually incorporates them by reference, so this actually
11 just completes the minutes. You are welcome to pass it
12 down if you want to look at it or the clerk will have it.

13 MR. BARESICH: No, not unless someone specifically needs to
14 reference it.

15 MR. WILLIAMS: Back on to my time line, March the 3rd of 2008
16 two members of DWQ, Allen Johnson and Mike Randall,
17 visited Marvin at the request of Councilwoman Patton.
18 There was a tour made of four sites within the Marvin
19 area. Three of them were in Marvin, one was in
20 unincorporated Union County. And during this tour,
21 Mr. Mike Randall made mention of the 200 foot buffers.
22 This caused a great deal of consternation amongst some of
23 the people who were there. I was amongst them. I was
24 personally very upset because his statements rendered all
25 of our planning for Greenways in the northern part of

1 Marvin absolutely useless because the only place to put
2 Greenways there, because of the state of development is
3 along the creek, and Mr. Randall words to me were, "You
4 can't build anything next to a creek within 200 feet of
5 it."

6 On March the 17th, as a direct result of the March
7 the 3rd visit, we received -- the Village of Marvin
8 received a letter from Mike Randall defining DWQ's
9 postconstruction stormwater management and the buffer
10 requirements. And I have for you copies of that letter.
11 And also, to go with that, I have an abstract from the
12 Village of Marvin zoning ordinance on their stream buffer
13 requirements.

14 MR. BROWN: So the DWQ letter will be Exhibit 7 and the zoning
15 ordinance extract will be Number 8.

16 MR. BAY: Mr. Williams, before you get started, I've got to
17 ask you a question. Is now an appropriate time to talk
18 about a possible conflict? Is it a little too late or --
19 I mean, I just want the Board to understand where I
20 reside.

21 MR. BROWN: I think if you feel you've got something to
22 disclose --

23 MR. BAY: I just want to be sure that we're open. I mean,
24 this trail we're talking about that is impacted, even
25 though I'm just learning about this here, but where I live

1 will back up to the section that Mr. Williams talks about
2 where it cuts through is, I guess kind of runs through my
3 back yard or near my area. So I mean, it's not something
4 I'm concerned about by any means, but I do want you guys
5 to know that technically I live on Groves Edge Lane, which
6 I can point out here. This is Groves Edge (indicating)
7 and I can't show you where my house is, quite frankly, but
8 it's one of these blocks here.

9 MR. BARESICH: And so is the Board to understand that while
10 you do want to make sure that that is known, that you
11 stated that you feel that you can continue to be impartial
12 in your decision making as part of this process?

13 MR. BAY: That's correct.

14 MR. BARESICH: Now, are there any concerns with the parties
15 involved here?

16 MR. ROBINSON: No, Mr. Chairman.

17 MR. SULLIVAN: No.

18 MR. WILLIAMS: One of our contentions is that the letter that
19 I've just given you from Mike Randall to DWQ constitutes
20 the first notice that DWQ would enforce 200 foot buffers
21 in the Village of Marvin. No other communication had been
22 received from them discussing those 200 foot buffers prior
23 to this letter. So Marvin had submitted its final form on
24 August 13th, and March 17th we got this letter telling us
25 that this is the way it works, these are the buffer

1 requirements, this is what's going to happen, henceforth,
2 on all streams and tributaries of Six Mile Creek and the
3 Six Mile Creek basin, which is pretty much most of
4 northern Marvin.

5 MR. BAY: So to make sure I understand that correctly, there
6 is no other written communication?

7 MR. WILLIAMS: Correct.

8 MR. BAY: Are you aware of any verbal communication?

9 MR. WILLIAMS: Other than the March the 3rd meeting, I
10 personally am not.

11 MR. FARLEY: Mr. Williams, I'm sorry, it was the discussion in
12 consideration of preliminary sketch plan, I believe it's
13 Exhibit 5 --

14 MR. WILLIAMS: The January 15th meeting?

15 MR. FARLEY: Yeah. When Mayor Ciaramella makes reference to
16 the 200 foot buffer with DWQ. Do you know if he had any
17 -- are you aware that he had any conversations with DWQ on
18 this?

19 MR. WILLIAMS: I am not aware. As we move on, on June the
20 3rd, as a consequence of a DWQ letter, I had had
21 conversations prior to June 3rd with Mr. Duston and with
22 Anthony Fox about the dilemma facing the Parks and
23 Greenway board as to how we could implement greenways in
24 the face of a 200 foot nondisturbed buffer. And the
25 upshot of those conversations was the suggestion that as

1 it's included and mentioned in the DWQ letter in front of
2 you, that one of the ways to deal with this is to have
3 vested rights granted to the landowner or the person doing
4 the construction. So based on that, I applied for vested
5 rights for the Parks and Greenway board.

6 Elysian Fields -- Mr. Epps here, also had a problem
7 with the 200 foot buffers. So he likewise applied for
8 vested rights. On June 23rd, Mr. Duston wrote two
9 letters. One of them was addressed to me as chairman of
10 the Parks and Recreation board, and one to Mr. Epps. The
11 one to me granted vested rights to Marvin and the Parks
12 and Greenways board, rendering us immune from the 200 foot
13 buffer requirements.

14 MR. ROBINSON: Ms. Graham, which letter is Number 9?

15 MR. WILLIAMS: Number 9 is the one to Parks and Greenways.
16 And this one is Number 10. This is the letter that was
17 written to Mr. Robert Epps, sent to Anthony Fox for him to
18 approve the verbiage and only the verbiage. That never
19 made it from Mr. Fox's desk to Mr. Epps' mailbox.

20 MR. SULLIVAN: To the extent that Mr. Williams said it was
21 sent only for review of verbiage. He doesn't know -- he
22 wasn't involved in that communication between Mr. Duston
23 and Mr. Fox.

24 MR. WILLIAMS: With due respect, I will show a little later
25 that Mr. Duston's words will echo that point.

1 July the 8th, the Village council meeting,
2 Mr. Robinson has spoken about that. It was one of the
3 critical times in this matter and what I have, if it would
4 please the Board, I have a recording, an extract, of what
5 happened at the meeting. It takes about 12 minutes to
6 play and you will be able to hear the voices of all the
7 participants of the discussion. I also have the
8 transcript of those same conversations. So I'd like to
9 pass out the transcript, and we are up to 11.

10 MR. BROWN: If I might ask, this transcript, this is an actual
11 council meeting, correct?

12 MR. WILLIAMS: This is from an actual council meeting, and I
13 have the recording of the Council meeting.

14 MR. BROWN: You got that from the Village, I assume?

15 MR. WILLIAMS: I got that from the Village clerk.

16 MR. BROWN: And would there be official minutes of this
17 meeting approved by the Council?

18 MS. GRAHAM: This is the July meeting.

19 MR. BROWN: Do you have any minutes of this meeting in
20 addition to this transcript?

21 MR. WILLIAMS: I will have to look.

22 MR. SULLIVAN: This is Exhibit Number 11?

23 MR. BARESICH: Yes, it's Number 11, council meeting.

24 MR. ROBINSON: Mr. Brown, if I might add, a recording of the
25 actual meeting, an audio recording as we have here, is

1 certainly as accurate as whatever the minutes reflect, so
2 if there is any question about what was said at the
3 meeting, we have the actual audio recording. So to me,
4 it's a bit superfluous to get what the minutes were when
5 we have the actual recording, but if you wish, we can take
6 out those minutes.

7 MR. BROWN: I'm just thinking of an evidentiary issue here
8 again. Unless you willing to stipulate, we don't
9 necessarily know the accuracy of the transcript, and
10 again, from an evidence point of view, this council can
11 only consider official actions of the Village council.
12 And the only official action is the one in their approved
13 minutes. Now they may be virtually identical. They may
14 be identical. There may be words omitted. But the only
15 actual action that this board, I think, can consider as an
16 evidentiary matter is the official minutes. And if there
17 have been minutes prepared and approved, then that would
18 be the actual record, for this hearing's purposes, of that
19 meeting.

20 MR. ROBINSON: Well, I think what you are saying is what
21 actions the Village council took at that meeting are
22 reflected in the minutes. That's somewhat irrelevant to
23 our purpose here. We just want to get out what was said
24 at the meeting because that is what is relevant for our
25 purpose here tonight, and there can be no better evidence

1 of that than an actual audio recording because the minutes
2 are simply somebody else's translation of what we've just
3 heard. Now we've got the actual taping. And so my point
4 is, yes, the Village minutes do say what action the Board
5 took, but we're after a broader spectrum of what was said
6 in the meeting that might not be reflected in the minutes.
7 Because not everything in the meeting is taken down in the
8 minutes, as you well know. But we don't have any problem
9 with getting the minutes into the record, but what I'm
10 saying is, the evidence we're concerned with likely is not
11 going to be in the minutes because not every word verbatim
12 is taken down.

13 MR. BROWN: The evidentiary point is, however, unless you
14 bring every body, every person from the Council, the
15 statute on the evidence is set up so that you can get
16 hearsay in, but the only official hearsay you can have,
17 actually, is certified copies of the minutes. That
18 statute allows you to introduce those minutes that are
19 certified and assert the truth and accuracy of what's
20 contained therein. Everything other than that is just
21 mere hearsay and can't be considered as an official action
22 of the Council and be given the truthfulness that you want
23 it to have.

24 MR. ROBINSON: Again, we're not concerned with the official
25 action of the Board. We're concerned with what was said

1 at the meeting.

2 MR. BROWN: And what is said at the meeting, when that body
3 says, "This is what we said at that meeting," it is the
4 approved minutes. That's the only official announcement
5 of what is said at that meeting for purposes of the
6 truthfulness of it and the introduction of it into this
7 proceeding as evidence.

8 MR. WILLIAMS: I do not have a copy of those minutes with me.
9 So you are telling me that I should not play the
10 recording?

11 MR. BROWN: Well, the Board will have to decide. I guess one
12 other question, if I might. On this transcript, who
13 prepared it and how was it prepared?

14 MR. WILLIAMS: I had it done from the recording.

15 MR. BROWN: A commercial enterprise, an official transcriber?
16 Who and how was it done?

17 MR. WILLIAMS: A friend, a personal friend. I gave them the
18 disk, the CD, and asked, "Could you please transcribe
19 this? Take down every word that's said and put it into a
20 document book."

21 MR. BROWN: Is that person here?

22 MR. WILLIAMS: Yes.

23 MR. SIWIK: Has he or she been sworn in?

24 MR. WILLIAMS: No.

25 MR. BARESICH: And I guess also, at that point, we would then

1 have to also understand that the audio recording itself
2 would have had to be certified?

3 MR. BROWN: In the absence of minutes, the tape itself is
4 probably a public record. It is a public record. Tapes
5 don't have to be retained forever. Typically they're
6 copied over or removed at some point in time. That's why
7 the minutes would become the official record. If somebody
8 has transcribed this, I think for the Board to get
9 comfortable with this information that you're receiving,
10 somebody needs to tell us how it was prepared and that
11 literally every word that's in this transcript is
12 absolutely accurate with what was listened to on the disk.

13 MR. ROBINSON: I agree with that. Let's do that right now.
14 We can call the person up who prepared the minutes and
15 let's do -- let's just put in the record what we've done
16 and how it was done.

17 MR. WILLIAMS: The transcript was done by Ms. Graham in her
18 spare time at my request.

19 MR. ROBINSON: Well, then, let's swear Ms. Graham and let's
20 get that in the record.

21 (Mr. Brown swears in Ms. Graham.)

22 MR. BROWN: Do you want to lead her on this?

23 MR. ROBINSON: Go ahead without us.

24 MR. WILLIAMS: Melody, I'm sorry that we have to do this.

25 MR. BARESICH: If you could, just for the record, state your

1 name.

2 MS. GRAHAM: Melody Graham. Address? 606 Deer Cross Lane,
3 Waxhaw.

4 MR. WILLIAMS: For the purposes of this hearing, as I was
5 putting together all the documents I needed to have
6 something that I could give to you. I can't give you a
7 recording for everybody, but have something that you could
8 have in front of you that you could follow along with the
9 conversations that occur. I decided that the best
10 approach would be to have a document that was a transcript
11 that was a significant portion, in my opinion a
12 significant portion, of that council meeting. And Melody
13 is a close friend, and I asked her if she could do that
14 for me, and she agreed.

15 MR. BARESICH: And how would you -- it's up to them to --

16 EXAMINATION OF MELODY GRAHAM

17 BY MR. ROBINSON:

18 Q. Ms. Graham, how did you go about preparing this transcript
19 which has been offered as Exhibit 11?

20 A. I listened to the tape, to the recording of the meeting
21 and typed the meeting verbatim.

22 Q. As you heard it on the tape?

23 A. As I heard it on the recording.

24 Q. And where did the recording come from?

25 A. It came from -- it came from -- a copy of the meeting that

1 I made for Ray, he gave to me and I listened to it at home
2 and did that at home.

3 Q. And so the recording that you transcribed was a recording
4 of the Village of Marvin -- I mean of Marvin's recording?

5 A. It was the Village of Marvin's meeting, yes.

6 Q. Okay.

7 A. It was the Village of Marvin council meeting.

8 MR. WILLIAMS: I purchased that disk two
9 days after the Council meeting.

10 Q. But who recorded --

11 A. I recorded the meeting, yes.

12 Q. And so when you listened to that tape or that disk to
13 prepare Exhibit 11, did you do your best to put down every
14 word verbatim as it was on the disk?

15 A. Yes.

16 Q. And did you proofread your work and listen to the disk
17 again?

18 A. Yes.

19 Q. How many times did you do that?

20 A. Numerous times.

21 Q. Are you satisfied in looking at Exhibit 11 that, as much
22 as humanly possible, what is on the disk is in Exhibit 11,
23 your transcript?

24 A. Yes.

25 MR. ROBINSON: Mr. Chairman, I would say

1 that solidifies the matter.

2 MR. SULLIVAN: Mr. Brown, I don't think that fixes the hearsay
3 issue and I'm also concerned about the fact that it's just
4 an excerpt and not the complete meeting. And in looking
5 at this, I don't know what's not here and what's here.

6 MR. WILLIAMS: I can tell you, Mr. Sullivan. I can play you
7 the whole meeting, if you like. I have that also but
8 we'll be here for a couple of hours.

9 MR. SULLIVAN: Well, and again, I'm not suggesting that's the
10 solution. I think the solution is for a full transcript
11 or something to be here tonight and this isn't it. I
12 mean, in good conscience on behalf of my client, I think I
13 can withdraw this objection. I think I can make it for
14 the record, and of course, the Board can do whatever it
15 deems is best.

16 MR. ROBINSON: Mr. Chairman, I would move that we have
17 established the evidentiary basis for introducing this
18 Exhibit 11, and if somebody has a problem with its
19 accuracy, as we have just said, we have the whole tape
20 here, and we'll play the whole thing. But when you go
21 into a proceeding, you try to save as much time as you can
22 and you don't play the entire three-hour meeting if you're
23 only talking about 12 minutes of it. And that's why we
24 went through this process of trying to save the Board all
25 that time.

1 And I would add that if there are matters affecting
2 due process that are not in the Board minutes, then
3 there's no way to prove the due process elements except
4 necessarily outside what's in the Board minutes. And on
5 that basis as well, I would say that we're entitled to go
6 forward with this Exhibit 11, especially since we have put
7 up substantial evidence of its accuracy. And again, I
8 would add if somebody has a problem with that accuracy,
9 they can rebut it any way they want to, but for the time
10 being, for our purposes, it should come into evidence and
11 it can be attacked in whatever way somebody wants to do
12 it.

13 MR. BROWN: May I ask Mr. Williams just a couple of questions
14 sort of on voir dire? Were you at this meeting of the
15 Village council?

16 MR. WILLIAMS: No, I was not.

17 MR. BROWN: Did you listen to the entire disk?

18 MR. WILLIAMS: On I think maybe ten occasions.

19 MR. BROWN: After Ms. Graham prepared the transcript, did you
20 compare your listening of the disk with the transcript?

21 MR. WILLIAMS: Yes, I did. There was a match.

22 MR. BROWN: Was it an exact match?

23 MR. WILLIAMS: Yes.

24 MR. BROWN: I would advise you can note the objections for the
25 record. I think the transcript can come in. I have

1 doubts and concerns about playing the tape. It's going to
2 be redundant and I don't think it's going to add anything.
3 We've already heard this is an accurate transcript if you
4 can make your evidentiary presentation off the transcript.
5 I do think at some point it would be advisable to get the
6 official minutes certified and in the record so that
7 there's no doubt about what is the official action.

8 MR. WILLIAMS: I apologize for the oversight.

9 MR. BROWN: Okay, at this point I think if you want to testify
10 about the transcript, I think the Board can consider that
11 at least at this point.

12 MR. BARESICH: Yeah. At this point, with the evidence that
13 we've heard in terms of both from Ms. Graham, as well as
14 Mr. Williams, in terms of their reviews of the tapes and
15 their attesting to the accuracy of this transcript, I'd
16 have to overrule the Village's objection at this point and
17 allow these transcripts to be entered and to be referred
18 to as a part of this hearing. If you'd like, please go
19 forward.

20 MR. WILLIAMS: Thank you. I'm not going to take you through
21 every line of this but just the general sense and first of
22 all, there is a statement by Mr. Duston where he describes
23 the fact that he had two requests regarding vested rights.
24 His explanation of common law vested rights, that he had
25 spoken with Anthony Fox at great length on these matters,

1 and that the only person able to make a decision on vested
2 rights or allowed to make a decision on vested rights was
3 the senior planner or zoning administrator, and at that
4 point, Mr. Duston was interim planner for the Village of
5 Martin.

6 MR. BARESICH: And can you refer specifically to the lines in
7 this document where you are referencing?

8 MR. WILLIAMS: Yes. That's on page 1 of Exhibit 11 and the
9 first paragraph that's labeled Bill Duston.

10 MR. HUMPHRIES: May I ask a question? Ray, what do you intend
11 for this to show?

12 MR. WILLIAMS: That there was intrusion into a process that
13 had been defined by Mr. Duston and Mr. Anthony Fox, the
14 Town attorney. And that intrusion in the process violated
15 the process and indeed polluted it to such an extent that
16 a decision that had already been made was reversed. And
17 it was done so because of external input.

18 MR. HUMPHRIES: Is the whole document intrusion or are there
19 specific --

20 MR. WILLIAMS: The points where the intrusion occurs are when
21 Ms. Patton speaks. And there is, if you'll pardon the
22 pun, a pattern here of first of all, objection by
23 Ms. Patton to the granting of vested rights to the Parks
24 and Greenways board and the question asking Mr. Duston,
25 "Did you take into account anything about the July 2007

1 date," that is, July 1st which I've explained in great
2 detail. DWQ mandated their 200 foot buffers but that
3 mandate did not apply to the Village of Marvin.

4 Mr. Duston answered, "Yes, I took everything into
5 account."

6 "Was all this information if you base this decision
7 on prior to July of 2007?"

8 Mr. Duston, "Yes, all was prior to 2007."

9 Now, understand that Mr. Duston at this point had
10 received two requests for adjudication of vested rights
11 entered at the same time. He had written two letters, of
12 which of you have copies. They were written on the same
13 day. So one has to reasonably assume -- I hate to use
14 that word but -- when he talks about one of those
15 situations, he must also be talking about the other. I
16 don't think it would be possible for him to completely
17 divorce himself and use an entirely different set of
18 parameters on two such similar cases about exactly the
19 same topic. So here, his statement is that he had
20 discovered -- considered everything prior to the 2007
21 date, July 1st, 2007.

22 MR. FARLEY: Mr. Williams, what -- in your opinion, why would
23 Mr. Duston not have pushed the letter he sent to you to
24 Mr. Fox, like he did the letter he sent to Mr. Epps?

25 MR. WILLIAMS: I have absolutely no idea. The only thing I

1 can tell you is during the two-week period between the
2 drafting of that letter and the Council meeting on July
3 8th, I had two telephone conversations with Mr. Duston.
4 In both of those conversations he told me of the existence
5 of the letter and their contents.

6 MR. SULLIVAN: Objection.

7 MR. WILLIAMS: As the meeting progresses, Mr. Duston refers to
8 the second request, which is for Mr. Robert Epps
9 acknowledging that the Town had approved a preliminary
10 plat that we correctly know now as a sketch plan. That
11 approval had occurred on January the 15th. Mr. Duston
12 said, "Don't quote me on the date because I don't remember
13 what it is, but council did approve that preliminary
14 plat." Ms. Patton, "It was after July 2007?"

15 Yes it was. We have no argument with that. But it
16 was also before March the 17th. Further, Ms. Patton asked
17 what Mr. Duston's letter, addressed to Mr. Robert Epps,
18 said. It's probably going to be a positive one and it
19 goes on to explain that, yes, he did grant common law
20 vested rights to Mr. Epps in the wording in that letter.
21 Ms. Patton asked, "It sounds like you're saying that, in
22 your opinion, Elysian Fields subdivision should get vested
23 rights." Mr. Duston, "I think so, yes."

24 Ms. Patton, "So the impression I have if DWQ said
25 that as of 2007 that specific creek should have a 200 foot

1 undisturbed buffer and it did not get approval prior to
2 that going into effect, how can you possibly -- I'm really
3 missing" -- and the comment was not completed. Ms. Patton
4 here is trying to enforce a July 1, 2007 mandate from DWQ
5 where we had already shown that mandate was invalid.

6 As the conversation continues, it is finally agreed
7 to that Ms. Patton can meet with Anthony Fox, Mr. Duston,
8 and Anna Whalen. Anna Whalen was the recently hired new
9 planner for the Village of Marvin but had been excluded
10 from this particular process because of her lack of
11 history. This had been going on for so long and Mayor
12 Ciaramella and Mr. Duston had agreed that it should be
13 Mr. Duston's prerogative to handle this matter. The
14 decision was made to have a meeting to sit down and
15 discuss the merits of the case that had already been
16 decided. And the rules governing common law vested rights
17 is once that decision has been made, the Village council
18 cannot --

19 MR. SULLIVAN: I object to this. I think he's making a legal
20 argument and he is here just as a fact witness.

21 MR. ROBINSON: I would add here he's not talking about case
22 law, common law, counselor. He is talking about the
23 Village of Marvin rules about the process here. Is that
24 correct?

