

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
TOWN OF NORTH SMITHFIELD  
ZONING BOARD OF APPEALS

PROCEEDING AT HEARING :  
:  
IN RE: :  
:  
NARRAGANSETT IMPROVEMENT CO., :  
RANKIN PATH REALTY :

DATE: March 31, 2008  
TIME: 7:00 P.M.  
PLACE: Primrose Fire Station  
North Smithfield, RI

BEFORE:

Vincent Marcantonio, Sr., Chairman  
Stephen Kearns  
William Juhr  
Guy Denizard  
Mario DiNunzio  
Dean Naylor

PRESENT:

FOR THE APPELLANT . . . MICHAEL KELLY, ESQUIRE

FOR THE ZONING BOARD  
OF APPEALS. . . . . PETER D. RUGGIERO, ESQUIRE  
FOR THE TOWN. . . . . PATRICK DOUGHERTY, ESQUIRE

ALSO PRESENT:

Bob Benoit, Building Inspector  
Michael Phillips, Town Planner  
Joseph Cardello, Planning Board Chairman

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1 (HEARING COMMENCED AT 7:12 P.