25 MR. WILLIAMS: Correct.

1 MR. SULLIVAN: Are those rules written down somewhere?

2 Because I would prefer that he introduce those rather than
3 reciting what --

4 MR. ROBINSON: Tell us what Mr. Duston told you the rules
5 were.

6 MR. WILLIAMS: The rules were that Mr. Duston would make the
7 decision, and by Mr. Duston's statements in this
8 transcript -- let's see if I can find it. Mr. Duston made
9 the decision. The Council cannot overrule him. His exact
10 words were, "You can fire me but you can't change my
11 decision." And the only way that decision could be
12 modified is by appeal to this board.

13 MR. ROBINSON: And this is what Mr. Duston told you were the
14 rules?

15 MR. WILLIAMS: Yes. This is what Mr. Duston said to the
16 Council that night. If you'll bear with me. (Examines
17 document.) Mr. Duston's statement on page 2 of the
18 transcript, the large paragraph in the middle of the page,
19 where he states when asked what did the letter say, "It's
20 probably going to be a positive one because there has been
21 a lot of money expended between 2007 and 2008 and because
22 the letter was received in March 2008." The letter he is
23 referring to there is the letter of which you have a copy
24 from DWQ where it first announces 200 foot buffers for the
25 Village of Marvin.

1 And Mr. Duston continues, "But let me say this.
2 Both Anthony," that's Anthony Fox, the attorney, "and I
3 agree that this decision rests with the zoning
4 administrator. An aggrieved party, and I'm quoting
5 statute here, whoever that party may be, an aggrieved
6 landowner, an elected official, anyone who feels that the
7 decision made by the zoning administration was in error,
8 has the right to appeal that decision and that appeal
9 would go to the Board of Adjustment.

10 These are the words of Mr. Duston: "The Board of
11 Adjustment decision may be appealed through the courts.
12 My decision, that is the decision of the zoning
13 administrator, cannot be overturned. You can fire me but
14 you cannot overturn my decision. The zoning administrator
15 has the authority to make these decisions. The statutes
16 are very clear as to the appeal process. That is the
17 process that goes categorically to the Board of Adjustment
18 and the Board of Adjustment decides. I would have to
19 prove my case to the Board of Adjustment, if appealed.
20 Did I act in a reasonable and rational way? The Board of
21 Adjustment will have the power to uphold, overturn, or
22 amend my decision or any decision of the zoning
23 administrator. I'm not sure if you've had any cases
24 before the Board of Adjustment and the zoning
25 administrator decision." Yes, there have been other

1 cases.

2 So we have it from Mr. Duston that his decision was
3 the only decision. His decision, by his own admission,
4 had already been announced to the meeting, that he had
5 written the letter, that the letter had been sent to
6 Anthony Fox, and the letter contained approval of vested
7 rights for Robert Epps and Elysian Fields. So at this
8 point, any alteration of that decision has to be an
9 aberration of the process because the decision has been
10 made and, by Mr. Duston's own words, cannot be overturned.

11 MR. ROBINSON: Except by this board.

12 MR. WILLIAMS: Except by you gentlemen sitting here. On July
13 the 9th, the day after the meeting, there was an
14 additional meeting in the town hall. Present were
15 Ms. Whalen, the new planner, Mr. Duston, Mr. Phelps was
16 present on the telephone, and Ms. Patton. During that
17 meeting --

18 MR. BROWN: May I ask a question? How do you know that? Are
19 you basing this again on personal knowledge?

20 MR. WILLIAMS: I would have to admit that this is hearsay,
21 yes. I'm sorry.

22 MR. BARESICH: We can't accept hearsay.

23 MR. WILLIAMS: I'm sorry. Okay. Let me then step forward.

24 MR. BROWN: Tell us what you know.

25 MR. WILLIAMS: Okay. What I know is that Mr. Duston told me

1 at a later date that there had been a meeting, that he had
2 or that Anna had been instructed during that meeting to
3 accept any documents that Ms. Patton wished to present,
4 and that she was to vet those documents as to which ones
5 were suitable to be passed on to Mr. Duston to enable him
6 to remake his decision. Those documents were passed on to
7 Ms. Whalen at a meeting at 1 o'clock on July the 13th and
8 were subsequently passed to Mr. Duston.

9 MR. BROWN: Was everything you just said what Mr. Duston said?

10 MR. WILLIAMS: Yes.

11 MR. BROWN: We'll let him speak to that.

12 MR. ROBINSON: And for the record, if I may, that Mr. Duston
13 said that to Mr. Williams means it's not hearsay because
14 it's an admission of a party opponent, so we're not
15 talking about hearsay.

16 MR. WILLIAMS: The upshot of this was Mr. Duston wrote me
17 another letter on July 28th. In this letter, he denies
18 vested rights to Mr. Robert Epps and Elysian Fields. The
19 last two entries on the time line are on July 29th I filed
20 on behalf of Parks and Greenways Recreation Advisory Board
21 for a hearing to appeal the denial of vested rights to
22 Elysian Fields and Robert Epps, and on August the 25th,
23 Mr. Epps himself filed an appeal for a hearing before this
24 board.

25 Mr. Chairman, I am pretty much done with the

1 evidence portion but I do have, I think, what Mr. Brown
2 termed some sort of argument that I'd like to present.

3 MR. ROBINSON: Before you go there, if I may ask you some
4 questions.

5 EXAMINATION OF MR. WILLIAMS

6 BY MR. ROBINSON:

7 Q. When you were talking about what Mr. Duston said about the
8 meeting that happened, did you understand from Mr. Duston
9 that Councilwoman Patton did in fact submit documents to
10 Mr. Duston --

11 A. Yes, sir.

12 Q. -- on or around July 11, 2007?

13 A. Yes, and I also had that information from Ms. Whalen.

14 Q. Do you know what those documents said?

15 A. Yes. I have copies of some of them. They were pretty
16 much reiterations of the DWQ letter of March the 17th and
17 the rules involved.

18 Q. Thank you.

19 MR. BROWN: Mr. Chairman and Mr. Williams, before you present
20 an argument, I think it's important for the Board to get
21 all of the evidence. The tradition and standard procedure
22 is to have closing arguments at the end of all the
23 evidence. You are also represented by counsel, and it's
24 typical for counsel to do the closing argument for you. I
25 don't want you engaging in an unauthorized practice, but I

1 think the other applicant-appellant has got testimony to
2 give and I would think we would want to hear from the
3 staff testimony and I think if we could figure out who and
4 what arguments will be made as closing arguments, it would
5 be appropriate to do that after all the evidence.

6 MR. WILLIAMS: Can I make a statement that when I say
7 arguments, they are basically statements of fact from the
8 evidence that I have presented tonight except that
9 evidence was presented as a time line and what I have done
10 is consolidated some of those pieces to bring them
11 together to show the interaction between those various
12 pieces.

13 MR. ROBINSON: So you are not making an argument, you are
14 making statements of fact. I thought you had
15 mischaracterized that.

16 MR. BROWN: But aren't you merely repeating what we have all
17 just heard?

18 MR. WILLIAMS: But in a different context because it ties it
19 together as associated events rather than separated by
20 large periods of time.

21 MR. BARESICH: If you could please just give us an overview of
22 that, given that we already have heard a lot about that
23 time line?

24 MR. WILLIAMS: Okay.

25 MR. BARESICH: So if you could kind of summarize that, what

1 you're trying to lay out here.

2 MR. WILLIAMS: Basically what I have is six situations derived
3 from the evidence that you've heard so far. Everyone, in
4 my belief, should mandate vested rights to be granted to
5 Elysian Fields, because of the various conflicts of dates
6 and actions throughout this process.

7 MR. BARESICH: Now, were these items that have already been
8 discussed, though?

9 MR. WILLIAMS: Not in this manner, that each of the parts are
10 being presented. But it's rather as though I have
11 presented you with many pieces of a jigsaw puzzle and now
12 will put them together.

13 MR. BARESICH: How long will this take?

14 MR. WILLIAMS: Ten minutes at most.

15 MR. BROWN: Mr. Chairman, with respect to the characterization
16 of it, what you are describing is a closing argument. You
17 take the facts that are heard and you weave them together.
18 You can create as many situations as you want, you cite
19 the law that you want to apply to those. That's what a
20 closing argument does with the evidence. And I think
21 we're getting that closing argument -- we're doing a
22 closing argument during an evidence-gathering portion.

23 MR. WILLIAMS: I can do it later if that's your preference.

24 MR. BROWN: You or your counsel -- somebody will do that. I
25 don't think it's appropriate at this point in time.

1 MR. WILLIAMS: I'm fine with that as long as we get the chance
2 to present this.

3 MR. ROBINSON: We'll do it later. But I would add on that
4 point that what he is talking about is an iteration of
5 fact and that we'd much rather it come from him who has
6 been involved in this on a day-to-day basis for years,
7 than me repeating the facts he has told me. So I would
8 prefer that he do the closing argument -- not the closing
9 argument part because I've got the closing argument part
10 myself, but the factual part. I'd prefer he do that when
11 we get to that point. And I just bring this up now so we
12 can possibly avoid that when we get to the end.

13 MR. BROWN: I think we'll get there when we get there.

14 MR. BARESICH: Yes, there is a lot more to be said in between
15 now and then from both sides, so some of that may come
16 out. So I'd like to move on at this point.

17 MR. WILLIAMS: Okay. I have one last piece of evidence, 13.
18 And this is an e-mail that was sent by Mayor Ciaramella to
19 Ms. Graham, explaining the Council's opinion about the
20 Elysian Fields development.

21 MR. BARESICH: Is this something that's admissible?

22 MR. BROWN: Tell us how you got this document.

23 MR. WILLIAMS: Mr. Ciaramella called me earlier this week to
24 ask me about the appeal and how I felt about it. He asked
25 was there anything he could do. I said it would be nice

1 if we had some indication of the support given by the
2 Council for this project during their January 15th
3 meeting. And he said, "I will draft the letter and send
4 it to Ms. Graham. She will have it tomorrow morning."
5 Mr. Ciaramella could not be in town tonight. He is away
6 on business.

7 MR. BARESICH: Is that admissible?

8 MR. BROWN: No. I don't think it is.

9 MR. WILLIAMS: Okay. Paper airplanes. Thank you. That
10 concludes my presentation.

11 MR. BROWN: Mr. Chair, Mr. Epps was to appear to testify.
12 He's sworn. Oh, I'm sorry. Do you have any cross?

13 MR. SULLIVAN: No.

14 MR. EPPS: Hello, everybody. I am Robert Epps. This is my
15 wife, Marissa Epps. I live at 517 Pacer Lane, Marvin,
16 North Carolina. May I take a moment to put this sign up?
17 I'm sorry it's so large.

18 MR. BROWN: I want to tell you that's a fine-looking sign.
19 And it looks expensive. If you use that as an exhibit,
20 that's going to stay with the Village and become part of
21 this record of the proceedings.

22 MR. EPPS: I just want to point out that we are residents of
23 Marvin, so the development of Elysian Fields is here. We
24 live here. (Indicating.) Elysian Fields is our back
25 yard. And that's important to what I'm going to say here.

1 I've heard so many objections, I'm not sure where you're
2 going to stop me but I'm just going to go and you'll have
3 to stop me.

4 MR. WILLIAMS: It doesn't hurt.

5 MR. EPPS: As I've said, I'm Robert Epps and this is my wife,
6 Marissa Epps. We live here in Marvin. We moved here from
7 Monroe six years ago. We have two little girls and a
8 whole bunch of animals. Most people around town know us
9 as the people with the two shaggy cows, the longhorns over
10 on the corner of Joe Kerr. We love living in Marvin and
11 raising our family here. We love the heritage of the
12 Marvin equestrian feel and the people we call neighbors.

13 We, like most residents, would love to see the
14 things that make Marvin special perpetuate. That's why
15 when our neighbor and friends, Bill and Louise Baughman,
16 began selling his property to developers, we went and
17 spoke to him. We understood why he was selling it. He
18 was concerned about his health and what would happen to
19 Louise if he should pass and they needed to get top dollar
20 for the property. But we asked that if that fell through,
21 to please come see us because we have a different idea
22 with what could be done.

23 He had a signed contract with the developer. The
24 developer was looking to maximize his profits. and I don't
25 fault him for that. This is America. He has rights. But

1 again, we had a better idea. We still have to subdivide
2 it to pay for our idea. But this is actually the packet.
3 Do you need these one at a time or is it permissible to
4 just give out the packets?

5 MR. BROWN: It would be preferable to give them one at a time
6 just so we can keep tabs on it. The only issue with a
7 packet is you may or may not address something that's in
8 that packet. If you've got one document at a time and you
9 can label each one, you can get the testimony relevant to
10 it.

11 MR. EPPS: Okay. This is the actual kitchen island --

12 MR. ROBINSON: Well, for the record, we object to that 13 not
13 coming in.

14 MR. BROWN: So we are going to have it tendered and not
15 allowed, so this will be 14.

16 MR. ROBINSON: Mr. Brown, I'm just trying to protect the
17 record because if we have to appeal, I want everything in
18 there.

19 MR. BROWN: I didn't hear an objection at that time so I may
20 have misunderstood.

21 MR. EPPS: Now, again, this is our hand sketch Marissa and I
22 came up with that we submitted to the very first Village
23 planner we met, Karen Dunn, in the fall of 2006, roughly
24 two years ago. Sorry it's not as pretty as that sign. I
25 don't want to relinquish it.

1 As you can see from the sketch, what I did was
2 something that was different. We wanted to conserve what
3 is presently horse pasture, keep it horse pasture, but in
4 order to do so, we had to -- we still had to subdivide it.
5 So roughly 50 percent conservation, 50 percent homes. I'm
6 a builder. I'm not a developer. This is the first time
7 we've tried something like this. So the intent was I
8 would build the houses. That's what I've been doing for a
9 living for the last 10 to 12 years. And the reason we had
10 to subdivide or would have to subdivide is in order to pay
11 for it. We didn't have the money to buy this outright.

12 Our idea was something that we felt and feel that
13 we in Marvin could be very proud of. As I said, this is
14 the same sketch I took to Karen Dunn and, I believe, and I
15 won't speak for him, but I believe that Bill has seen it
16 at one time or another as well. As luck would have it,
17 most developers did drop out of the deal with Bill because
18 they felt like they needed two more lots than the
19 ordinance would allow. They actually approached us to
20 purchase some of our land to get their density up to work
21 it out. We declined. So we eventually worked out an
22 arrangement with Bill and Louise Baughman that allowed us
23 some time to do all the necessary homework before
24 purchasing the land, because as I said, it would have to
25 be subdivided in order to keep the other half

1 conservation.

2 We did not have the money to purchase it outright.
3 We had to set up two mortgages to pay for it and the idea
4 was to pay off those mortgages with the proceeds from the
5 eight lots that we eventually hope to sell. We couldn't
6 do this until we felt assured there would be no
7 complications, like tonight. Bill and Louise were going
8 to give us time to do the research. I met with the
9 Village planner, Karen Dunn, in September of 2006 for a
10 pre-application conference to go over the ordinance and
11 how I should proceed. At times, I'm going to say I or we.
12 We is me and my wife. She was excited about what we were
13 proposing for that space there.

14 I explained to her our desire to optimize the
15 conservation half of the land. She loved the idea and she
16 believed so would the Boards and the Council. She
17 recommended that we allow her some time to draft
18 equestrian ordinance that would help us to achieve that
19 goal and still allow the number of lots that we would need
20 to pay for all of this. It turns out that the town -- and
21 I think this is a matter of fact for our Village -- we
22 pride ourselves in the equestrian field and equestrian
23 farms but we don't have an equestrian ordinance. It turns
24 out that drafting such an ordinance, the meetings, the
25 input, all the things that were required are quite lengthy

1 and we were not getting the positive response that you
2 might expect in an equestrian community. So after roughly
3 eight months of watching the Village struggle with the
4 equestrian concept, we decided to just submit the plan by
5 right. And by right, I mean by the ordinance.

6 MR. BARESICH: Excuse me. Does that mean this same plan was
7 submitted by right or was it changed at all, the sketch
8 plan?

9 MR. EPPS: The barn, the stone bridge I wanted to build across
10 the creek, the wooden windmill, those all had to come off
11 because those didn't fit ordinance. And what we were
12 trying to do with the equestrian ordinance was to find
13 ways to get a stable on the conservation land and try to
14 push those lots back because the way the ordinance is now,
15 a lot has to be, no matter what's going on, no matter what
16 size house, it's got to be X-wide, X-deep in order to get
17 your square footage.

18 And the overall goal is -- I don't know if any of
19 you have seen it. I don't know if you went to mares --
20 last year's mares was there, but there is gorgeous tree
21 line, there's gorgeous pastures, there's trees all around
22 it. We just don't want to remove any of them. We just
23 want to keep it as close to what it has always been as we
24 could. But in order to do that, we have to take away some
25 of it.

1 Now, I do have a time line, but having heard what I
2 heard -- this is all personal and I guess I'll just read
3 it. And I will have some papers to pass out. 9/6/06 is
4 when I met with Karen Dunn for the pre-application
5 meeting. She was excited about the proposed sketch.
6 10/6, while Karen worked on an equestrian ordinance, I
7 began meeting with utility companies and contractors.
8 From 10/6 to February '07, I continued my due diligence,
9 my research. I met with the Village staff several times
10 by now. We needed to check everything out before spending
11 any money. At this point, I haven't closed. I hadn't
12 purchased the property. February 4th, after completing
13 our due diligence and feeling comfortable with everything,
14 we set a closing date with Bill and Louise Baughman to
15 close on April 23, 2007. Is a settlement statement okay
16 to give?

17 MR. BROWN: Yes, sir. Bring it up.

18 MR. EPPS: And this is actually in the vested rights
19 applications, forms.

20 MR. BROWN: This will be 15.

21 MR. EPPS: And if I can just say a moment, we paid -- if you
22 look at that settlement statement, we paid a lot of money.
23 We probably paid more than some would argue that the
24 property is worth, but in our opinion, it was worth that
25 if we could do this. But also, it was Bill and Louise's

1 nest egg. So it's kind of hard to negotiate someone down
2 when you know that the last 20 years they've been building
3 equity and they hope to live off of it for the rest of
4 their lives. After making our offer in writing to Bill
5 and Louise, I did a boundary survey of the property on
6 February 13th. As you can see, we were reluctant to spend
7 any money up until we were sure this was a go.

8 On March 6th, 2007, I contacted Lawrence
9 Associates. They're an engineering firm out of Monroe, to
10 provide engineering services. On 3/7, Clint Lawrence from
11 Lawrence Associates contacts Karen Dunn to verify that
12 they're submitting a proposal to us, a proposal from Clint
13 to us. On 3/9, we contracted with Lawrence Associates to
14 provide engineering and surveying services. We signed a
15 contract for \$26,000 and they began formalizing the sketch
16 plan. Now, that same month, on the 29th Clint Lawrence
17 meets with Karen Dunn at the Village Hall to go over our
18 sketch plan. Again, this is an engineer talking to a
19 planner. On 4/13, Clint e-mails Karen explaining that he
20 has incorporated her comments from their meeting and he
21 has also spoken to M.J. Namin, the Village engineer, about
22 Elysian Fields in passing, and he would like to schedule a
23 formal meeting with M.J. Namin and Karen at the Village
24 Hall.

25 MR. BROWN: Mr. Epps, may I ask you a question? Are you

1 participating in these meetings or how do you know these
2 conversations have taken place?

3 MR. EPPS: I briefly participated in the meetings so far. I
4 didn't stay for them, but I was there to say hi, and left.
5 The ones with --

6 MR. BROWN: So the things that happened after you left, how do
7 you know that they happened?

8 MR. EPPS: So far, I think all I've said was that Clint meets
9 Karen Dunn at Village Hall to go over the sketch plan. So
10 I saw them meet and they were holding my sketch plan, so
11 that I know. The e-mails, I have for you. I think that's
12 the next reference I made under Communications. Prior to
13 that, I think the only thing I said was that Lawrence
14 contacts Karen Dunn to verify ordinances, and I'm happy to
15 drop that, if you'd like.

16 MR. BROWN: I just think, as the Board discussed, if you are
17 speaking from knowledge, tell us how you have that
18 knowledge.

19 MR. EPPS: Okay. Fair enough. I have these e-mails.

20 MR. BAY: Do we need to determine how he got these e-mails?

21 MR. BROWN: He'll tell us, I'm sure.

22 MR. EPPS: They were copied to me from Clint Lawrence.
23 Actually, some of them involved Mr. Duston so you can look
24 at them if you'd like.

25 MR. BROWN: We'll just call the whole packet, I guess, 17.

1 MR. EPPS: Karen responds to Clint Lawrence, letting him know
2 that Bill Duston will be the interim planner and that she
3 is leaving. In the e-mail, it says Mr. Duston will be the
4 interim planner but it does not say that she'll be
5 leaving. But I think we all know she left. On 4/23,
6 Marissa and I close on Bill and Louise Baughman's property
7 and that's the copy of the settlement statement that you
8 have. 4/27, Clint Lawrence and Bill Duston schedule
9 another pre-application meeting for 5/2/07 and that's
10 contained in those e-mails. And I call it another pre-
11 application because I've already done a pre-application
12 with Karen, but this was an official pre-application,
13 scheduled with Mr. Duston. On 5/2, Clint and Bill Duston
14 meet, along with M.J. Namin, at the Village Hall at
15 1 o'clock. An official pre-application form is filled out
16 and paid for. Karen had actually not asked us to do this
17 previously but Bill is very good with his paperwork so. I
18 don't know if -- unless you want copies of those, I think
19 they're all public record but I have them here if you need
20 them.

21 MR. BROWN: I think it's up to you. If you think that action
22 and that date is important, I'd get it in the record if
23 you've got it.

24 MR. EPPS: Okay. This is a subdivision application and pre-
25 application conference.

1 MR. SIWIK: The highlighting is yours?

2 MR. EPPS: Yes, that's from me.

3 MR. SIWIK: Thank you.

4 MR. EPPS: On 5/15, two things happened. We decide not to
5 wait on the equestrian language anymore, which I've
6 already alluded to, but that's actually the date that we
7 turned in our sketch plan by right. We paid a \$3,000 plan
8 fee and submitted the sketch plan application as a by-
9 right plan. At this time, the only thing we're asking for
10 is a reduction in the viewshed buffer, and I'm happy to
11 explain what that is if anyone needs to know. If not
12 -- okay. This is a copy of the application for submittal
13 of the subdivision sketch plan, and the highlighting,
14 again, is from me. I know we are out there trying to save
15 trees and I feel like I'm handing them out piecemeal right
16 here. On May the 25th, almost two weeks later, Bill
17 Duston submits his Elysian Fields red-lines back to us.
18 And I'm not sure if everyone knows what I mean by red-
19 lines, but it's his comments about what needs to be done
20 to the sketch plan for it to be considered. The 25th is
21 the date of that.

22 MR. ROBINSON: 2007?

23 MR. EPPS: 2007, yes. But I'm only up to May 25, 2007, and
24 other than some other comments, that's as far as I'm going
25 to go with the time line. We have a staff-approved plan

1 with these red-lines. All that needs to be done is the
2 adjustments made that Bill Duston has red-lined. The only
3 thing we're asking at this point from the planning board
4 and council is a reduction of the viewshed, which they do
5 eventually agree to. At no point, have we encountered any
6 mention of 200 foot buffers from anyone, including Bill
7 Duston, because at this time, 200 foot buffers do not
8 exist.

9 And the whole reason for all that is that I'm just
10 trying to show that this wasn't fly-by-night. We really
11 worked hard on this, certainly up to this point. But let
12 me get to that. Now, the fact that these buffers were not
13 ever mentioned through this process by no less than, at
14 this point, three Village planners and two engineers, had
15 always baffled me right up to the point until I received
16 Bill's letter of vested rights denial in July of this
17 year. I couldn't understand why none of these people,
18 including Bill Duston, could miss such a thing. They
19 didn't. It didn't exist. The buffer -- these -- DWQ --

20 MR. SIWIK: Are you saying specifically the 200 foot or any
21 reference to buffer?

22 MR. EPPS: 200 foot. Marvin had -- Marvin has a 100 foot
23 buffer.

24 MR. SIWIK: Thank you. Yes. Okay. I wanted to make sure.

25 MR. EPPS: Yeah. And we definitely designed around that.

1 MR. SIWIK: I know.

2 MR. EPPS: And the fact is they didn't even know it was coming
3 because at the time it wasn't. Marvin had some ordinance.
4 When I read the attachment to his letter -- are you all in
5 possession of the letter and the attachment?

6 MR. BROWN: That was one of Mr. Williams' exhibits.

7 MR. WILLIAMS: I gave them the letter. I didn't give them the
8 attachment at that point, but they have it because it was
9 the letter from DWQ, the March 17th letter. Yes, they
10 have that as a different exhibit.

11 MR. BARESICH: I think that's Exhibit 12. Would you look at
12 Exhibit 12 and make sure that's the one we're talking
13 about?

14 MR. BROWN: Are you referring to the DWQ letter?

15 MR. EPPS: I am, from Mike Randall dated March 17th.

16 MR. ROBINSON: The DWQ letter is Exhibit 7 and the Duston
17 denial letter is Exhibit 12.

18 MR. BROWN: I would look at 7.

19 MR. WILLIAMS: Mr. Brown, Exhibits 7 and 12 were sent in a
20 single package to Mr. Epps.

21 MR. BROWN: I understand.

22 MR. EPPS: Which I don't want to give away, but this is the
23 original letter from Bill Duston and it's exactly what you
24 have. But in my case, this came attached to this. Is it
25 okay for me to ask Bill to look at this and see if that's

1 accurate or is it even necessary, if you guys consider --

2 MR. BROWN: Bill, I'm sure, will testify later to that.

3 MR. EPPS: Okay. Okay, then I'm going to go ahead and make
4 reference to this.

5 MR. BARESICH: Go right ahead.

6 MR. EPPS: As I said, Mr. Duston, Karen Dunn, and at this
7 point, Jonathon Edwards, who was a third planner I
8 encountered, the Village engineer, M.J. Namin, my
9 engineer, Clint Lawrence from Lawrence and Associate, a
10 fairly experienced firm, none of them knew about some
11 upcoming buffer simply because it didn't exist and Marvin
12 had its own ordinance. When I received this letter and
13 this attachment, which I previously didn't have, I read
14 it, and when I saw that my own Village had rescinded their
15 stormwater 2 permit without any public notice, I was
16 floored.

17 This whole -- there had been talk about DWQ
18 buffers, speculation on who was going to enforce what and
19 who was going to do this, so for the last year, you know,
20 we lived with what's going on here, what are these buffers
21 all about. And no one ever mentioned that it was because
22 our Village had rescinded their own permit without telling
23 anyone. Granted, it was done in a council meeting, but I
24 never received public notice and here I was in the middle
25 of a process. As far as I know, anyone else developing or

1 subdividing didn't know about it. Anyone who lives
2 against a creek, they don't know about. They probably
3 still don't know about it at this point. They probably
4 don't have copies of that either. So it was done without
5 notifying residents, including us, and I couldn't
6 understand how they could do something like that without
7 at least notifying those of us against the creeks.

8 You've got people like the Ardrey's who have been
9 here forever, Joe Brantley who has been here forever.
10 He's the corner property with the pretty split-rail fence.
11 You have us, and then just many people that follow the
12 creek. There was never any input offered, asked for, from
13 any of us. It's a matter of fact that you lose roughly
14 one acre of land for every 100 foot of creek when you talk
15 about a 200 foot buffer. Now, 100 feet, for those of you
16 who don't know it, is probably the length of this.

17 (Indicates.) I don't know for sure but it's probably
18 close to this, maybe a little bit longer. You lose an
19 acre every time. Now, for someone like us who has a long
20 stretch along the creek or the Brantley's or the Ardrey's,
21 that's devastating. And in our case, it would kill our
22 plan.

23 What it does is actually -- I'll just illustrate on
24 this. Although at first glance, if a 200 foot buffer
25 comes up here -- and I've looked at it so much, you'll

1 have to trust me that's about 200 feet. At first glance,
2 it looks like you just lose two lots. But what happens is
3 the cul-de-sac has to be moved down, and this 200 foot
4 buffer that DWQ is now talking about is do not disturb.
5 You can't have a cul-de-sac in it, you can't have a
6 sidewalk, you can't have a curb. So the cul-de-sac gets
7 shoved down here. So it's not two lots we lose, it's
8 four. The project is not feasible with four lots, not for
9 what I had to pay for the property, the costs I've
10 incurred in the last two years, and the development costs.

11 Now that we've closed on the land and we've spent
12 all this money, without it being feasible, it actually
13 puts my family's future at risk. As I've said before, two
14 mortgages to pay for. This wasn't a cash purchase. Bill
15 -- excuse me, Mr. Duston's application reflect that and I
16 think you can see that in both letters that three of the
17 conditions were at least met, and one of them was
18 substantial expenditures, one of them was that we would be
19 harmed without vested rights. I think he concedes that at
20 both times. And that's why, especially in today's
21 economy, things are pretty ugly out there.

22 Why and how this happened isn't something I'm
23 trying to burden you with tonight but this situation is
24 why I'm here. It's why we're here. It has been extremely
25 frustrating and stressful, many lost nights of sleep. We

1 thought this whole mess would be behind us, though, when
2 Bill told me his decision was a positive one, and he did,
3 with a phone call to me personally, say the decision was
4 -- he was sending to Anthony Fox was positive and that
5 Anthony Fox was just to check the verbiage. I'm not going
6 to hold him to what he said, verbiage, syntax, structure
7 of the letter. The decision was his and that's something
8 he told me personally.

9 What we hope that you'll consider tonight is the
10 spirit under which vested rights exist. The intent is to
11 protect people like us who have spent substantial money,
12 time, and effort on something like this, Elysian Fields,
13 from changes like these stormwater buffers. I believe
14 that's the purpose of vested rights. As I read it, it's
15 complicated. I'll give it that. Those statutes are
16 difficult for me to read, but I believe that when they
17 wrote them, it's this type of situation they had in mind.
18 I also believe that, from what I've read about this board,
19 that the Board is permitted to render decisions based on
20 the spirit, general purpose, or intent of the rules, and I
21 derive that from -- I don't know if you need a copy but I
22 would like to give it out anyway even though you may not
23 need it. It's the Board of Adjustment, one of the
24 statutes, and I highlighted the part -- I'm sorry, I have
25 to hand you guys page 1 of 3. Let me give you a complete

1 copy. I don't know about you, but whenever I see 2 of 3,
2 3 of 3, I want to see all three. (Distributes material.)

3 Even though I snapshot it with a highlighter, I
4 want you to have the whole thing. I won't read that to
5 you. I'll let you read it to yourself. That's what I
6 understand about Board of Adjustments, that you guys are
7 kind of a checks and balance. You're a place for people
8 like us to go when we feel like we've -- the wrong
9 decision has been rendered. And we believe -- or I
10 believe that situations like this are exactly where
11 statutes give rise to boards like you and give you the
12 flexibility to render decisions based on what is fair and
13 just. We believe that our Village can be fair and just,
14 and we just pray that you agree. That's actually all I
15 have.

16 MR. BARESICH: All right. Thank you. Any cross?

17 MR. SULLIVAN: I don't have any questions.

18 MR. BROWN: Well, if the Board has any questions and then if
19 there's any cross, then we can move on.

20 MR. BARESICH: Let me ask the Board, is there anyone who needs
21 to take a break or anything like that. Anybody need five
22 minutes or anything?

23 MR. SIWIK: I also have some questions. So you time it,
24 either after or before.

25 MR. BARESICH: Yes. If anyone has some questions for

1 Mr. Epps, go ahead first.

2 CROSS-EXAMINATION BY THE BOARD

3 BY MR. SIWIK:

4 Q. Did you do any other work when you planned this as far as
5 the effect of the changes you're going to do on the land
6 might have on the drainage into the creek?

7 A. Yes. We --

8 Q. Did you review that as part of this issue claiming this
9 paragraph D as a possibility of what you have done?

10 A. Sure. We -- WELL, first, let me say, before I show you
11 this, Part of the original concept, long before there was
12 any mention of a heelsplitter or water quality, any of
13 that, is to keep all the trees. In fact, the trees that
14 we do have to lose, we're not going to lose. The trees
15 that are on the Baughman property driveway are so large 8
16 to 10, 12-inch oaks, that I'm paying to have moved. I've
17 already moved eight of them when I thought that I would be
18 working on this this summer. I moved them in the spring
19 when I knew that it was appropriate for the trees.

20 I have to report, some of them are doing quite
21 well. And we moved them along Joe Kerr. We moved four
22 there and we put four of them along the back side of
23 Marvin Creek to create a green screen. Then I added 13
24 more trees along the back of Marvin Creek, again for a
25 green screen. There was just this void that affected them

1 and affected us. We added 13 more on top of these. Now,
2 even though the trees may not survive, I just think it's
3 better to spend the money to try. And if it doesn't
4 survive, then I'll replace it. But at least I've tried
5 instead of just cutting it down.

6 We designed the plan around the pockets of trees
7 that are there, which I made council aware, and that's
8 part of reason they agreed to the 85 foot viewshed buffer
9 reduction. Again, we want to save the trees. As far as
10 water quality, when the word started getting passed about
11 potential DWQ buffers in the fall of last year, one of the
12 things, I believe it was the Planning Board asked for, was
13 a biologist's report. So I spent about \$5,000 on a
14 biologist's report and this is the only copy I have. If
15 it -- you know, I don't mind entering it as evidence but
16 there's only one copy. I'll have to pass it around. Is
17 that okay?

18 MR. BROWN: It's up to you if you're going to tell us about it
19 or if you want them to read it for the merits of what's in
20 there.

21 MR. SIWIK: Can you just offer the one copy in evidence
22 without giving copies to the rest of the Board?

23 MR. EPPS: I'd be happy to and because I've actually read this
24 whole thing. I'm going to offer it as evidence. Can I
25 read one paragraph from it? Or actually, it's two

1 sentences, I believe.

2 MR. BROWN: Sure. You're reading -- well, we'll get it to the
3 clerk. What is it you're reading from?

4 MR. EPPS: I'm reading the actual cover letter of the report
5 from Wetland and Natural Resources. The name of the
6 biologist was Chris Heismann.

7 MR. FARLEY: When is it dated?

8 MR. EPPS: It's dated December 11, 2007. And it's addressed
9 to me, but I've provided copies to the Village as well.
10 (Reads.) "The engineered stormwater practices in concert
11 with the buffers that will be maintained achieve the
12 highest level of water treatment possible." When he
13 refers to the buffer, he's talking about the 100 foot
14 buffer. "Namely, the North Carolina Division of Water
15 Quality has modeled stormwater efficiencies for these
16 devices at 85 percent total suspended solids, TSS.
17 Removal in the vegetative buffers will provide an
18 additional TSS removal. In other words, the runoff from
19 the site will be cleaner after the site has been
20 developed."

21 He goes on to say that the site could further be
22 improved -- I don't know if you can get any better than it
23 being better after it has been developed, but he says it
24 could be improved if we'll fence off the entire creek so
25 that our horses -- we have two horses and the two furry

1 cows -- so that they don't go in the creek. This isn't a
2 requirement of DWQ. It's not a requirement of the
3 Village. But because he said it would be a good thing, we
4 agreed to do it.

5 MR. SULLIVAN: Mr. Epps, if that's your only copy, we've got
6 two and we would be happy to give one of ours to be in the
7 record.

8 MR. EPPS: Sure. Thank you.

9 MR. BROWN: That will be Exhibit 22.

10 MR. BARESICH: Yes, I'd like to take probably a five-minute
11 break for everyone.

12 MR. BROWN: No cross, Bobby?

13 MR. SULLIVAN: No.

14 (A recess was taken.)

15 MR. BARESICH: I'd like to call us back to order. At this
16 point we've heard the appellant's case. At this point I'd
17 like to move on to the Village side, and if you'd like to
18 present your first witness?

19 MR. SULLIVAN: Certainly. I'll call Bill Duston.

20 MR. DUSTON: Would you prefer me here or at the podium?

21 MR. SULLIVAN: If you could, at the podium, please.

22 (Bill Duston takes the stand.)

23 DIRECT EXAMINATION BY MR. SULLIVAN

24 Q. Bill, could you just state your full name for the record?

25 A. Bill Duston.

1 Q. And where do you work?

2 A. Centrolina Council of Governments.

3 Q. But for purposes of the events we've been talking about
4 here, what was your position?

5 A. I was the interim planning director.

6 Q. And what were your duties, generally, as interim planning
7 director?

8 A. To review plans that came in, to assist staff with zoning
9 permits, to meet with developers, and to review with them
10 the Town's ordinances and guidelines.

11 Q. Let me ask you about this 200 foot buffer requirement that
12 we've just talked about. Just to clarify, whose 200 foot
13 buffer requirement is this? Whose is that?

14 A. DWQ's.

15 Q. By DWQ, you mean the Division of --

16 A. Division of Water Quality.

17 Q. This is not a Village of Marvin regulation?

18 A. That is correct.

19 Q. Now, we've also talked about this date of July 1, 2007.

20 A. Uh-huh.

21 Q. Let me refer you back to, I think it was Exhibit 7, which
22 is that March 17, 2008 letter. This is a March 17, 2008
23 letter from DWQ to the Village of Marvin, is that right?

24 A. Yes, sir.

25 Q. Can you turn over to the top of the fifth page of that

1 letter?

2 A. Okay.

3 Q. And just read the first paragraph?

4 A. Under Existing Land Uses, "The State's postconstruction
5 program does not apply to existing land uses. The
6 undisturbed buffers only applies to new development, and
7 only new development that has not established the vested
8 right prior to July 1 of 2007."

9 MR. ROBINSON: I would object to that
10 being accurate characterizations of the law as it
11 was applied to statutory vested rights as what that
12 page is talking about. We're talking about common
13 law vested rights, and I object to it as being an
14 erroneous characterization of a law and irrelevant.

15 MR. SULLIVAN: I just asked him to read
16 the letter. I didn't ask him to --

17 MR. ROBINSON: Well, that's substantive
18 evidence, and I'm objecting to it.

19 MR. BARESICH: I think it's fine for him
20 to restate it. This document has already been
21 entered into evidence, so to just have him read
22 that particular document I think is fine. If
23 there's something else you objection to
24 specifically when it relates back to that, you'll
25 certainly have the ability to object to that.

1 MR. ROBINSON: Yes, sir. I don't object
2 to him reading it. I object to it as a statement
3 of accurate law.

4 MR. BARESICH: Understood.

5 BY MR. SULLIVAN:

6 Q. Bill, if you could turn the page back. Could you read the
7 first paragraph at the top of that page?

8 A. Okay. (Reads.) "Under exclusions to the postconstruction
9 program as administered by the State, the postconstruction
10 practices required by session law 2006-246 Section 9,
11 shall not apply to the development conducted pursuant to
12 one of the following authorizations, provided the
13 authorization was obtained prior to July 1, 2007, and the
14 authorization is valid, unexpired, unrevoked, and not
15 otherwise terminated.

16 Q. Now, the postconstruction practice I think Mr. Williams
17 talked about earlier, that includes the buffer that we're
18 talking about, the 200 foot buffer?

19 A. I believe so.

20 Q. Okay. And again, that July 1, 2007 date is in there?

21 A. Yes, sir.

22 Q. And what is, of the authorizations they list, the one at
23 the bottom, the last bullet point, what does that one say?

24 A. It says, "A vested right to the development pursuant to
25 common law."

1 Q. So we are talking about common law there?

2 A. Yes, sir.

3 Q. Okay. So the July 1, 2007 date that's there, again, that
4 comes from DWQ?

5 A. Yes.

6 Q. That's not a Village of Marvin date or not a date that the
7 Village of Marvin came up with?

8 A. That is correct.

9 Q. And that's not a date that you came up with?

10 A. I did not come up with that date, no.

11 Q. As the interim planning director for the Village of
12 Marvin, do you have any authority to change DWQ's
13 requirement that there be a 200 foot buffer?

14 A. No.

15 Q. And as the Village of Marvin's interim planning director,
16 do you have any authority to change the July 1, 2007 date
17 that DWQ issued?

18 A. No.

19 Q. So DWQ was saying, in order to be exempt from our 200 foot
20 buffer, you have to have a vested right on or before
21 July 1, 2007?

22 A. That's what the letter says.

23 Q. What are the requirements for common law vested rights?

24 A. That significant amount of time, labor, resources have
25 been expended based on the validly issued governmental

1 permit.

2 Q. So you have to have for common law vested rights some sort
3 of government approval of a permit that you're relying on
4 when you spend money?

5 A. Yes.

6 Q. The Elysian Fields, did they have a government approval on
7 or before July 1, 2007?

8 A. No.

9 Q. When did they get their approval?

10 A. In January of 2008.

11 Q. So after this cutoff date that DWQ established?

12 A. Yes.

13 Q. And there was some discussion about your determination of
14 vested rights for the Greenway as opposed to Elysian
15 Fields, and you found vested rights for the Greenway, is
16 that right?

17 A. Yes.

18 Q. When did the Greenway receive its approval?

19 A. A few months prior to July 1, 2007.

20 Q. So sometime in the spring 2007?

21 A. Spring, I would say spring of 2007.

22 Q. So unlike Elysian Fields, they had an approval for this
23 cutoff date that DWQ established?

24 A. Yes.

25 Q. Okay. Let me ask you about a couple of things that were

1 discussed about how you went through and made this
2 decision. I don't know what the exhibit number is for
3 this draft of a June 23rd letter. I didn't catch it when
4 he was going through.

5 MR. BARESICH: Ten.

6 MR. SULLIVAN: Exhibit 10?

7 Q. Let me refer you to Exhibit 10, a June 23, 2008. This is
8 a letter you drafted stating that you were going to find
9 that Elysian Fields had vested rights, is that correct?

10 A. Yes.

11 Q. Okay. Now, that letter has Draft written on it. You put
12 that on there as a draft, right?

13 A. Yes.

14 Q. And did that letter ever go out to Mr. Epps or anybody at
15 Elysian Fields?

16 A. Not until it was requested by Mr. Williams or Mr. Epps in
17 relation to this. Not at the time.

18 Q. Okay, so that's not something that you issued as a
19 decision granting vested rights?

20 A. No. That is correct.

21 Q. Now, ultimately the letter you ended up issuing found that
22 there were no vested rights?

23 A. That is correct.

24 Q. There was a lot of talk about how that happened. Can you
25 just explain for us, since it was your decision, how you

1 came from a draft letter that said no vested rights to an
2 actual decision that said vested rights?

3 A. The basis for the change in decision was based on a letter
4 that I subsequently found out about and saw and was given
5 to me from DWQ to Ms. Patton with a carbon copy. It says
6 on the letter Jonathan Parker, Village of Marvin, but it
7 meant Jonathan -- I would assume it meant Jonathan Edwards
8 -- that was issued by DWQ that said that Six Mile Creek
9 was a perennial streams. Perennial streams are subject to
10 200 foot buffers. Mr. Edwards introduced that in his
11 staff report.

12 MR. ROBINSON: Hold on one second.
13 We're testifying about a letter that's not in
14 evidence, and we need to see that before we have
15 testimony on it.

16 Q. Do you remember approximately the date of that letter?

17 A. No. Mid November of 2007.

18 MR. SULLIVAN: We've only got two of
19 these. We'd like to introduce these as -- are we
20 starting over with exhibit numbers?

21 MR. BROWN: Well, yes. I would say that
22 this would be Town's Exhibit 1. Exhibit 1.
23 Everything from here on would be Town.

24 MR. ROBINSON: And for the record, is
25 this a letter that Ms. Patton gave you?

1 MR. BROWN: You'll have a chance to
2 cross-examine, but --

3 MR. ROBINSON: Well, I'm just trying to
4 clarify his testimony.

5 MR. BROWN: You'll have a chance to do
6 that on cross-examination.

7 BY MR. SULLIVAN:

8 Q. Can you explain what this letter is that we're looking at?

9 A. It's a letter from DWQ. It's from Robert Krebs of DWQ to
10 Ms. Patton, as I mentioned before, cc'd to Jonathan
11 Parker, Village of Marvin. And it says, DWQ -- and I'm
12 reading -- "DWQ staff evaluated an unnamed tributary to
13 Six Mile Creek, Marvin Branch, and McBride Branch to
14 determine whether these streams are perennial or
15 intermittent. DWQ staff has determined that all of these
16 drainage features are perennial."

17 Q. Do you know that letter well enough to pass it around to
18 board members while I continue to ask you questions? Do
19 you need it in front of you? We can borrow the one that I
20 gave to Mr. Robinson.

21 A. No, I think it'd be fine.

22 MR. SULLIVAN: Okay, I'll hand that
23 around, give you a chance to look at it. I
24 apologize for not having multiple copies.

25 MR. ROBINSON: Before we introduce this

1 letter, as I understand it the letter that
2 Mr. Duston received was an unsigned letter from
3 this gentleman, and this is the first we've ever
4 seen of this letter that's signed, because this is
5 not in the Village records.

6 MR. SULLIVAN: No, Mr. Duston identified
7 this, and we're offering it into evidence, and you
8 can ask questions about it on cross if you'd like
9 to.

10 MR. BROWN: You can ask about what he
11 got from whom and what it was, and just lay the
12 foundation to get it into evidence. Just because
13 it's different from what you thought it would be.

14 MR. ROBINSON: Well, it's not different
15 than I thought it would be, it's different than
16 what's in the Village's records. That's why I'm
17 objecting.

18 MR. BARESICH: You can bring that when
19 it comes time.

20 BY MR. SULLIVAN:

21 Q. All right, Mr. Duston, real quick, explain again very
22 briefly what would this letter, what role it played in
23 your decision changing about vested rights?

24 A. That in November of 2007, prior to the sketch plat being
25 approved by the Village council, that the Village, and the

1 Village planners specifically, was aware of the fact that
2 DWQ has classified Six Mile Creek as a perennial stream.
3 Perennial streams require 200 feet of buffer, and
4 Mr. Edwards, his staff report in December -- or January,
5 to the Village council, references that letter. It says
6 that a letter from the Mooresville office of DWQ, and I
7 believe that letter is from the Mooresville office of DWQ,
8 references that Six-Mile Creek is indeed -- has been
9 classified by --

10 MR. SIWIK: It does.

11 A. Has been classified by DWQ as a perennial stream. That --

12 MR. SIWIK: Go ahead, I'm sorry.

13 A. Okay. And this information was made known to me. And
14 then I started putting pieces together that this
15 information was known by the Village prior to the plat
16 having been approved. And it just -- when I'm seeing the
17 July letter -- excuse me, the March letter, then that goes
18 back to July 1 and that Six Mile Creek was then, prior to
19 approval, had been classified as a perennial with a 200
20 foot buffer --

21 Q. So I mean, is it safe to say that this is information you
22 didn't have when you made your initial draft
23 determination?

24 A. That is correct. I did not have that letter. The
25 Mooresville DWQ letter I did not have.

- 1 Q. There was a lot of testimony already about what role
2 Councilmember Patton played in all this. Can you explain
3 in your own words what role she played in this process?
- 4 A. Councilmember Patton, to the best of my knowledge, handed
5 a number of documents to Ms. Whalen, who then gave them to
6 Ms. Graham, who gave them to me. This letter was one of
7 those documents.
- 8 Q. And were those documents -- did you have any kind of
9 discussion with Councilmember Patton about what your
10 decision should be?
- 11 A. No. At that meeting?
- 12 Q. At the Council meeting, you're talking about?
- 13 A. Well --
- 14 Q. I'm answering your question. Go back. I don't want to
15 talk over your words. Go back and tell us.
- 16 A. Okay, did Ms. Patton influence -- ask me the question
17 again. I'm sorry.
- 18 Q. Let me ask it another way. Is it correct that there was a
19 Council meeting where this was discussed --
- 20 A. Yes.
- 21 Q. -- this other transcript?
- 22 A. Yes.
- 23 Q. And then there was a reference to another meeting that --
24 for Anthony Fox who participated, and you and Anna Whalen
25 and Councilmember Patton?

1 A. That is correct. There was that meeting.

2 Q. Now, for that second meeting, were all council members
3 invited?

4 A. Yes.

5 Q. And Ms. Patton is the one who came? She's the only one
6 who came?

7 A. She was the only one that chose to come, yes.

8 Q. And at either council meeting or this second meeting, did
9 she have discussion with you about what your decision
10 should be?

11 A. No. She -- as the transcript shows, she has concerns and
12 then at the meeting itself, no. No.

13 Q. But she did provide documents -- I mean, she gave some
14 documents to Anna Whalen, and Anna provided documents to
15 you?

16 A. Through Melody.

17 Q. And this letter, this November 20th letter, is one of
18 those documents?

19 A. Yes.

20 Q. Okay. Are you aware of anything in the Village ordinances
21 or any other provision that says that a council member
22 cannot provide documents that are relevant to a vested
23 rights decision that you make?

24 A. I don't know of anything to that effect.

25 Q. And in making your vested rights determination, you took

1 documents that Mr. Epps gave you?

2 A. Yes.

3 Q. He gave you documents about money that he'd spent and so
4 forth, and you reviewed those as part of making your
5 vested rights determination?

6 A. Yes.

7 Q. And you accepted documents from Councilmember Patton and
8 looked at those as you did Mr. Epps' documents?

9 A. Yes.

10 Q. But ultimately the decision that you made -- and this is
11 Exhibit 12, this is the July 28th letter, this is the
12 decision that you -- this is the one you actually sent out
13 denying vested rights, is that right? Or is that -- do I
14 have the wrong one?

15 A. I believe that this is the correct one, yes.

16 Q. And you're the one who signed that letter?

17 A. Yes.

18 Q. That is your decision?

19 A. This, the July 20th, is my decision.

20 Q. And do you agree with the decision that you issued in that
21 July 20th letter?

22 A. I do.

23 Q. And again, the -- going back to -- not to belabor the
24 point, but this July 1, 2007 cutoff date, that's something
25 that again came from DWQ?

1 A. That is correct.

2 Q. Not something that you believed you had the power to
3 change?

4 A. I do not have the power to change that, that is correct.

5 Q. They said, you had to have a vested right as of that date,
6 and your job was to determine whether there was a vested
7 right of that date?

8 A. Yes.

9 Q. And because there was no development approval on that
10 date, there could be no common law vested rights?

11 A. True. As of that date, yes.

12 Q. I don't have any further.

13 CROSS-EXAMINATION BY MR. ROBINSON

14 Q. Mr. Duston, you had this March 17, 2008 letter from DWQ,
15 which is Exhibit 7, when you wrote your draft letter
16 granting Mr. Epps vested rights on January 23, 2008, did
17 you not?

18 A. Yes, I did. I had this letter when I wrote the draft.

19 Q. So you had the March 17, 2008 letter where DWQ is saying,
20 in DWQ's opinion, that vested rights had to be obtained
21 prior to July 1, 2007, correct? You had that information?

22 A. Yes.

23 Q. And yet on June 23, 2008, you had already decided to grant
24 Mr. Epps vested rights, did you not?

25 A. I had written a draft letter that was to be shared and

1 discussed with the Village attorney.

2 Q. You had made the decision to grant Mr. Epps vested rights
3 as reflected in the letter?

4 A. I wrote a letter saying that I was going to approve vested
5 rights, that is correct.

6 MR. BARESICH: Mr. Williams, can I ask
7 you to sit back down on the bar while you're
8 questioning the witness, please?

9 MR. ROBINSON: Well, I've got some more
10 documents to hand him, but I'll do that.

11 MR. WILLIAMS: For the record, I'm
12 Mr. Williams.

13 Q. And you gave your letter of June 23, 2008 granting
14 Mr. Epps vested rights to Anthony Fox for approval of your
15 language, correct?

16 A. For review.

17 MR. SULLIVAN: Objection. I think we're
18 getting into attorney-client communications there
19 as well.

20 MR. ROBINSON: Well, that's been waived
21 a long time ago in this meeting.

22 MR. SULLIVAN: This is the first time
23 we've put on a witness to discuss this. Your
24 witnesses have talked about it, but you can't waive
25 attorney-client privilege on behalf of the Village.

1 MR. ROBINSON: Well, that's not --

2 MR. BARESICH: That's true about the
3 meeting, anyway.

4 MR. ROBINSON: Yes, he talked about it
5 in the July 8, 2008 Village council meeting as
6 well, and the reasons why he gave it to Mr. Fox,
7 which is in the exhibit of the transcript of the
8 meeting.

9 MR. SULLIVAN: And to the extent of
10 discussing a public meeting, I don't have any
11 objection.

12 BY MR. ROBINSON:

13 Q. Why did you give your draft letter to Mr. Fox?

14 A. I wanted that the decision that I made, I wanted Mr. Fox's
15 review and make sure that if there are any issues later on
16 that they could be addressed.

17 Q. But you had the sole authority to make the decision?

18 A. That is correct.

19 Q. And that was not Mr. Fox's authority?

20 A. No. It is my sole decision to make this determination.

21 Q. And then after the subject came up at the July 8th Village
22 council meeting, you talked about the meeting that you had
23 with Ms. Patton and you talked about the documents she
24 gave you then, is that correct?

25 A. Yes.

1 Q. And one of those documents was the letter to Ms. Patton
2 dated January 20, 2007, is that correct?

3 A. No, sir. I referenced the letter dated November --

4 Q. I'm sorry, November 20, 2007?

5 A. That is the letter that I referenced.

6 Q. And did the letter that you gave, was --

7 (A discussion was held off the record.)

8 Q. So in any event, this is one of the documents she gave you
9 later, after the Village council meeting?

10 A. Through the Village staff, yes.

11 Q. And you heard Mr. Williams' testimony about what you said
12 to him. Do you deny anything that Mr. Williams testified
13 that you said to him?

14 A. I can't specifically recall what I said to Ray, but --

15 Q. As you heard Mr. Williams testifying, was there anything
16 that came up that you denied saying to him?

17 A. I cannot recall every conversation that I had with
18 Mr. Williams. So to say -- I can't say, Oh, I can
19 remember specifically that I said that to Ray. So I don't
20 want to say that everything that Ray said to the T is
21 exactly what I said. But I cannot recall every
22 conversation that I had with Ray.

23 Q. I don't think he's claiming to give a verbatim
24 recapitulation of what you told him. But what my question
25 to you is, did anything Mr. Williams say under oath here

1 tonight, do you deny any of that, what he said.

2 MR. SULLIVAN: Objection. Why can't
3 -- I prefer that Mr. Robinson just ask him --
4 refresh Mr. Duston of what was said. We're talking
5 about testimony from an hour or two ago. I think
6 it would be better if he says, Do you remember when
7 Mr. Williams said X, is that true rather than ask
8 him --

9 MR. ROBINSON: Well, if that's the way
10 he wants to phrase it, that's fine. I'm trying to
11 cut to the chase to say, Is there anything he said
12 that you deny?

13 MR. SULLIVAN: Again, sir, I would
14 prefer -- if the testimony were given again --

15 BY MR. ROBINSON:

16 Q. All right, let me ask you this, do you recall the
17 testimony that Mr. Williams gave about what you told him
18 the rules of the process were?

19 A. Regarding the rules of the process, everything that I told
20 Ray -- and actually, he quoted me from quoting at the
21 meeting was exactly correct.

22 Q. And so it was outside the process for Ms. Duston to be
23 giving you -- Ms. Patton to be giving you the material?

24 A. That's a legal answer. I can't answer that, sir.

25 Q. Well, I -- okay. But in any event, what Mr. Williams said

1 you said the rules were, you don't deny that that's true?

2 A. Regarding the Rules sir, I do not. I do not.

3 Q. Okay. That's all I have.

4 MR. BROWN: Any redirect?

5 MR. SULLIVAN: No.

6 MR. EPPS: Am I allowed to redirect or
7 ask questions?

8 MR. BROWN: Yes.

9 CROSS-EXAMINATION BY MR. EPPS

10 Q. Bill, in the letter you sent me, there's four criteria?

11 A. Yes, sir.

12 Q. Did I meet any of the criteria?

13 A. Yes, you did.

14 Q. Can you tell everyone which three?

15 A. The four criteria are: the owners made substantial
16 expenditures, the expenditures were made in good faith,
17 the expenditures were made in reliance on a valid
18 governmental approval as such was required, and the fourth
19 one, the owner would be harmed without a vested right.
20 According to the July 28th letter: It is my opinion and
21 find that the requirement that the owner has made
22 substantial expenditures has been met. Test two, the
23 expenditures were made in good faith, I found that one.
24 Test three, the expenditures were made in reliance on the
25 valid governmental approval if such was required, that was

1 the one that I did not find. And the fourth one, the
2 owner would be harmed without a vested right, I believe I
3 did -- I believe I did find -- let me try and make sure.
4 If find that you -- wait a minute. Yes, I believe that
5 you have no -- yes. So the only test that in my July 28th
6 letter, that I said that Mr. Epps did not meet was the one
7 that says the expenditures were made in reliance on a
8 valid governmental approval if such were required.

9 Q. The letter you sent me had only one attachment.

10 A. I'm so sorry.

11 Q. If I show it to you, maybe you'll -- can I show it to you?
12 The -- this is what you actually mailed to me.

13 (Indicates.)

14 MR. BARESICH: Is this a letter that's
15 in evidence already?

16 MR. EPPS: It is.

17 MR. SULLIVAN: Which exhibit is it, just
18 so we're --

19 MR. SIWIK: Exhibit 12.

20 MR. BROWN: Are you referring to the
21 July 28th letter?

22 MR. EPPS: It is. And with the
23 attachment of the March 17th letter.

24 MR. BAY: Just so we're clear, can we
25 see that?

1 MR. EPPS: Sure. I don't mean you to do
2 my work for me.

3 MR. BROWN: I'm sure that's an important
4 letter. Are you contending in any way that that's
5 different than Exhibits 7 and 12?

6 MR. EPPS: No, not at all. Not at all.
7 The only question I'm asking is, are these the only
8 documents that he mailed to me with that second
9 letter, in which he denied the vested rights.
10 Because I've heard them talk and then make
11 reference to another letter that I've never seen,
12 referring back to the DWQ letter about perennial
13 streams and Six Mile Creek.

14 A. That letter, the November letter, was sent to Terri,
15 Ms. Patton, and to the Village planner, and was referenced
16 by the Village planner in his staff report that went
17 before the Village council at their January meeting when
18 they made the decision. It references the November letter
19 from the Mooresville DWQ office.

20 MR. BROWN: I think he's asking you did
21 you mailed that letter.

22 A. I did not.

23 Q. Because it was my understanding when I received this
24 letter -- well, prior to receiving this letter when you
25 and I talked when I heard that you were changing your

1 decision, and this is -- this is the letter that you and I
2 spoke about, and this is where you received or you derived
3 that July 1st date from, was this DWQ letter. And this is
4 my understanding from our personal conversation that this
5 is what you were basing that third criteria that you
6 denied the vested rights on, was this letter here.

7 A. And this letter references back to July 1, and the issue,
8 best of my knowledge, it was known by all that the 200
9 foot buffer would apply based on that November letter.
10 And that was the reason why I -- the guts of the reason
11 why I changed my decision between the draft that was sent
12 in June to the actual letter in July.

13 MR. BARESICH: Is there a reason why you
14 wouldn't have included that letter as part of the
15 justification why you denied him vested rights?

16 A. I can't recall why. I truly do know why. I felt like it
17 was a valid letter officially submitted to the Town given
18 the fact that it was referenced in an official staff
19 report and made part of the record before the Village
20 council. As to why I didn't, at this point I truly do not
21 recall why.

22 MR. SIWIK: Bill, I'm confused. Can you
23 please, for my benefit, go through the chronology
24 of that letter? When did it appear, and how did it
25 get into the records of the Village official

1 records, and how did it get to you? I'm confused.

2 A. When I first took on -- when I was asked by Mayor
3 Ciaramella to address the issue of vested rights both for
4 Greenway and for the Mr. Epps, I asked the Village staff
5 to give me the information that's at hand. The Village
6 staff did give me the March letter, and I was working off
7 of the March letter for Mr. Epps. I did not have
8 initially the November letter. It was not issued to me,
9 it was not furnished to me, by the Village staff. When
10 Ms. Patton met with us and she says, "I've got more
11 information for you," that letter, the November letter,
12 was subsequently given from Hannah to Melody to me. And
13 that was at that point that I first saw that letter.

14 MR. FARLEY: What date was that, do you
15 remember?

16 A. I think Mr. Williams referenced the date. July 13th was
17 the --

18 MR. ROBINSON: 11th.

19 A. 11th?

20 MR. SIWIK: I have a question for you.
21 Does it being in Hannah's hand, and only in her
22 hands, and not in the Village records an official
23 receipt by the Village? You know, is there a time
24 delay between her receiving it and when it got into
25 the Village records, and why would there be a time

1 delay?

2 MR. BROWN: Well, I think that's a
3 matter for the Board's deliberation. I think
4 you've got to ask Mr. Duston about his testimony.

5 MR. SIWIK: Right. Okay, I'm sorry.

6 MR. BROWN: He's already testified about
7 a cc on it as well.

8 A. It's my understanding that it was in the Village's hands
9 and that it was cc'd to the Village planner, and the
10 Village planner referenced it in his staff report.

11 MR. BAY: Do we have a copy of that?

12 MR. BROWN: The staff report was Exhibit
13 6, which was part of those minutes.

14 MR. BAY: That was the --

15 MR. BROWN: That's the one that he's
16 -- you've added staff report in with those minutes,
17 right, when you were testifying earlier?

18 MR. BAY: Yes.

19 MR. BROWN: That is the staff report
20 he's referring to.

21 MR. BAY: I only had one copy, so it
22 doesn't matter.

23 MR. WILLIAMS: I didn't copy this
24 document.

25 MR. FARLEY: Mr. Duston, can I ask you

1 another question while they're looking for that?
2 Why would you have sent Mr. Williams the approval
3 for the vested rights on June 23rd and not have
4 sent a draft copy of that letter to Anthony Fox?

5 A. A draft letter of that had been sent to Mr. Fox.

6 MR. FARLEY: And he had already reviewed
7 it?

8 A. Yes, he had.

9 MR. FARLEY: So this was an approved
10 letter from Mr. Fox?

11 A. Mr. Fox and I had looked at that letter.

12 MR. BROWN: This is the staff report,
13 Exhibit 6, that's referenced in Exhibit 5, which is
14 excerpts of the minutes, and the reference is to
15 this DENR letter is second paragraph on page 3.

16 MR. BARESICH: What exhibit is that?

17 MR. BROWN: That is Exhibit 6, the staff
18 report that's been incorporated into the minutes of
19 the --

20 MR. SIWIK: It's not dated, though,
21 that's the only thing.

22 MR. BROWN: No, it doesn't, but the memo
23 is dated.

24 MR. SIWIK: Yes. No, no, the memo is
25 dated.

1 MR. ROBINSON: May I ask one question
2 for clarification of the record?

3 FURTHER REDIRECT EXAMINATION BY MR. ROBINSON

4 Q. Mr. Duston, you said that the senior planner of Village of
5 Marvin was cc'd on the letter. What was that Village
6 planner's name?

7 A. Jonathan Edwards.

8 Q. And what is the name on the November 20, 2007 letter?

9 A. It's Jonathan Parker.

10 Q. Okay.

11 MR. EPPS: If everyone else is done, I
12 still have two more questions.

13 MR. BARESICH: Please.

14 CONTINUED REDIRECT EXAMINATION BY MR. EPPS

15 Q. Bill, do you remember how long it took you to come up with
16 your first decision to allow me vested rights I have
17 applied. But I think the letter there is dated June 24th,
18 so almost three months?

19 A. It took a while, yes.

20 Q. But it only took four days to reverse it?

21 A. There was a reason why. I was waiting on Mr. Fox to give
22 guidance on how vested rights should be handled and what
23 criteria. So Mr. Fox was to have written a memo to me to
24 go over how vested rights -- I think to me and both to the
25 Council as well -- as to how vested rights. And I didn't

1 take action until I received that letter from Mr. Fox.

2 Q. Okay. Last question. I fit three of the criteria. The
3 fourth one was the date. So then why with my application
4 in hand wouldn't you grant vested rights as of the day I
5 got my permit -- my approval from the Town on
6 January 15th?

7 A. Because there was not -- a substantial amount of time,
8 labor, and resources were not spent on something by
9 July 1. That permit had not been issued by the Town on
10 July 1, and so that was the cutoff date.

11 MR. BROWN: Bill, can I ask you to turn
12 your head? You're a little hard to hear.

13 A. I'm so sorry. That with the information that I had, and
14 the new information that I had, it was apparent to me that
15 the 200 foot buffer was made known -- was known by the
16 Village staff and the Village, and was part of the
17 evidence presented -- I don't want to say evidence. It
18 was a legislative hearing -- part of the documents
19 presented at the January 15th approval of the sketch
20 plats. And it was that -- that was the main thrust as to
21 why this draft changed from leaning towards approval to
22 the denial. Because at that point, it was clear to me
23 that A, the 200 foot was known. When I'm reading the
24 March letter and it says clear as a bell effective July 1,
25 that this was known by all at the time of adoption.

1 Because again, the staff report that's part of the minutes
2 of the January 15th meeting approval references that
3 letter, references the fact that DWQ has come in and
4 classified Six Mile Creek and the streams leading to it as
5 perennial.

6 Q. Now --

7 MR. ROBINSON: Objection. The objection
8 to that characterization. Those documents speak
9 for themselves.

10 CROSS-EXAMINATION BY THE BOARD

11 BY MR. BARESICH:

12 Q. Now, that January 15th approval, Bill. That sketch plan
13 -- it reflected 100 foot buffers on it?

14 A. It did not reflect a 200 foot buffer on it.

15 Q. Okay. And typically when you approve a sketch plan like
16 that, would that have made a difference whether the --
17 would you have said, Well, wait a minute, this doesn't
18 have a 200 foot buffer, we should not approve this?

19 A. I wasn't at that meeting, so I really can't say what
20 transpired there. I've read the minutes, and I think
21 you've got the minutes that say that at that point in
22 January they're -- I would need to have the minutes in
23 front of me, because I don't want to quote off the top of
24 my head.

25 MR. BROWN: This is in January 2008,

1 correct?

2 A. It says in here, in fact, the 200 foot -- it says, fourth
3 paragraph down, it does reference the 200 foot buffer. It
4 says that at that point it's only a recommendation, it's
5 not a mandate. But in March, it -- it says that it goes
6 back to July 1, 2007.

7 Q. So in January it was treated as a recommendation, but
8 based upon the information you got in March, you're saying
9 then it became a mandate?

10 A. Right. And it was made -- it was clear to me at that
11 point that the whole issue of the 200 foot buffer was
12 known by all prior to January 15th. When I wrote the
13 draft, I did not have the November letter. I didn't have
14 any of the background information leading towards this.
15 As I stated previously, information was given to me,
16 including that November letter, which was made part of the
17 record. And so based on that information, and also based
18 on what the March 15th letter says, I felt that the most
19 proper decision that could be made was that not all of the
20 four findings of fact were met, and that the one that was
21 not met was expenditures were made on reliance on a valid
22 governmental approval such was -- such were required.

23 Q. One of the items mentioned by the appellants was in
24 regards to -- are common law vested rights typically
25 sought out before a decision is made coming down on rights

1 or are they something that just happened?

2 A. There are plenty of attorneys here that could answer this
3 question, but Marvin has in their ordinance what's also
4 called site-specific development plan requirements, or an
5 option. And what that does is if one exercises it is, I
6 got approved now, I want to make sure that I don't get
7 messed over by any changes in the regulation so I'm going
8 to apply through the site-specific development plan
9 process, and if the Village council approves me, I can be
10 vested for a designated amount of time from any changes
11 that would adversely affect me. That is an option that
12 people take. They don't take it too often, but it's
13 clearly an option, and it's written into the Marvin code.

14 The other option that I see is the option of asking
15 for common law vested rights. The other option is if you
16 get a validly issued building permit, and that vests you.
17 That is not the case here, because no building permits
18 have been issued. That's just not germane. The other
19 option that I have seen others in other communities
20 attempt to get is common law vested rights, which says
21 that based on a validly issued government approval you
22 spent a significant amount of time, labor, and resources.
23 Now, the letter says that -- the March letter says that
24 that date, the trigger date, is July 1, 2007.

25 MR. BARESICH: I'm thinking about specifically an argument

1 that was made that a common law -- do you disagree with
2 what they said before, that a common law vested right can
3 be set with a date like that, or does a common law vested
4 right just occur? Am I mischaracterizing what you said
5 before?

6 MR. ROBINSON: I'm not sure.

7 MR. BARESICH: When you were talking
8 about that July 1st date, I thought one of your
9 arguments was that Division of Water Quality really
10 had no standing to set that date, and I'm wondering
11 what his argument is to the contrary.

12 MR. ROBINSON: Right. My argument --

13 MR. BARESICH: As it pertains to common
14 law vested rights.

15 MR. ROBINSON: Right. My argument is
16 the common law vested rights doctrine is applied by
17 Mr. Duston and the courts and DWQ has no input on
18 common law vested rights.

19 Q. And I'm wondering what your opinion on --

20 A. I really can't answer that question.

21 MR. BROWN: As your counsel, to answer
22 your question, you can apply for vested rights as
23 it's coming down the pike and you know a change is
24 about to happen, or you can ask for it after the
25 fact. And that determination can be made after the

1 fact, and it can be adjudicated ultimately. Either
2 way, before or after.

3 BY MR. BAY:

4 Q. Is there a Village of Marvin -- either a statute or time
5 requirement from when an application is filed, such as
6 this, for vested rights before action is required?

7 A. I'd have to check the code. I'd just have to check the
8 code.

9 MR. BROWN: So your answer is you don't
10 know?

11 A. Let me check the code. And I also need to take a look at
12 the rules of procedure that I gave to you.

13 MR. BROWN: Just so the witness
14 understands, I think you are asking a time period
15 between when he receives a request as the zoning
16 administrator for a zoning administrator to make a
17 decision --

18 MR. BAY: Right.

19 MR. BROWN: -- not necessarily when an
20 appeal is filed and that matter comes here.

21 MR. BAY: Right, yeah. No, not that.
22 Not that time. I'm referring more back to the
23 statement Mr. Epps made about when --

24 MR. BROWN: Somebody asked the
25 administrator to make a determination, is there any

1 time limit on when --

2 MR. BAY: And I think the statement was
3 when he filed an application for vested rights.

4 A. I'm not seeing anything in the rules of procedure. Let me
5 go to the code itself. (Reads.) "An appeal to the Board
6 of Adjustment shall be made within 30 days," this is from
7 Mr. Epps, "of the mailing or hand delivery of the decision
8 by the zoning administrator. An appeal stays" --

9 MR. BROWN: That's the second step.

10 MR. BARESICH: Yeah, we're talking more
11 about when --

12 A. I'm just reading. An appeal stays --

13 MR. BROWN: I don't think the Board's
14 procedural rules are going to answer the question
15 about when a zoning administrator has to -- if it's
16 in there at all, it's going to be in the code.

17 A. Yeah, well, I don't see it in the code, and I don't see it
18 either in the rules. It has to be handled expeditiously.

19 MR. BROWN: General law on time frames
20 is reasonable under the circumstances.

21 MR. EPPS: Can I go ahead and finish?

22 MR. BARESICH: Yes, sir.

23 CONTINUED REDIRECT EXAMINATION BY MR. EPPS

24 Q. Bill, you keep making reference to the March 17th letter.
25 On the second voucher rights letter you wrote to me, you

1 deny a vested rights actually based on that letter, but on
2 this draft, which is the same one you have and everyone
3 has, could you read Test 1?

4 A. In the draft, "You, the owner of the tract that Elysian
5 Fields subdivision is located on have spent over \$21,800
6 in expenses directly related to the subdivision. All of
7 the expenses were incurred subsequent to the garnering of
8 the sketch plat approved by the Village. Moreover,
9 according to the receipts you provided to me, \$8,750 was
10 spent prior to the Village's receipt of the March 17, 2008
11 letter from DWQ. It is therefore my opinion that you did
12 incur substantial expenditures."

13 Q. Okay, because I thought that just a few moments ago you
14 said that I had not incurred substantial expenditures
15 between January 15th and March 17th?

16 A. It says expenditures -- what the July letter says, that
17 the expenditures -- the test that failed the July letter
18 was the test that expenditures were made in reliance on
19 the valid governmental approval that such was required.
20 And I fall back to the July 1, 2007 date based on DWQ.

21 Q. Based on their March 17, 2008 letter?

22 A. Yes.

23 Q. The last question I have for you, you mentioned that this
24 draft letter approving my vested rights, which again you
25 had told me about verbally, and you had told me -- I'm not

1 going to tell you what you told me, but I remember we
2 talked that the letter was just going to Anthony to be
3 reviewed but he could not change your decision.

4 A. That is correct. The decision was made by me.

5 Q. Okay, I'm sorry.

6 A. The decision was made by me.

7 Q. So with that in mind, do you mind just flipping to the
8 last page and reading who else you copied that letter to?
9 It wasn't just to Anthony Fox.

10 A. It would have been -- what Mr. Epps is saying is that
11 there are cc's to John Ciaramella, Melody Graham, Anthony
12 Fox. I don't recall specifically, but my gut feeling was
13 that Mayor Ciaramella -- no, perhaps Mayor Ciaramella and
14 Ms. Graham did get copies of the draft. I can't say so
15 for sure. I can't say -- I don't recall.

16 Q. The reason I ask that question is because I know that the
17 Town received a copy of this letter. Am I allowed to --
18 is there a point at which I can call someone who hasn't
19 been identified as a witness?

20 MR. BARESICH: The would have to be
21 sworn in.

22 MR. BROWN: Well, we're actually on the
23 Town's witnesses now. You can do some redirect,
24 but ordinarily on redirect you can't really call
25 new witnesses. But why don't we just get through

1 this witness and --

2 Q. Okay. I'm done, Bill. Thanks for being patient with me.

3 A. Okay.

4 REXCROSS-EXAMINATION BY THE BOARD

5 BY MR. BARESICH:

6 Q. Bill, one question. The call, when it was verbally --

7 A. I'm so sorry?

8 Q. The call, when it was verbally relayed to him that,
9 pending the attorney's review, was that instituted by you
10 to Mr. Epps or by Mr. Epps to you?

11 A. I think -- I know we had --

12 MR. EPPS: This will probably jog your
13 memory. We -- you called me, because you had
14 concerns of being voiced as I had submitted, there
15 were too many. You didn't agree with all of them.

16 A. I think that is correct.

17 MR. EPPS: You didn't agree with me
18 applying salary, that I collected and they
19 attributed to Elysian Fields. You didn't feel like
20 that was appropriate. You didn't feel like the
21 utilities I pay over there were appropriate. You
22 didn't feel like the -- somehow we whittled \$89,000
23 worth of invoices down to \$21,000 in that
24 conversation. Which, my question to you in that
25 conversation, and it was on June 20th. My question

1 to you was, Bill, you're asking me to whittle these
2 numbers down and I'm okay with that if you'll tell
3 me where you're headed with. And what did you say?

4 A. I would say -- my recollection I'm leaning towards
5 approval.

6 MR. EPPS: And you were getting ready to
7 send a letter to Anthony Fox saying such.

8 A. And the letter was sent to Anthony Fox. The draft letter
9 was sent to Anthony Fox.

10 BY MR. BAY:

11 Q. Now, a question on the -- for the -- in the final letter
12 that went to Mr. Epps, the July 28th letter, page 2 of it
13 talks about the date of invoice purchase payments and all
14 those old ones. When did you become knowledgeable of
15 those other payments?

16 A. Actually, Mr. Epps sent me two sets of invoices. He sent
17 me one set of pre-January 15th -- I think the first set --
18 I can't recall which set he sent me first, but he sent me
19 two sets of invoices. I did request a second set of
20 invoices from you. So he gave me a whole bunch of
21 invoices, pre and post January 15th.

22 Q. When did you get those sets?

23 A. Sir?

24 Q. When did you get those sets?

25 A. Probably I would say within -- I want to say within a

1 couple of weeks after -- he sent me one set of invoices
2 when he submitted his application. Again, I waited for
3 Mr. Fox to give me a memo detailing the process to go
4 through, and then once I started reviewing that -- and as
5 I stated before, there was delay, I want to say, upwards
6 of a month in receiving that memo, and during that time I
7 really just didn't do much of anything. And then once I
8 received the memo, I saw the invoices that Mr. Epps gave
9 me. I had a conversation with him, and I asked him to
10 submit additional invoices, which he did.

11 Q. Do you know about when that was?

12 MR. EPPS: I have -- I don't mind
13 reading these to you. I have them here.

14 Q. Not the date of the invoices, the receipts of the
15 invoices.

16 A. When did I receive them?

17 MR. EPPS: I have the cover letters. On
18 April 2nd -- this is the first letter I gave to
19 Bill. I too thought he just wanted invoices up to
20 July 1st, and they totaled \$1,189,000.

21 MR. EPPS: So the first set of invoices
22 dated April 2nd?

23 MR. EPPS: Correct. And then Bill said,
24 "No, wait a minute, I want the invoices only after
25 January 15th." So -- and that was on May 29th.

1 A. So there was a month's hiatus.

2 BY MR. BARESICH:

3 Q. And so the reason for your requesting those invoices,
4 specifically?

5 A. Because I wanted to see the whole picture, because I
6 literally -- once I got the stuff that Mr. Epps had first
7 given me, I really didn't pay much attention to it until I
8 got the letter from Anthony -- the memo from Anthony Fox
9 telling me, this is the procedure to go through. And then
10 once I saw that, I saw that I only had pre-January 15th.
11 I didn't have anything between January 15th and on, so I
12 asked Mr. Epps to then send me stuff between January 15th
13 and on, and he did.

14 BY MR. BAY:

15 Q. Here's my question. They're actually Plaintiff's Exhibit
16 10, the drafts, Test 3, you start off that paragraph
17 saying, "All of the expenses you provided me were incurred
18 after January 15, 2008"?

19 A. I was leaning -- and --

20 Q. That's kind of my question, is -- the definitive statement
21 of saying all of the expenses provided me were incurred
22 after January 15, 2008. But that wasn't all the invoices
23 that you had.

24 A. All of the invoices that I was considering were the ones
25 after January 15th.

1 Q. Okay.

2 BY MR. BARESICH:

3 Q. And that's because you can only consider expenses that are
4 based upon a valid governmental approval?

5 A. Correct.

6 BY MR HUMPHRIES:

7 Q. Can I ask a question? Mr. Duston, the Division of Water
8 Quality's letter is dated March 17th. In your opinion, on
9 March 16th of 2008, did Mr. Epps have vested rights?

10 A. Now?

11 Q. On March 16th --

12 A. If you're asking me -- are you asking me that question as
13 of today, if I were looking back to March the 16th?

14 Q. On March 16th, you were --

15 A. The information that I have in hand now, no.

16 Q. No, on March 16th, if you had issued a decision on March
17 16th, the day prior to the letter from the Division of
18 Water Quality --

19 A. The day prior to the --

20 Q. -- did Mr. Epps have vested rights, in your opinion?

21 A. Let me see, let me think about that. If the letter from
22 DWQ comes on March the 17th, on March the 16th did he have
23 vested rights?

24 Q. If you had sent him a letter, would that letter have given
25 him vested rights or not?

1 A. The letter comes out -- he's asking me on March 16th if no
2 official letter comes out on March 17th -- the March 17th
3 letter established the July 1 threshold. So I did not
4 know about the July 1 threshold. I would take a look at
5 what he spent based on the validly issued governmental
6 approval between January the 15th and March the 16th.

7 Q. Right.

8 A. And I would take a look at what he had spent during that
9 time. Because if I did not have, and I'm just thinking
10 out loud here, if I did not have the July 1 date at that
11 time, I -- there's no way that I could apply it. I could
12 only apply between then, January 15th, and March the 16th.
13 So I guess the answer would be based on what we're talking
14 about, I probably -- yes.

15 Q. Thank you. That's all I've got.

16 MR. BROWN: Mr. Epps, were you done?

17 MR. EPPS: Yes. Bill, thank you.

18 BY MR. FARLEY:

19 Q. Bill, I guess I'm still struggling with, you know, what
20 your thoughts or if you could tell me what -- why Anthony
21 would have approved one -- you sent him the letter at the
22 same time, right? The June 23rd letters that -- approving
23 the Parks and Greenways vested rights, and a draft
24 approving Mr. Epps, right? You sent them the same day,
25 but we heard testimony that we had a July 4th date, so I'm

1 still kind of wondering what's behind that?

2 A. Mr. Fox and I had talked about Parks and Greenway before,
3 and there were -- and I would assume that there had been
4 previous -- I know there were previous iterations of the
5 Parks and Greenway letter. That Parks and Greenway letter
6 was discussed and reviewed by Mr. Fox and with me, and we
7 agreed that the letter dated June the 23rd was okay. I
8 felt very comfortable with it, as did he, and I guess to
9 get to your point why, is that prior to July 1, the Parks
10 and Greenway plan had been approved by the Village
11 council. That had been approved in the spring of 2007,
12 and there were expenses that were incurred. And the
13 validly issued approval for the Parks and Greenway was the
14 approval of the Parks and Greenway plan. The Parks and
15 Greenway --

16 MS. GRAHAM: Master plan.

17 A. Master plan. So July -- excuse me, June the 23rd, I
18 issued that formal letter to Parks and Greenway, and it
19 went out, and that was the letter. That was my decision.
20 I also wrote up a draft to Mr. Epps based on the
21 information that I had that went to Mr. Fox on the 23rd,
22 24th. And I did not hear back from Mr. Fox for a while,
23 but upon getting -- upon discussing the matter more with
24 Mr. Fox, and based on all of the information that I had, I
25 felt that the letter that I ultimately wrote and issued in

1 July, July 28th, was the correct -- was the letter that
2 was my decision, and that I stood by.

3 Q. And your decision changed on July 11th, when you received
4 that?

5 A. I wouldn't characterize that as true, because -- no, that
6 is not true. Because I got a ton of information. I got a
7 lot of information from Ms. Patton that I had to sift
8 through and see what, to me, was relevant and what was
9 there that, if anything, that would make me change my
10 mind, if at all. And the one thing that, as I mentioned
11 before, that did strike me was that November letter from
12 DWQ that was stated that Marvin Creek and the other
13 streams that run into it are perennial and require a 200
14 foot buffer.

15 Q. Now, is it typical of DWQ to write a letter to a single
16 councilperson and a planner?

17 A. I don't know.

18 Q. You haven't seen that in any of your dealings with the
19 Centrolina government?

20 A. If I -- if I ask them, they'll send me a letter. If I ask
21 on behalf of a Town, and I often serve on behalf of towns,
22 so just as the case was here, I was -- on the interim
23 zoning administrator -- the interim zoning administrator,
24 yeah, they could have written --

25 Q. Well, in your professional opinion, why would the DWQ have

1 written?

2 A. That I don't know. I do not know. I can't speak for DWQ.

3 Q. All right, that's fair.

4 MR. BARESICH:

5 Q. I think during Mr. Williams' testimony, he had mentioned
6 the fact that had the easements already been given at this
7 point, Parks and Greenways wouldn't be having these
8 issues. And his part of the property could still be
9 developed as it originally was, because they already have
10 common law vested rights.

11 A. The Greenway?

12 Q. Is he correct in when he made that statement?

13 A. I issued -- let me just give you my spin on it. I issued
14 the letter vesting the Greenway master plan. And the
15 Greenway map that you see there, that has been vested. As
16 applied to Mr. Epps' property, I denied it.

17 MR. BROWN: Mr. Chair, I don't know that
18 there's been any testimony -- there's been
19 references to easements, but there's been no
20 testimony as to whether they exist, whether they've
21 been recorded, or whether they've been drafted, and
22 whether they've been agreed to. There's only been
23 reference to easements

24 MR. BARESICH: Okay.

25 MR. FARLEY: I actually made a reference

1 to that point.

2 MR. BAY: May I address that?

3 MR. BARESICH: If somebody could --
4 specifically on the easements, and you had made
5 that statement before, so clarify just that
6 statement.

7 MR. WILLIAMS: On the easements
8 themselves, that was part of the process leading up
9 to approval of his sketch plat, and when a sketch
10 plat is --

11 MR. BARESICH: So it was part of a
12 process the Town was involved in specifically to
13 Mr. Epps?

14 MR. WILLIAMS: Yes. We talked to the
15 Greenway board, looked at Mr. Epps' plan, looked at
16 our maps and our plans to Greenways and said this
17 property has on it a planned Greenway. And the
18 Marvin ordinance requires then that that Greenway
19 be donated, that easement be donated to the Town.
20 But that donation could only become effective at
21 the time of final plat approval. So if this --
22 this is why Parks and Greenways is involved in this
23 process, because if Mr. Epps does not get final
24 plat approval, if he cannot complete his plan to
25 build Elysian Fields, then Parks and Greenways lose

1 any chance of that easement. Does that clarify it
2 for you, John?

3 MR. BARESICH: Yes.

4 MR. BROWN: You're testifying you don't
5 have those easements yet? There are no recorded
6 easements?

7 MR. WILLIAMS: There are no recorded
8 easements on that property.

9 MR. BARESICH: Any other questions?

10 (Witness exits the stand.)

11 MR. BROWN: Mr. Epps, did you mention something about a
12 rebuttal witness, or do you still have some desire to have
13 a witness rebut some of Mr. Duston's testimony?

14 MR. EPPS: Yeah, and actually, Melody has been sworn in. And
15 she may be able to answer, but if she can't, then I wonder
16 if I can get the other person who's here sworn in?
17 Whichever you prefer. She may remember.

18 MS. GRAHAM: Good luck with that.

19 MR. BARESICH: Is there a procedural problem allowing that?

20 MR. BROWN: I mean, we can consider this rebuttal testimony,
21 so let's see what it is.

22 MR. SULLIVAN: Well, I mean, we're not done putting on our
23 witnesses on our end, so --

24 MR. BARESICH: Please, go right ahead.

25 MR. SULLIVAN: And maybe it's the same person. I'm just going

1 to ask Anna Whalen to come and testify.

2 MR. EPPS: Oh, perfect.

3 MR. SULLIVAN: And we can kill two birds with one stone.

4 MR. EPPS: She was, yes.

5 (Anna Whalen takes the stand.)

6 MS. WHALEN: Anna Whalen, Village of Marvin senior planner,
7 3701 Spokeshave Lane, Matthews, North Carolina.

8 DIRECT EXAMINATION BY MR. SULLIVAN

9 Q. Anna, first of all, there has been some discussion about
10 what documents were and were not in the Village's files.
11 Can you shed some light on that?

12 A. Yes. At the time that the vested rights application came
13 forward, the letter that I had in a file was the March
14 2008 letter. I did not have other -- the filing system is
15 less than to be desired in my office, so I did not have
16 knowledge of other documents. And so that's all that I
17 provided to Bill Duston to make his determination. After
18 the meeting that -- the Council meeting, and after it was
19 decided to sit down and have the discussion with the
20 Village attorney, Councilwoman Patton, Bill Duston, and
21 myself, when Councilwoman Patton said that she had other
22 documents that the Village had received that I may not
23 have knowledge of that I didn't share with Bill, it was
24 determined that we would meet on Friday to basically go
25 over those documents.

1 She did present me the documents. I went through
2 them and said which ones I would take that were related to
3 Elysian Fields and to the DWQ ruling. There were things
4 that I did not include in what I gave Bill Duston, and
5 there were things that I refused to look at at that time,
6 because they were in relation to a different application.
7 The ones that I ended up providing to Bill Duston included
8 the staff report that you already have from Jonathan
9 Edwards, so I'm not sure which exhibit number that one is,
10 but the January 15th.

11 MR. BROWN: It's Exhibit 6.

12 A. I did again provide him the -- so you have the March 17th
13 letter? I will tell you subsequently I did find an
14 official signed version, original, folded, that was in an
15 envelope. I provided him the November 20, 2007 letter,
16 which is now an exhibit. I provided him an October 3,
17 2007 letter from DWQ to Jonathan Edwards regarding
18 postconstruction requirements. I provided him an e-mail
19 that Terri Patton sent me that she was cc'd on, and it was
20 a string of e-mails from Mike Randall and Jonathan
21 Edwards. I provided him a September 20, 2007 letter from
22 United States Department of Interior, Fish and Wildlife
23 Service to Rene Dotson. I provided a July 10, 2007 that
24 was actually from Rene Dotson to Mike Randall about the
25 waiver request from our permit that we had. And I sent

1 him a fax saying other documents that may be applicable in
2 your review -- so this was not -- these were things that
3 she went over, but they were -- we had copies of them
4 online. The staff report for March 11, 2008, Village
5 council minutes of September 11, 2007. I put page 9 of 12
6 for stormwater and flood plain. Number 2 was July 31,
7 2007, page 5 on the NPDES phase 2 permit, and number 3 was
8 the January 15, 2008 page 6 of 9 on Elysian Fields.

9 Those were the documents that I went over with
10 Ms. Patton and that she provided me. Subsequent to our
11 meeting, she basically -- in her providing me those
12 documents, they were documents that were either addressed
13 to a staff person, cc'd to a staff person, or they were
14 documents that we drafted to go to someone else.

15 In addition, I provided a copy of the report that
16 you have from the biologist that was part of Robert Epps'
17 application, so I provided that to Bill Duston, and I also
18 looked through our documents and provided him an original
19 -- basically, the first time Mr. Epps came in where the
20 property was still owned by the Baughmans, I provided him
21 that sketch plan and dated material.

22 Q. So the documents that Bill Duston didn't have when he did
23 his first draft, they were provided to him by Terri Patton
24 through you. Were those all documents the Village had,
25 they were in the Village's records for the most part,

1 somewhere?

2 A. Yes.

3 MR. ROBINSON: Objection; leading.

4 A. I did end up finding the November 20th letter, which I
5 have now given you my original. So you have my original
6 that was addressed -- that was folded up and provided to
7 Jonathan Edwards. I have the March 17th original letter
8 now. I don't have a copy anymore. The October 3rd letter
9 I also have, the Jonathan Edwards version that's signed
10 that has to do with postconstruction requirements. I have
11 an unsigned version that was in -- it looks like it was
12 electronically sent that was in a file that was in the
13 office, and it matches the signed version. And I don't
14 want to give up my only signed version, but I don't mind
15 providing this one if you're comfortable with that.

16 MR. BROWN: It depends on whether you
17 want to introduce it into evidence. Are you asking
18 her to introduce that?

19 A. It is something that I -- it's the October 3rd.

20 MR. SULLIVAN: We would like to offer
21 that into evidence. I have an unsigned copy, but
22 not a signed copy.

23 A. I have a signed version.

24 Q. That's the only signed version?

25 A. I'm trying to remember if I made a copy of it back at the

1 office.

2 MR. BROWN: We'll need the signed
3 version.

4 A. All right. (Indicates.)

5 MR. FARLEY: No, we haven't seen that
6 one, have we?

7 A. No. That was included in the packet that I provided to
8 Bill Duston.

9 MR. BROWN: Will you pass it down?

10 Q. And other than providing documents to Bill Duston, were
11 you involved in the vested rights determination at issue
12 at all?

13 A. Not on Elysian Fields. Well, I'll correct myself. I was
14 there the day that Robert Epps brought in his binders that
15 had the fees. So for the original application when he
16 brought them in, I did make recommendations on -- with
17 Bill, on his -- to itemize more what he spent monies on,
18 to not just give a lump sum. And I believe it had to do
19 with some salaries that we asked him to itemize. That was
20 really the last time that I ended up working on the
21 project.

22 Bill did send me a fax of the draft letter.
23 Because I was busy I didn't look at it. It still had the
24 cover sheet on it. When the discussion came up about
25 trying to find a third party that was not involved in the

1 decision making, I did tell Anthony Fox that I had not
2 read that letter, and so it was recommended that I go
3 ahead and just basically shred that letter and then go
4 ahead and be the person that would end up receiving the
5 documents from Councilwoman Patton. So after that, my
6 involvement has been just basically passing documents.

7 Q. I don't have any other questions.

8 CROSS-EXAMINATION BY MR. ROBINSON

9 Q. The applications that Ms. Patton submitted to you that you
10 did not pass on to Mr. Duston concerned what?

11 A. One of them I have here, which was essentially a cut and
12 paste of the law regarding statutory vested rights and
13 common law vested rights that she took excerpts out of out
14 of a book. She highlighted those sections, and then on
15 the second page she actually started writing her opinion
16 on how things could be interpreted. And I did not pass
17 that on to Bill Duston. The second things that I did not
18 even look at myself had to do with the Longview South, the
19 application. She wanted to make sure that I had those,
20 felt that they were important to be included. I said that
21 was a different project and would not be appropriate to be
22 introduced to Bill Duston for Elysian Fields. I did tell
23 her that I'd like to sit down with her at a later time to
24 make sure that my records are up to date, and so she and I
25 will go through those in the future to make sure I have

1 all the documentation for that project.

2 Q. In your discussions with Ms. Patton, why did she feel the
3 Longview South documents were relevant?

4 A. They also had letters from DWQ. Their property also is
5 impacted by the heelsplitter.

6 Q. So Longview South is, in terms of its creek situation, in
7 the same situation Mr. Epps is in?

8 A. Correct.

9 Q. And do you know whether Ms. Patton has an interest in
10 Longview South not getting vested rights either?

11 A. She did mention that the outcome here would potentially
12 affect that outcome there.

13 Q. So she didn't want Mr. Epps to get vested rights because
14 that would set a precedent for Longview South?

15 A. That part she did not share with me.

16 Q. Was that your interpretation of what she said?

17 A. I did not basically go to that interpretation.

18 MR. ROBINSON: That's all I have.

19 MR. BROWN: Mr. Epps?

20 CROSS-EXAMINATION BY MR. EPPS

21 Q. She may have answered the one question I was going to ask,
22 and that was -- mentioned that the letter he sent to
23 Anthony for review, that first letter, that approval
24 letter?

25 A. Uh-huh.

1 Q. And he wasn't sure if he had actually cc'd it to the mayor
2 and the town. And I remember that I went in and asked for
3 a copy of the letter. When I heard that she had managed
4 to get involved in this, I went looking for the letter,
5 and not only did you -- did Bill say that he wouldn't give
6 me a copy, but when I went looking for the Town's copy,
7 you said you received it but --

8 A. I am not sure. I do not know whether or not anything was
9 sent to the mayor or to Melody -- to Ms. Graham. I do
10 know that I did receive a fax copy. I did receive a fax
11 copy as well on the Greenway, but that one I got to. This
12 one, to be honest, I just didn't get to, just because of
13 the other things that I was working on. But when they had
14 talked -- when we did have the one conversation with
15 Anthony, the discussion was wanting to basically hand
16 these documents -- Councilwoman Patton had asked if she
17 could hand these documents over to Bill, and we had
18 decided that it would be appropriate that if she delivered
19 them to me that I could do that, because at that point I
20 was not -- did not know what the decision was.

21 Q. If memory serves me, at that point a copy of my draft
22 letter, my letter of approval, you shredded?

23 A. Yes.

24 Q. So you shredded that letter once she got involved?

25 A. I shredded the letter after the meeting with Anthony Fox.

1 Q. Okay. That was the only question I had.

2 A. Okay.

3 (Witness exits the stand.)

4 MR. BARESICH: Now if you want to go back to the issue of the
5 possible redirect of the witness that you wanted to
6 potentially call?

7 MR. EPPS: That was her. And that was the question I was
8 wanting to ask.

9 MR. BARESICH: All right, that being said, at this point are
10 there any other questions amongst the members of the Board
11 here? Okay, at that point we'd like to move on to the
12 closing statements. Given the time and everything, I ask
13 that we don't do too much restating of the evidence but
14 try to tie it all together for us in a concise fashion.
15 And please don't -- do you normally go in the same order
16 as which we switched around?

17 MR. ROBINSON: The appellant goes last.

18 MR. SULLIVAN: I would say that the appellant goes first.

19 They're the one with the burden and they put on the --

20 MR. ROBINSON: Well, yeah, first and last. We get to go
21 twice. I mean, that's the way it is in court. I assume
22 it's the same way here.

23 MR. BROWN: I think let's just get a closing statement from
24 all the parties and give them 10 minutes -- 15, 10 at the
25 most. Just the closing statement of your position and

1 why. The hearing is still open, and I think the Board is
2 trying to make sure there's nothing else that they need to
3 know before they close this hearing. I would say start
4 with Mr. Williams' case, Mr. Epps' case, and then the
5 Town's closing.

6 MR. ROBINSON: So you want us to go first?

7 MR. BROWN: Yes.

8 MR. ROBINSON: If I could just, before I start, because I am
9 going to be very brief, we talked about this earlier,
10 again in court, if I wanted my client to give a closing
11 statement he would be allowed to do that. And I think
12 Mr. Williams ought to be allowed to give a closing
13 statement along with me. I just wanted to make sure that
14 that's okay with everybody.

15 MR. BROWN: We're okay with that as long as it's part of the
16 closing.

17 MR. ROBINSON: All right. I had a -- not long, but longer
18 closing planned, but our case was made by the other side,
19 or established by the other side just a few minutes ago,
20 and this was in response to questions from Mr. Chairman
21 and Mr. Humphries as to these dates we've been talking
22 about. And I wrote it down. What Mr. Duston said was, in
23 response to Chairman Baresich's question, in January of
24 2008 the November 20, 2007 letter was a recommendation.
25 In March 2008 it became a mandate. And that is our whole

1 case.

2 The 200 foot buffers were not mandated in Marvin
3 until the receipt of the March 17, 2008 letter. Prior to
4 that, it was who's going to do what, are we going to have
5 it, so forth and so on, a lot of uncertainty going on, as
6 we've seen here tonight, where the Village's records have
7 unsigned copies and now they have signed copies and so
8 forth. That's what was going on with this DWQ stuff at
9 that point in time. And as Mr. Duston himself said in
10 response to Mr. Humphries' question about on March 16
11 would vested rights have been granted, he ultimately said
12 yes, and he said at that point, quote, There was no
13 official word.

14 So the official word on the 200 foot buffers came
15 on March 17, 2008, and up until that point, there were no
16 200 foot buffers in Marvin. And that is hugely important,
17 because on January 15, 2008 Mr. Epps received his approval
18 from Village council, and from that point to March his
19 expenditures have been gone through here. And so that in
20 and of itself we would submit proves that March 17, 2008
21 is the operative date, and not the November 20, 2007.

22 And again, DWQ does not have the power to say, Your
23 buffers are 200 feet effective July 1, 2007. The first
24 that Marvin heard of that officially was March of 2008,
25 and that's our whole case, that that was the official

1 word, the official change of the ordinance. In the case
2 law handed you that showed what had happened there, that's
3 -- the first item references the amendment to the
4 ordinance as the operative date.

5 And if I could, I would like to hand these -- these
6 are the same letters that are in evidence, but it just
7 highlights the different dates, which is exactly what
8 Mr. Humphries was referencing. So I'll pass these to the
9 Board, if they want to look at them. If not, then I'll
10 just hang onto them.

11 MR. BARESICH: I think the evidence has been submitted.

12 MR. ROBINSON: Okay. So in any event, what we just heard was
13 that the March 17, 2008 date is the quote/unquote official
14 word, the official amendment to the ordinance. And again,
15 I go back to what I said earlier, it would have been
16 virtually impossible -- it would have been impossible,
17 logically and otherwise, for Mr. Epps to have obtained
18 common law vested rights prior to July 1, 2007, because
19 that 200 foot buffer had nothing whatsoever to do with him
20 or Marvin on that day. And the time that it did have to
21 do was when the official word came in March 2008. Thank
22 you.

23 MR. WILLIAMS: You've heard from Mr. Robinson. I've got a
24 slightly different take on some of these. First of all,
25 I'd like to talk about the draft letter written by

1 Mr. Duston on June 23rd. That conferred vested rights
2 upon Mr. Epps and Elysian Fields. That draft letter was
3 sent to Anthony Fox for his approval, along with a similar
4 letter for Parks and Greenway's board. Mr. Fox acted upon
5 one of them and not the other, and then, based on
6 testimony, I think actually Mr. Robinson said it, the July
7 4th vacation and whatever else was going on in Mr. Fox's
8 life at that time, there was no consideration given to
9 that letter until it was brought up at the July 8th
10 Council meeting.

11 My question is, are we going to penalize Mr. Epps
12 and his family because of Mr. Fox's vacation? If Mr. Fox
13 had acted upon that letter and said to Bill, Yes, the
14 verbiage contained within this is satisfactory, it meets
15 all the legal requirements, it would have been mailed out.
16 The only thing that stopped it from being mailed out was
17 Mr. Fox's July 4th vacation and whatever else occupied his
18 mind for that two-week period. That alone, to me, says
19 that Mr. Epps should get his vested rights because he
20 cannot be penalized by the inaction of someone over which
21 he had no control.

22 The public statements of Mr. Duston at the July 8th
23 meeting confirmed both the existence and the contents of
24 the July 23rd letter. These statements, in effect,
25 constituted making public his decision. He said, I have

1 written the letter, I have sent it to Anthony Fox, it is
2 going to confer vested rights. When asked by Ms. Patton,
3 he said, This letter will confer vested rights on
4 Mr. Epps. At that point, that is an open declaration that
5 vested rights existed to Mr. Epps at that point in time.
6 From then on, the only appeal against that letter was to
7 come here, as we've done tonight, and approach the Board
8 of Adjustments. Anything else that occurred was a
9 violation of the process.

10 Finally, you gentlemen have the option not only of
11 enforcing the law as you see it, but you can deal with the
12 spirit behind those laws. You can vacate any decision
13 made by the zoning administrator. That's your right. I
14 ask you to consider a situation where Mr. Epps is denied
15 common law vested rights. He cannot develop his property.
16 He cannot build a trail down the edge of his creek. But
17 tomorrow morning, my Parks and Greenway board and I can go
18 there and do exactly that. We can do things with his
19 property that he can't do. Now, how that complies with
20 any spirit of the law defeats me completely.

21 It would seem to me that if someone has vested
22 rights to develop a piece of property, those vested rights
23 should automatically default to the owner of the property
24 as well. And in that case, Mr. Epps should be granted his
25 vested rights. Thank you.

1 MR. BROWN: Mr. Epps?

2 MR. EPPS: What Ray just said about the spirit of something, I
3 alluded to earlier as well. I think an awful lot of
4 information has come out, and I think that there's more
5 than enough there to make a decision on. But if you were
6 to discard all that, we still have the spirit under which
7 vested rights rulings should be applied. Bill has said I
8 met -- let's forget about the approval letter for a
9 minute. On the denial letter I met three categories. The
10 last one I didn't meet according to him because of those
11 dates. But what you haven't heard yet is what the
12 expenditures really were. I thought they would come out.
13 I thought they would be in the application somewhere with
14 everyone else.

15 MR. BARESICH: You can't --

16 MR. EPPS: Oh, I'm sorry. It's not that important to me.

17 MR. BROWN: Well, the hearing is still open. We're hearing
18 the closing arguments. You're about to switch from
19 closing arguments to testifying.

20 MR. EPPS: You're right. There's also been a lot of talk
21 about Councilwoman Patton. I didn't bring that up before.
22 I didn't make it part of our discussion because I've been
23 hearing about it for over a year, year and a half. We've
24 been dealing with what she's been doing for a long time.
25 And it's not invisible why. We -- I've had to listen to

1 the word precedent many times. The idea that the Village
2 or a councilperson would discard something that's good for
3 the Village, something's that good for all of us,
4 something that fits our land use plan -- you go to our web
5 site, we have horses on the website. But there's no
6 developments going in that encourage that. Elysian Fields
7 does.

8 The idea that the Village would actually block that
9 and would harm a family -- because we are a family; we're
10 not developers. We're just two people and two little
11 girls who thought we could do this. We could do something
12 different. We could do something special. Everyone will
13 benefit from it. We can make this happen. The idea that
14 they would throw that away to stop another development
15 coming up, and Longview South is who we're talking about,
16 the Village I don't think is willing to do that. Are a
17 couple people in the Village willing to do that? Yes.
18 And I don't want to talk about them anymore. I just want
19 to forget about them. Their ideology is really messed up
20 if they would discard good things to stop something that
21 they don't like.

22 Stopping Elysian Fields with this big hammer of a
23 DWQ recommendation didn't stop there. I also -- when I
24 went to apply for a permit for my back porch, a
25 councilwoman got involved. It was Terri Patton, because

1 our house is within 200 foot of the creek, and it has been
2 since 2002. And I want to go in and pull a permit. Well,
3 if I pull a permit for a back porch, what kind of
4 precedent does that set? Oh, my God. We're talking about
5 a back porch on someone's personal residence, and it
6 happens to be mine. But she's -- some are willing to stop
7 just so that a precedent is not set for this other
8 subdivision because they don't like it, or because there's
9 arguments. Whatever their reasons are, I don't are. But
10 I just don't think it's fair, and I think that's what you
11 guys are here to decide, what's fair and what's not fair.
12 And we're just hoping that you come to the same conclusion
13 that we have. Thank you.

14 MR. SULLIVAN: Thank you. It's certainly true that the
15 process didn't work as well here as it could have. There
16 were certain problems in terms of how long it took for
17 things to happen in the decision-making front. It's
18 unfortunate the Mr. Duston didn't have all the documents
19 that were relevant to this when he first made a draft
20 decision, and those came to him later on. But I mean,
21 ultimately, in terms of what those issues were, the
22 process itself has been talked about a lot, but really
23 what's before you is what's the decision that Bill Duston
24 ultimately made and is it right or wrong? And like we
25 said from the beginning, you're here sitting and looking

1 at this from scratch, and you don't -- you make the
2 decision whether he had vested rights or not.

3 Now, I personally -- I don't think there's anything
4 wrong with the process that happened here. They've talked
5 a lot about Councilmember Patton getting involved, but the
6 testimony was what she ultimately did is she took some
7 documents that were already in the Village's file and got
8 them to Mr. Duston, and not even directly. She gave them
9 to Anna Whalen, and Anna gave them to her. I mean,
10 Mr. Duston, when he's making his decisions is supposed to
11 look at all the relevant information, and he had documents
12 from Mr. Epps and these documents that Terri Patton gave
13 him were relevant to this. And again, they haven't shown
14 any kind of ordinance provision or law or anything that
15 says she can't do that.

16 But again, ultimately, that's neither here or
17 there. The question is, does this project have vested
18 rights on the date it was supposed to have it. And I
19 think what's getting lost in a lot of this is that the
20 regulations that Elysian Fields is running into are not
21 Village of Marvin regulations. These are State of North
22 Carolina regulations. The minutes from the January
23 meeting where this Council approved the sketch plan, they
24 say at the very end, "Councilwoman Lawton moved to approve
25 the preliminary sketch plan for Elysian Field subdivision

1 subject to the appropriate approvals by the federal, state
2 and county agencies, including the Division of Water
3 Quality." So the Council approved this in January, but
4 they still said this approval is contingent on you
5 satisfying everybody else's requirements, and they
6 specifically said, including DWQ. So there was an
7 approval, but Mr. Epps and Elysian Fields were still on
8 notice that they've still got to deal with DWQ.

9 And ultimately, what we're talking about here
10 tonight is a DWQ regulation. This 200 foot buffer is not
11 a creation of Bill Duston, it's not a creation of the
12 Village of Marvin. It's a creation of the State of North
13 Carolina. And maybe it is more than is needed. Maybe
14 it's going to be burdensome for Elysian Fields, but Bill
15 Duston, when he's sitting there making a vested rights
16 determination, can't do anything about that. This is a
17 state regulation, and he's there as the interim planning
18 director for the Village of Marvin. He can't say, DWQ, I
19 don't think a 200 foot buffer should apply to this
20 property so I'm going to ignore it. He has to follow
21 North Carolina law.

22 It's the same with this July 1, 2007 cutoff date.
23 That's a date, again, that DWQ came up with. That's a
24 state-imposed deadline. And again, Mr. Duston, when he's
25 sitting here making this determination, can't ignore that.

1 He can't say, Well, DWQ, even though this is your
2 regulation, I'm going to ignore the cutoff date that
3 you've given me and apply my own date. He's up against
4 state law in both instances. July 1, 2007 is from the
5 state of North Carolina, not from him. So all he can do,
6 as the planning director, is say, All right, DWQ has told
7 me that a 200 foot buffer is going to apply to any
8 development unless it has vested rights on July 1, 2007.
9 That's all -- that's the only decision he can make. To
10 have vested rights, you've got to have an approval, and
11 it's undisputed there was no approval on July 1, 2007. So
12 he ultimately said, once he had all the information, that
13 there are no vested rights here.

14 So my question to you is, you're sitting here
15 reviewing his decision saying where did Bill Duston make
16 his mistake? Where did he make his mistake? That DWQ
17 said July 1, 2007 is the date you've got to use? And the
18 law on vested rights is undisputed that you've got to have
19 an approval. Where did he make his mistake?

20 And the final point I'll leave you is that the
21 applicant has said that July 1, 2007 doesn't mean anything
22 because the common law of vested rights says that your
23 cutoff doesn't happen until an ordinance is passed. And
24 he's absolutely right. That is what the common law of
25 vested rights is. And I'll leave it to your attorney to

1 advise you of this, but the common law is the default
2 rule, because the State can change the default rule. And
3 that's exactly what happened here. And what I'd like to
4 hand out is not evidence but -- and I hand it out not for
5 the idea that you'll read this from beginning to end.
6 It's really more for your attorney. But this is an act
7 that the North Carolina General Assembly passed that
8 directly governs what we're talking about here. And I've
9 just highlighted --

10 MR. ROBINSON: Objection.

11 MR. BARESICH: On what grounds?

12 MR. ROBINSON: Well, I thought the evidence was closed.

13 MR. SULLIVAN: This isn't evidence. It's a statute. It's
14 law. It's like --

15 MR. ROBINSON: This is a statute that is in a note in the
16 statute book. There is no statute in the book.

17 MR. SULLIVAN: It's an enactment of the general assembly, and
18 the public hearing hasn't closed, and I don't see what the
19 -- again, they have raised the issue tonight about this
20 July 1, 2007 date not being made, so I just want to show
21 you, the July 1, 2007 date is in this enactment. It's
22 from the North Carolina General Assembly. So this cutoff
23 date is a date that the State of North Carolina has said
24 that's what you got to follow.

25 MR. ROBINSON: This hasn't been codified. There's an express

1 statement right here that that act he's talking about has
2 not been codified. I'll be glad to hand this to you.

3 MR. BROWN: My view as counsel is you can tender any law you
4 want. You can tender the case. You can tender a statute.
5 If you want to tender a note.

6 MR. SULLIVAN: And again, this is a long and complicated
7 statute, but all I've done is I've --

8 MR. BROWN: You might want to particularly keep your book.

9 MR. ROBINSON: Well, for the record, I am referencing GS
10 Section 143-214.7 in the note thereunder that directs the
11 recorder of the statutes not to codify the act he's
12 talking about. I'll be glad to submit a copy of this.
13 It's quite lengthy, but I'll be glad to submit a copy.
14 But I'm reading directly from Volume 16 in the North
15 Carolina General Statutes.

16 MR. BROWN: You want to send that. We don't have a copy
17 machine here, but any law you want to submit to that --

18 MR. ROBINSON: I'll be glad to send a copy.

19 MR. BARESICH: Just understand, though, that's specifically
20 referring to this section of law in that --

21 MR. ROBINSON: Yes, sir.

22 MR. BARESICH: -- in that that statement you just made?

23 MR. ROBINSON: Yes, sir. Yes, sir.

24 MR. SULLIVAN: And I don't want to get bogged down in the
25 details of all that. Ultimately I want to come back and

1 point out to you -- we can talk about whether the -- the
2 point I'm hopefully trying to make is, if he's contending
3 that the July 1, 2007 date is illegal or invalid, or it's
4 unfair for that to be imposed on him retroactively, maybe
5 he's got an argument, but he's bringing it to the wrong
6 place because Bill Duston as the planning director can't
7 say, I'm going to ignore this rule that DWQ has handed
8 down. If there's an issue with the July 1, 2007 cutoff
9 date or with the 200 foot buffer, he's got to take that up
10 with DWQ. It's a DWQ regulation. Bill Duston doesn't
11 have any authority to say, I'm going to ignore that. He's
12 got to follow North Carolina law. So if they think that
13 there's something wrong with that, and they think they've
14 got an argument, there's another forum out there for them
15 to go and do that. They've got to go take that up with
16 DWQ.

17 But again, where was Bill Duston's mistake? He's
18 looking at an instruction from DWQ saying July 1, 2007 is
19 your cutoff date. He can't ignore North Carolina law any
20 more than you or I can. And that's ultimately what our
21 position is. And I'm not saying this isn't a burden on
22 Mr. Epps. It might even be unfair for him to have to go
23 back and use July 1st as the cutoff date, but again,
24 that's a problem imposed on him by DWQ. So where was Bill
25 Duston's mistake when he made this decision?

1 MR. BARESICH: Okay. I think we've heard all the evidence.
2 We've heard the closing statements. Do I hear a motion to
3 close the hearing?

4 MR. FARLEY: I make a motion to close the hearing.

5 MR. SIWIK: Second.

6 MR. BARESICH: All in favor say aye.

7 (The motion passes unanimously.)

8 MR. BARESICH: All right, then the hearing is going to close.
9 Do we need another quick break before we move on to
10 deliberation? So let's take a five-minute break before we
11 move on to the discussion and deliberation.

12 (A recess was taken.)

13 MR. BARESICH: Okay, at this point we are moving on to the
14 discussion of the issue here. I think just to start it
15 off, you know, initially it seems that these things always
16 come down to dates, so I think the dates have been
17 important things here from my standpoint, so I think maybe
18 we start to talk a little bit about those, but let me just
19 get some of the input from your folks in terms of what you
20 think the important parts of the evidence that you've
21 heard so far. Jim, do you want to start?

22 MR. SIWIK: Yeah. On a factual basis, well, it's an
23 interpretation of the dates, in my mind. Do you consider
24 the January 1st date being the date -- of 2007 as the
25 date, and there is no variance of it? Can there be any

1 consideration of the other factors that were brought up
2 that there was essentially approval in January of '08, and
3 does that allow -- and the letter was written will they
4 allow it or not? I don't know. I am really up in the air
5 how to handle the dates, to be honest with you. I know
6 that doesn't help the decision.

7 MR. BARESICH: Go ahead, John.

8 MR. BAY: You know, I actually have a slightly different twist
9 on things. I don't know if it's right or not. But I
10 guess the statement that struck me was when it was stated
11 in the July council meeting what the ruling was going to
12 be, even though the letter was at issue, is that a
13 question that we need to answer? Is that truly -- when it
14 was stated in the hearing, did that truly become, as
15 Mr. Williams suggested, an actual public approval even
16 though the letter hadn't been issued?

17 Because to me, that's actually a procedural thing,
18 because then, if that was true and that kind of locked it
19 in, then the letter doesn't matter. The July 24th letter
20 doesn't matter in the sense that the decision was already
21 in approval and the normal course of action therefore, I
22 guess, the Town or somebody else actually filed a petition
23 with us to change the ruling.

24 So that's what I was struggling with was just like
25 that truly was, was it a public statement of his

1 acknowledgment of -- that he was going to approve it,
2 whether it was a right decision or a wrong decision, my
3 question is was that statement -- did that lock in the
4 Town at that point?

5 MR. FARLEY: That's kind of right where I was falling as well.
6 And you know, I looked at it and I say every other formal
7 approval happens via a letter. And I mean, in my mind
8 that's when the formal approval, when an applicant gets a
9 letter from the Village, a signed letter from the Village
10 planning and zoning administrator, and that's kind of what
11 I'm wrestling with right now as well.

12 I think also for me, the fact that the discussion
13 around the 200 foot buffer and setback was happening in
14 January of 2008, at the January 15th council meeting, and
15 that it became kind of news -- I don't know, I'm just
16 struggling. I'm struggling with the discussions that
17 happened in that January 15th council meeting and why that
18 wasn't part of your decision for that June letter draft.

19 MR. HUMPHRIES: In my opinion, and obvious from my questions,
20 on March 16th Mr. Epps had vested rights. Regardless of
21 the dates and everything to me, the simple is it's a
22 travesty of justice to come along later and say no, we
23 changed our mind, you don't have vested rights. So in my
24 opinion he had vested rights, he had common law vested
25 rights prior to the Division of Water Quality sending out

1 any letter, and I don't care if it's the Division of Water
2 Quality or the State of North Carolina, in my opinion it's
3 wrong to come along later and say no, you don't have
4 vested rights.

5 MR. BARESICH: Yes, I think that especially is one of the
6 things that's kind of important, and when you ask that
7 question and, you know, it took Mr. Duston a while, but
8 once he admitted the fact that at that point in time, with
9 the information that he had to make the decision at that
10 time, I don't know how you can say that they could have
11 had vested rights on that day, the 15th, but then not have
12 them later.

13 I was also interested in, you know, the question
14 that I asked where it was basically just a recommendation
15 and then it became a mandate, but you know. And to me a
16 mandate becomes something more so from that point forward,
17 you know. A recommendation, you know -- also the fact
18 that he made substantial additional commitments from a
19 monetary perspective in that time between when he had this
20 approval with recommendations until the point at which it
21 became a mandate.

22 MR. BAY: Yeah, he did, although the 200 foot buffer was
23 discussed in that same thing and that the DWQ was going to
24 give the final determination of whether to set back. I
25 mean, the mayor had said that he didn't think they would

1 approve the situation to apply that recommendation, and
2 Mr. Griffin had added that there was no regulation on it
3 at that point. So they were at least tossing around
4 whether this 200 foot thing was going to come into play or
5 not.

6 MR. FARLEY: Well, in Ms. Patton's closing, stating the fact
7 that this would be approved based on the DWQ approvals,
8 that plays a factor in it as well.

9 MR. HUMPHRIES: Don't get me wrong. I think what Mr. Duston
10 did was correct. Now, as the time line falls out, his job
11 is to apply the letter of the law. But here we go, the
12 question becomes was justice served. And in my opinion
13 justice wasn't served. Mr. Epps had vested rights prior
14 to the Division of Water Quality sending out a letter. It
15 just doesn't seem fair to me; it doesn't seem to be
16 justice if you can come along later and say no, we're
17 taking those away.

18 MR. BARESICH: Yeah, I respect that opinion, but I also am
19 sensitive to the fact that in order to overturn this
20 decision, I think we need to determine whether or not
21 there is something that Mr. Duston did potentially
22 incorrectly in addition to that. And I guess where I am
23 seeing the potential for where that could be would just be
24 in this determination of whether he correctly defaulted
25 back to the correct date the second time he looked at it,

1 which was July 1st of 2007, or whether it was the first
2 time he did it. Which time was he incorrect, you know,
3 because you could almost say he's correct in both of them
4 based on what he knew.

5 MR. SIWIK: Yes.

6 MR. BARESICH: But he was also incorrect. And as it speaks to
7 the concern that you have in terms of things being fair in
8 the end, I think one of the things that we've seen here is
9 the disturbances that we've had within the Village with
10 the multitude of planners and the reliance on the interim
11 managers and, you know, the reasons that records become
12 shoddily kept. And as the fairness goes, are we placing
13 undue burdens on a resident because of all these things
14 that were going on in the Village at the time too?

15 MR. SIWIK: I couldn't agree more. I mean, the Village
16 contributed to this in a great respect as far as I'm
17 concerned. And it may not be deliberate, but they did
18 because of the turnover, the delays, the vacations, all
19 the things. I guess you could say well, that's expected
20 in any small town like this, limited personnel and so
21 forth, but it still contributed a great deal to this thing
22 getting dragged out to where the point came that this
23 regulation that they have been talking about, and I heard
24 in the beginning about it back in 2007, that 200 feet
25 could be a possibility, that it came about. But you know,

1 how do you do that?

2 The man is making an investment in good faith,
3 doing everything we as a Village have asked them to do,
4 and then at the last minute, oops, the State has finally
5 come down and made it retroactive and we're sorry, you
6 know, we were going to approve it but now we're not. I
7 don't know how to put it in some terms that we can
8 overturn the verdict -- the decision of Bill Duston, which
9 I understand why he made it, in complete honesty. So I
10 don't know how to do it.

11 MR. HUMPHRIES: But Mr. Epps applied for vested rights simply
12 because here comes this thing saying, well, maybe you
13 don't have vested rights. So the application for vested
14 rights didn't even happen until after he clearly would
15 have reasonably assumed I have vested rights. Do you see
16 what I'm driving at?

17 MR. SIWIK: Yeah.

18 MR. HUMPHRIES: So the whole process here didn't even start
19 until well after he could clearly have assumed he had
20 vested rights.

21 MR. BARESICH: Mike, do you have anything to say?

22 MR. FARLEY: Well, I was going to go back to your point about
23 the record-keeping. Had Mr. Duston had Terri Patton's
24 letter that the DWQ had sent which should have been in
25 that file that you opened up with this March 17th letter,

1 we wouldn't be sitting here today, would we? That was a
2 rhetorical question. We wouldn't be sitting here today.
3 so I think, you know, the Village has some burden here,
4 and how that plays into it, I don't know.

5 MR. BAY: And the other question that I guess I wanted to get
6 your-all's understanding was that Marvin didn't rescind
7 from a time line.

8 MR. BARESICH: What was the actual date that they rescinded
9 those?

10 MR. BAY: When they rescinded their --

11 MR. FARLEY: Didn't we get it August 13, 2007?

12 MR. BAY: No, August 10, 2007, according to this letter from
13 Exhibit 7, the one from DWQ. And August 10, 2007, that's
14 when Marvin requested the permits be rescinded on the
15 stormwater, but that was done -- I was, I guess, a little
16 unclear as to whether Marvin still actually had
17 possession, because I don't know if we ever heard back
18 that the Town ever heard officially back from the DWQ
19 until we got this that it was accepted.

20 MR. BARESICH: Yeah, I guess Marvin requested the exemptions
21 on August 10th.

22 MR. FARLEY: That's right, requested it.

23 MR. BARESICH: Marvin submits a form asking DWQ to enforce the
24 stormwater manage on the 13th. From that point on, we
25 don't hear anything back until March 17th of 2008.

1 MR. BAY: At least from the documents that we have, right.

2 Okay.

3 MR. BARESICH: Yeah. Entered into evidence were some things
4 that there were some conditions going on, but as far as
5 both Mr. Duston at that time as well as the appellant at
6 that time, they didn't see anything or understand anything
7 or specifically coming back to the Village.

8 MR. SIWIK: Even if they granted it on August 10th, at that
9 point it was still 100 feet, as I understand it. So the
10 200 did not come in until some later date, and we were not
11 informed until well into 2008 that they had switched to
12 200 feet. So -- and we don't know of any date that they
13 accepted it other than this -- it seems to be very casual
14 correspondence back and forth. It wasn't very -- I mean,
15 yes, it is between two officials, but there's nothing
16 saying this is it, this is the date we're taking it over
17 or anything. Is there a document like that or did I miss
18 it?

19 MR. BARESICH: Let me see, I think there were two documents
20 from Water Quality, but there was only one copy of it.

21 MR. BROWN: These are Village Exhibits 1 and 2, and they are
22 from DWQ. One is the acceptance letter and one is the
23 October --

24 MR. BARESICH: I think there might have been Number 6 from the
25 plaintiffs.

1 MS. GRAHAM: Number 7.

2 MR. BARESICH: Oh, was that the one that was just admitted? I
3 thought that might have been the DWQ one.

4 MR. BROWN: The only other one there's just one copy of I
5 think is that staff analysis.

6 MR. SIWIK: I don't know, this one quickly just says -- it
7 doesn't say they -- it starts talking about what the
8 regulations are. But I guess it infers that they accept
9 turning back to them -- over to them, but I don't see,
10 maybe you can see. That's the October 3rd. The 20th is
11 the patent, and November 8th Marvin requested that they
12 evaluate the water. So therefore, they had met -- made a
13 ruling whether it would be covered yet. At this point
14 we're just requesting it on November 8, 2007. So it's
15 sometime after that they ruled.

16 MR. BROWN: I think the only other thing we just have one copy
17 of is that engineer's report, the wetlands report, from
18 the biologist in December of 2007.

19 MR. BARESICH: But that was a private entity, though, I think,
20 doing that report.

21 MR. BROWN: It does reference the recent discovery of the
22 heelsplitter in Six Mile Creek and some wildlife
23 commissioner guidance, et cetera. I don't know if that's
24 a --

25 MR. BARESICH: Yes, because I guess on August 10th the Village

1 of Marvin requested the permit rescinded granting them an
2 exemption from the requirements. Yeah, I think part of
3 the problem that we have here is still determining -- and
4 this is why the Village had such a hard time determining,
5 when or if any of these things would apply.

6 MR. BAY: So I guess my overarching thing is, are we just
7 trying to decide a process or correct a decision?

8 MR. SIWIK: How far can we go on this? I mean, we can --

9 MR. BAY: All right, so the process obviously we've discussed
10 a whole lot, which I didn't hear anything that would say
11 there was, you know, illegal or unlawful for additional
12 information to be available to the Town to make a
13 decision, so I don't think it's a process question, per
14 se. So it comes down to are we dealing with the ruling or
15 the correct decision. And it goes back to my question
16 about does a public meeting, was that really the first
17 rule that was in effect or does it go to the written
18 letter which was sent to, in this case, the applicant?

19 MR. FARLEY: Can we ask for some counsel on that? I mean,
20 from --

21 MR. BARESICH: From a legal standpoint.

22 MR. BROWN: Obviously, the matter is before you on an appeal
23 of a determination made by the zoning administration, and
24 that determination was that there was not vested rights.
25 The July 28th letter is what is before you. So a statute

1 with respect to boards of adjustment is asking you at the
2 request of the appellants to review that decision, and you
3 have the opportunity to agree with it or overrule it.

4 The statute before boards of adjustment was handed
5 out to you as one of the exhibits with some highlighting.
6 The section that was highlighted actually wasn't the
7 correct section. That's the section on variances. This
8 matter is not before you on a variance. So you're really
9 reviewing a decision of a zoning administrator, so it's
10 really both of the items you've said. It's the decision
11 and the correctness of it.

12 Now, whether it's a correct decision could rely on
13 a number of factors, and you have to determine that from
14 the evidence that you have heard tonight. What is the
15 vesting deadline, or what could be the vesting deadline
16 based on your best understanding of that from the evidence
17 you've heard. Was the earlier letter, as you alluded to,
18 actually a determination at any point so that it was
19 already determined? You'd have to determine whether there
20 was an earlier determination based on the evidence that
21 you've heard tonight.

22 One thing that hasn't been here tonight is a
23 witness from DWQ who could explain a lot of these gaps
24 about what their laws and rules are, and what course of
25 dealings they had, and how they perceived what these rules

1 are and how they affect Marvin. You just don't have that
2 evidence, so you're going to have to base your decision on
3 what they're doing and how that affects Marvin's
4 determination to its zoning administrator just based on
5 the evidence you have in front of you. And that's a
6 limited number of letters.

7 So you really are reviewing a determination, but
8 that doesn't mean you're just stuck with saying it's right
9 or wrong. There could be other considerations as to
10 whether that's a valid determination or not, or the timing
11 elements of it. There's a number of things you've got to
12 take into account from the evidence and the arguments that
13 you've heard from all three parties.

14 It is a four-fifths rule. They are appealing and
15 asking you to overturn this decision, and at least four of
16 you would have to vote to do that, and that's the way the
17 statute was set up on appeals of determinations.

18 MR. BARESICH: In terms of -- you know, I guess one of the
19 things that I -- when I look at the draft one from the
20 earlier date and then I look at Exhibit 12, which is the
21 actual one, and when you look at the actual tests and how
22 those tests are interpreted, you know, I guess what I have
23 a problem with is in the first one -- and even subsequent
24 to getting that notice on the 17th of March, it's almost
25 like his thinking kind of changed from the standpoint that

1 I believe if he was properly looking at the case when he
2 was looking at the first draft and saying okay, I need --
3 that's why he asked for that additional information in
4 April for the expenditures that were made from January on,
5 because at that point he knew that he could only justify
6 his decision based upon expenditures that were made after
7 what he considered a valid governmental approval.

8 Now, I guess what we have to come to terms with is
9 was he correct when he stated that in the draft part of
10 test number 1, or did he make the correct decision when he
11 turned them down in test number 3, all right? And when
12 I'm looking at both of these and then I bring to that kind
13 of the fairness issue that goes along with that, I can
14 tell you it has me leaning toward him, the fact that he
15 had the correct dates and issues kind of pegged the
16 initial time. And this again goes back to what David
17 said, where on the 15th of March or the 16th of March, you
18 know, I don't know how he could have had it then or had he
19 gotten his thing back the same day that Parks and
20 Greenways did. And then you throw into that the fact,
21 what you mentioned, that we could also then consider
22 possibly in his favor, that the public declaration at the
23 Town meeting as well as personal discussions within the
24 phone call, you know, those, they kind of lean one way for
25 me.

1 MR. FARLEY: Towards overturning?

2 MR. BARESICH: Correct. Now, that's just what I'm seeing.

3 And you know, on each one of those issues it kind of leans
4 that way to me. I don't know if we're finding things that
5 lean the other way.

6 MR. BAY: Yeah, I guess I'm still stuck on some of the public
7 declarations more so than, you know, you get new
8 information, you change your opinion and that's what you
9 do, right? That's more than, in my opinion, that it
10 should have been clarified during the public meeting that
11 it was in draft or was not a final decision of his and
12 that he alone had the authority to make the decision. But
13 I think that kind of locked us in, or locked the Town in
14 to a decision.

15 I'm not quite with you in terms of changing,
16 because when you get new information it changes your
17 mental position, but I mean it's still in the same
18 direction in terms of overturning it, it's just more --
19 really it's just more enforcing the public statement.

20 MR. FARLEY: Versus a formal written --

21 MR. BAY: Yeah, and that's where, obviously, the laws are --
22 that's where an attorney gets some clarity is that, I
23 mean, it's tough to say in certain venues that the written
24 word wins out over the spoken word. So that's why the
25 phone call doesn't necessarily mean as much because he

1 said he was leaning one way or the other. That's not an
2 oral contract nor would he necessarily even have the
3 right. That's where I'm just kind of stuck on when he
4 made that statement to the Town council and said that I
5 made the decision, you know, and that I alone with advice
6 from counsel, basically that I have the decision-making
7 authority. And it is to prove it, that's where, I guess,
8 I'm --

9 MR. FARLEY: Yeah, I mean, I'm kind of in that same ballpark
10 because I look at this and I say, you know, had that
11 November letter been in the file for Mr. Duston to review
12 prior to putting this draft together, we would not be
13 sitting here today. So what burden does the Village have
14 in this whole thing with an applicant who has put out a
15 great deal of money, you know, what burden does the
16 Village have in this, and was it a mistake on the Village.
17 I'm not blaming Mr. Duston because he didn't know about
18 that letter. But should it have been in there? In my
19 opinion it should have been in the files, and I think we
20 wouldn't be sitting here today.

21 MR. BARESICH: And is it the fact of Mr. Duston made a
22 mistake?

23 MR. FARLEY: No.

24 MR. BARESICH: Or is it a fact of was his ruling incorrect?

25 MR. FARLEY: I think his ruling was correct originally based

1 on the information that he had. Then when he got the
2 additional information, right, that would have changed the
3 ruling. My point here is that he should have had that
4 information available to him prior to him -- when he made
5 this original draft on June 23rd, and what impact did the
6 Village, you know, turmoil play in that?

7 MR. BARESICH: Who has that November 11th --

8 MR. FARLEY: It's the November one before that.

9 MR. BROWN: I will just tell you just again to further
10 counsel, the statute in 168.388 pertaining to appeals in
11 subparagraph B says that Board of Adjustments shall hear
12 and decide appeals from and review in order requirement,
13 decision, or determination made by an administrative
14 official charged with the enforcement of the ordinance.
15 It doesn't require it to be in writing. So it is
16 theoretically possible that you could make an oral
17 determination or some combination thereof. It just says
18 that you can appeal the ruling.

19 MR. SIWIK: Could we rule -- I'm not saying -- can we rule
20 that we then considered the oral statement and the first
21 letter as the decision and therefore that was valid and
22 therefore, the second one was not valid?

23 MR. BROWN: I think what I'm hearing you try to articulate
24 from the evidence is that if, in fact, the draft letter
25 and the statements about that draft letter at council

1 meeting constitutes in your mind, based on the evidence
2 you've heard, a determination, then that determination is
3 the determination to be appealed from. The second one
4 would be moot unless it, by it by its terms, rescinds the
5 earlier one. And of course, it doesn't say anything about
6 rescinding the earlier one because Mr. Duston's belief and
7 testimony was the earlier one was not a final decision.
8 It was just in a draft form, as is obviously clearly noted
9 DRAFT on that letter.

10 So you would have to determine. If you say we
11 really think that's a determination, that's what should be
12 appealed from, and the Village should have appealed from
13 that, well, unless there's some express revocation or
14 statement in the later communication that it was issued by
15 a mistake or error of fact or law and it's therefore
16 rescinded, then the other one, which pertains to the same
17 matter, to the same application, would in essence be moot
18 because there had already been a determination. If that's
19 what you see from the evidence, then you would have
20 determine that that combination of facts is, in fact, a
21 determination.

22 MR. FARLEY: But that statute you just read --

23 MR. BROWN: Just tells you what can be appealed from. It
24 doesn't have the word "written" in it, that's my only
25 thing to you.

1 MR. HUMPHRIES: This letter from the Division of Water
2 Quality, however, is indicating that there are new
3 development requirements. It doesn't make a decision for
4 Marvin whether or not someone has vested rights.

5 MR. BARESICH: Yes. And actually, I'm looking at the
6 November 20th one, and you mentioned that had Mr. Duston
7 had this in his hand at the time, I'm not seeing anything
8 here in particular, you know, that I think would make him
9 think anything other than this was just another thing to
10 update their saying that -- it doesn't go back to anything
11 like the --

12 MR. BROWN: The testimony, I think, was that that was a
13 pronouncement that in fact this particular creek was a
14 perennial stream, which triggers the 200 foot. It's his
15 understanding of the significance of that document.

16 MR. BARESICH: Okay, but it would still at that point be left
17 up to Mr. Duston as to whether or not he had vested
18 rights, correct?

19 MR. BAY: Yes. Yes.

20 MR. BARESICH: And would anything in that have changed
21 Mr. Duston's mind when he first made the determination
22 that there was a valid governmental approval? Would he
23 have said that wasn't a valid governmental approval?

24 MR. FARLEY: The way that I would have read this would be that
25 the 200 foot buffer would be required on this piece of

1 property along this creek. That's the way that I would
2 -- that's the basis that I'm taking that from. And had
3 that been the case, that actually would have played more
4 into the January 15th decision, not necessarily the
5 decision of common law vested rights later?

6 MR. FARLEY: Correct.

7 MR. HUMPHRIES: In my opinion Mr. Epps had valid governmental
8 approval. He already had vested rights.

9 MR. BARESICH: But he's lost them at some point.

10 MR. HUMPHRIES: Well, he already had valid governmental
11 approval. Whether or not the Division of Water Quality
12 requirements apply to him or not is a whole different
13 issue. He already had vested rights. There was no need
14 for him to even submit an application.

15 MR. BARESICH: I think it still has to be determined, whether
16 it be by us or statutorily or right.

17 MR. HUMPHRIES: I'm speaking the conditions were there that he
18 already had vested rights, but the letter from the
19 Division of Water Quality is stating that you have
20 construction requirements, not whether or not you have
21 vested rights.

22 MR. BROWN: Can I ask you what letter? Are you referring to
23 the March 17th letter?

24 MR. HUMPHRIES: Yes, March 17.

25 MR. FARLEY: If your plat was approved before July versus

1 2007?

2 MR. BAY: Right. But to have vested rights, right, your
3 expenditures had to be --

4 MR. SIWIK: Before July 19th, 2007.

5 MR. BROWN: That letter sort of sets out their view of what
6 they think their rules are.

7 MR. BARESICH: Well, and then that goes back to the thing of
8 what came up here toward the end, which is what's the
9 degree -- I mean, I don't know that it's for us to be
10 determining whether or not the Department of Water
11 Quality's July 1, 2007 is specifically valid or not, but I
12 guess what I don't understand is how we can just kind of
13 go back to that date after the point that vested rights
14 could have been already established. The March 17th one
15 is more the one for me.

16 MR. HUMPHRIES: The reason the Water Quality letter of March
17 17 says that, the construction practices are necessary to
18 deny vested rights prior to July 1, 2007, correct?

19 MR. BARESICH: Yes.

20 MR. HUMPHRIES: It does not bring into question whether or not
21 he had vested rights.

22 MR. BROWN: It does identify in a subsequent paragraph the
23 four types of vested rights that they will honor, which is
24 the basic four that common law vested rights involve. You
25 can do the statutory vested; you could do a building

1 permit. It acknowledges the basic mechanisms for vesting
2 and sort of explains what those are. And one of those is
3 common law.

4 MR. SIWIK: And common law would go along with he having, in
5 effect, verbal approval of that which was announced at
6 that meeting?

7 MR. BARESICH: If you're considering that the verbal --

8 MR. HUMPHRIES: Yeah, I'm saying, if --

9 MR. BROWN: Well, again, that's a little different.

10 MR. HUMPHRIES: We're stretching, yeah, I know.

11 MR. BROWN: The issue at the meeting and the draft letter is
12 whether that's a prior determination that supercedes
13 what's being implied here. The issue of when -- if you
14 look at the vesting file and what approvals and/or
15 expenditures you had to have prior to that vesting clock
16 is a different issue.

17 MR. BARESICH: Yeah, that goes back more to the March 15th or
18 March 17th deadlines. Yeah, those are really the two
19 dates.

20 MR. BROWN: You're going to have to make your own
21 determination based on that evidence.

22 MR. BAY: Yeah, because now that I re-read, you know, the
23 minutes, or Exhibit 11, the meeting notes, he doesn't say
24 for sure. He says that it's probably going to be
25 positive, so Mr. Duston does not say that he approved it.

1 He said that he's the one who can approve or deny and then
2 it's going to go to us to change it. But he never said
3 that that he -- that a draft was approval. He said that
4 it's probably going to be a positive.

5 I just wanted to clarify my comments before. I
6 thought it was more straightforward what he said in the
7 minutes -- or what he had said in the meeting. He said
8 it's probably going to be a positive, and we're assuming
9 that this is an accurate portrayal of it.

10 MR. FARLEY: He told Mr. Epps in a phone conversation.

11 MR. BAY: Right, but then you get to an oral, public
12 environment.

13 MR. SIWIK: Which he is not denying either.

14 MR. BAY: Right.

15 MR. BARESICH: Any other important areas anybody thinks that
16 we should have a discussion at this point about? Take a
17 minute just to go through your notes.

18 (Board examines documents briefly.)

19 MR. FARLEY: As I'm re-reading the Test 1 in the draft, and
20 while this wasn't the final draft, when I re-read Test 1,
21 I mean, that to me continues to say that there's nothing
22 incorrect in what Mr. Duston says there. (Reads.) "You,
23 the owner of the tract where Elysian subdivision is
24 located, has spent this money after the approval by the
25 Village and prior to receipt of the letter from DWQ. So

1 at that point, you know, he's really making a
2 determination there. You could take Test 1 of a correct
3 opinion as you have there, because there's nothing
4 incorrect in his statements there that to me could quite
5 actually fit in Test 3, which was the reason for
6 disapproval, which he doesn't reference in his letter
7 to Mr. Epps on July 28th in Test 1. He doesn't reference
8 anything about the DWQ, right?

9 MR. BARESICH: Well, no, as part of that letter, and it's not
10 here, but that other attachment, I guess, the March 15th
11 letter was attached to this. But none of those prior ones
12 were.

13 MR. FARLEY: Right. But he's culling that out in Test 1 in
14 his draft.

15 MR. BARESICH: Yeah, he pulled that out, yes.

16 MR. FARLEY: And he's not culling it out in Test 1 of his
17 actual letter to Mr. Epps.

18 MR. BROWN: He actually just summarizes the expenditures only
19 before July 1, 2007.

20 MR. BARESICH: Yeah, because at that point --

21 MR. BROWN: He doesn't go through March in his final.

22 MR. FARLEY: July 1.

23 MR. BARESICH: Yeah, it seems once he committed in the second
24 letter to using that earlier date, that everything
25 reverted out. Those pieces reverted out. But do they

1 make -- does it make them any less correct? Does it make
2 it any less proper? Does it make it any less a
3 commitment? And the only reason why it does fit there is
4 because there was that period of time.

5 MR. FARLEY: Well, he had established the vesting deadline
6 differently of July 21st, right, in -- I'm sorry, July 1st
7 in the second one?

8 MR. BAY: All right, so the fundamental part of this decision
9 change, right, was that when he saw the November 20th
10 letter or whatever that was, was it then he was aware of
11 the guidance from the DWQ that the stream would be
12 perennial, which would then add the 200 foot requirement?
13 Thus, for Test 3 to work, right, the expenditures that
14 were determined in Test 1 were substantial, those were
15 made in reliance on a valid government approval around
16 those dates, right? So he didn't have the government
17 approval prior to January 15th.

18 MR. FARLEY: Right. And the Council culled that out.

19 MR. BAY: So that's where the November 20th piece comes into
20 effect, right? It's really an application of Test 3?

21 MR. BARESICH: Well, I still not sure -- I still don't -- I
22 see November 20th as just a statement that says that that
23 creek is affected by the Marvin thing, but I don't see
24 anything specifically in that November 20th --

25 MR. FARLEY: To tell you about the 200 feet?

1 MR. BARESICH: Well, in regards to how it pertains to that
2 specific -- well, I guess it does pertain to that.

3 MR. BAY: You are right, because the way I understand it, the
4 four tests have to be passed to basically circumvent the
5 200 foot buffer.

6 MR. BARESICH: Correct.

7 MR. BAY: And the Test 3 is where we are getting stuck, I
8 think, or at least in my head I'm getting stuck, is that
9 when the valid governmental approval was, from that point
10 that substantial expenditures occurred, right? So
11 everything passed --

12 MR. BARESICH: Well, the only valid government approval could
13 have been January 15th.

14 MR. BAY: Right. Exactly. It's how that played into the
15 decision, if you will, of the guidance letter on
16 November 20th that had it been in his possession, or once
17 it got into his possession Mr. Duston changed his opinion
18 saying that now it was declined, that it did not meet
19 those tests. In the absence of it, you've got the
20 approval that says, you know, we didn't get a letter until
21 March 17th.

22 MR. BARESICH: I'm still not sure that that November 20th
23 states whether or not it meets that test as it concerns
24 common law vested rights. I think the November 20th goes
25 to whether or not they are affected by 200 foot buffers or

1 not as a matter of a sketch plan, which would have been
2 incumbent upon the Council when they made their
3 determination on January 15th. You know what I'm saying?
4 That letter is more important than the approval of some
5 plan.

6 MR. BAY: That's where you come back to the January
7 conversation of him saying, well, the 200 foot is just
8 guidance right now.

9 MR. BARESICH: Or recommendations.

10 MR. BAY: Or a recommendation. The mayor said that he thinks
11 they won't approve this situation and enforce the 200
12 foot, and as Mr. Griffin said, there's no required
13 regulation.

14 MR. BARESICH: You know, so they made a valid governmental
15 approval with knowledge in hand.

16 MR. BAY: Of guidance that I've not --

17 MR. BARESICH: Of a recommended thing, not a mandate at that
18 point. The only time it truly became a mandate in
19 anyone's eyes seemed to be March 15th, except the DWQ.
20 That was there a long time. But even that wouldn't have
21 been true, because for some period of time Marvin was
22 still controlling it on their own, so it really -- you had
23 to really listen to what the DWQ says. So that even --

24 MR. BAY: And when did the backdating start? Was there
25 anything that was issued from the DWQ before March 17th

1 that backdated to July 1st, do you remember? Where is
2 that October letter?

3 MR. BARESICH: The November letter?

4 MR. BAY: No, the October letter. You've got three letters
5 from the DWQ, right, the October, the November, and the
6 March of '08. Because if the backdating doesn't occur
7 until March 17th --

8 MR. BARESICH: Yeah, do any of those state July 1st?

9 MR. BAY: So even though the November 20th suggested that the
10 perennial streams, 200 feet or whatever, and it got to
11 that point it was not necessarily going backwards in time
12 -- I'm just reading -- perused it.

13 MR. FARLEY: Until March 17th.

14 MR. BAY: March 17th, and that is when they --

15 MR. FARLEY: Reversed the July --

16 MR. BAY: From all the evidence that we've seen, that's the
17 first time, that July 1st of '07 came up.

18 MR. SIWIK: But it's not in here. There's no July 1st, 2007
19 in here.

20 MR. BAY: So probably, I guess, my --

21 MR. SIWIK: This in-stream determination of --

22 MR. BAY: That's when the backing doesn't come into effect,
23 yeah.

24 MR. BARESICH: Until the 15th of March?

25 MR. SIWIK: Of Six Mile Creek, not specific to this property,

1 which is part of -- it abuts it, as do many other pieces
2 of property. So this is not specific to a piece of
3 property, but it would apply to everyone.

4 MR. BROWN: If you'd like me to look at it --

5 MR. FARLEY: I think we need to reach kind of a conclusion as
6 a board here and agree upon a vesting deadline to help
7 kind of guide the next.

8 MR. BARESICH: Yeah, do we believe it's 7/1, or do we believe
9 it's 3/15? And even given the fact that we're now
10 reviewing these three DWQ documents and there doesn't even
11 seem to be a reference in these to that earlier date until
12 the March 15th one --

13 MR. BAY: Which at that point it was determined that the --

14 MR. BARESICH: That's what I was saying before, Bill wouldn't
15 have necessarily changed his opinion to the vested rights
16 based upon those earlier letters. They could have
17 changed --

18 MR. BAY: I don't even think he should have, yeah, after. I
19 guess, and then the question comes down of saying from
20 January 15th through March 17th --

21 MR. BARESICH: Did he pass Test 3.

22 MR. BAY: Did he pass? No, Test 3 then is clear. It's now in
23 my opinion it's really Test 1, substantial expenditures.

24 MR. BARESICH: That was the second one. Or are you
25 questioning the substantial --

1 MR. BAY: The amount, yeah. I mean, that's --

2 MR. SIWIK: That's in a matter of interpreting, and it's
3 already been interpreted one way.

4 MR. BARESICH: What was the latest number, because that number
5 would have been what was in the draft, which even the Town
6 would have said was 29,000, approximately.

7 MR. SIWIK: 21-eight.

8 MR. BARESICH: Which I would consider substantial in any
9 economy.

10 MR. BROWN: I mean, Mr. Duston testified that he agreed that
11 there have been substantial expenditures.

12 MR. BARESICH: Yeah, in both situations.

13 MR. BAY: Yeah, but he also testified that this should be
14 denied, so -- all right, if we're looking at the decision
15 we've got to look at the whole decision.

16 MR. BROWN: Well, that's true, but if he's incorrect about
17 substantial expenditures, then it should be denied as
18 well.

19 MR. SIWIK: The preservationists may be wrong.

20 MR. BARESICH: Are you getting hung up that 19,000 is not
21 substantial?

22 MR. FARLEY: I don't know what the test is, you know what I
23 mean? I mean --

24 MR. HUMPHRIES: What constitutes new development? Development
25 that has already been approved or development that starts

1 after March 17th?

2 MR. BARESICH: Is it a sketch?

3 MR. FARLEY: It says in here that this applies to new
4 development.

5 MR. SIWIK: But he could not have done anything, legally done
6 anything on that property. He did move some trees. But
7 he owned the property. He was moving trees for
8 development. In the terms here I doubt it would be
9 accepted but we could stretch it if we want.

10 MR. BROWN: The basic way of my understanding these State
11 rules, be it stormwater or watershed, we have this
12 difficult frame where they apply to new development, and
13 new development is everything that's not existing
14 development. So you can see in that same March 17th
15 letter a discussion of what is existing development. It's
16 something that's actually built and on the ground that
17 exists. But for those situations where it's not actually
18 built and on the ground, that's where they then have
19 discussion of the vesting of rights. So a building
20 permit, vested rights, statutory approval, common law.

21 And again, it seems like -- I find this all kind of
22 cumbersome and confusing too, there's actually two steps.
23 They appear to have their own set of rules, deadlines, and
24 requirements that you see in at least the three letters
25 that we have, but they also put, as it should be, the

1 vested rights determination back with the local
2 government, and that would be through a determination to
3 be made by the zoning administrator. And whether they can
4 agree or disagree with that, whether they can agree with
5 Bill's ruling, agree with your ruling, whatever it is, can
6 they try and override that? We don't have any evidence
7 that would give us any guidance as to what happens from
8 here on in.

9 MR. BARESICH: Well, not seeing the dates in those previous
10 letters from the Department of Water Quality until the
11 17th at least makes me comfortable with the fact that I'm
12 much confident in using the March 17th date than I am the
13 July 1st date.

14 MR. FARLEY: As a vesting deadline?

15 MR. BARESICH: As a vesting deadline. Do we have a fair
16 assessment on that? Do we agree to that?

17 MR. FARLEY: I mean, I do.

18 MR. BARESICH: Now, at that point it comes to the next -- then
19 at that point, as of March 15th, does he fit all four
20 tests? Four, nobody argues. Three, that's where we get
21 into the fact of has he made expenditures made in reliance
22 on a valid governmental approval, right? Now, if we're
23 saying that March 17th is the date and January 15th is the
24 approval, then I would say that the reasoning that Bill
25 Duston used in the draft in line 1, at that point even he

1 is saying that there is substantial -- you know, so they
2 would be substantially made on the reliance of a valid
3 governmental entity. So that would actually handle both,
4 1 and 3. At that point we're left with 2, and I don't
5 think there's been any evidence here that none of these
6 expenditures haven't been made in good faith. That's
7 where I'm at. Are there any questions with those
8 particular pieces at this point?

9 MR. FARLEY: That's kind of where I'm at as well. And I think
10 if you looked at 4, that's also not an issue.

11 MR. BARESICH: Yeah. Yes, it's obvious that the denial of
12 this would be very detrimental to the folks.

13 MR. SIWIK: May I make a motion? Can we move it to a motion?

14 MR. BARESICH: If we were to be able to do this based upon
15 that and not on the facts, you know, I mean, that goes
16 back to the whole fairness thing and I'd be right there,
17 but in order to make the determination on law and the
18 facts and the evidence that were provided, I think I see a
19 path anyway where we do have the ability to overturn this.
20 And you know, if somebody wants to make a motion at this
21 point.

22 MR. SIWIK: I'll make a motion that we overrule the decision
23 on the basis that Epps did meet Test 3. I mean, if you
24 want to clean it up, that's fine.

25 MR. BARESICH: Well, if you want someone else to clean that up

1 you'd probably need to pull that motion.

2 MR. SIWIK: I'll pull it then, and somebody can use some more
3 -- I mean, the language.

4 MR. BROWN: Whatever your motion is, try to articulate your
5 grounds.

6 MR. SIWIK: Well, go ahead, you do it, please.

7 MR. BARESICH: Yours is still on the table.

8 MR. SIWIK: I withdraw it.

9 MR. BARESICH: I'd like to make a motion that we overturn this
10 ruling based upon the fact that the later date of the
11 letter that was sent on July 28th incorrectly relied upon
12 the July 1st of 2007 date as using that determination as
13 to whether or not the appellant had the common law vested
14 rights, and given that, we now need to look as to whether
15 or not he did have them per the four tests, which is has
16 the owner made substantial expenditures, and I think
17 that's clearly been delineated that from the time between
18 the governmental approval was made on January 15, 2008
19 that he has made substantial expenditures; that he does
20 pass Test 2 in that the expenditures were made in good
21 faith; that he does pass Test 3 that they were made in
22 reliance on a valid governmental approval, which was done
23 when his sketch plan was approved by the Council; and we
24 also determined that number 4 would be set aside as well,
25 given the fact that if this were denied, the owner would

1 face great harm without a vested right.

2 MR. BROWN: Would you specify what the vesting date is?

3 MR. BARESICH: And I would state that the vesting date, given
4 that July 1st never really even appeared in any of the
5 things that we see, from the communications that we see
6 for the Village until the date of March 17, 2008, so that
7 would be the date that we would work from in terms of
8 determining his common law vested rights.

9 MR. FARLEY: I second the motion.

10 MR. BARESICH: All in favor, say aye?

11 (Motion carries unanimously.)

12 MR. BARESICH: And the motion passes unanimously. All right,
13 I would like to thank the Board for their patience. I
14 would like to thank the lawyers and the witnesses that are
15 all involved here and the folks that showed. I need a
16 motion.

17 MR. BROWN: We need to adjourn.

18 (Motion to adjourn was made by Mr. Siwik and
19 second by Mr. Humphries. The motion passed
20 unanimously.)

21 (WHEREUPON, the hearing was adjourned at 1:22 a.m.)

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1 STATE OF NORTH CAROLINA

2 COUNTY OF MECKLENBURG

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4 CERTIFICATE OF REPORTER

5 I, SALLY W. LOWRANCE, CVR, Notary Public, do hereby
6 certify that the foregoing hearing was taken and transcribed
7 under my supervision and direction, that the parties were
8 present as stated, and that I am not of counsel for, or in the
9 employment of any of the parties to this action, nor am I
10 interested in the outcome of this action.

11 I do further certify that the foregoing 185 pages
12 constitute a true and accurate transcript of the testimony.

13 This the 10th day of November 2008.

14

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17 SALLY W. LOWRANCE, CVR

18 Notary #19971610098

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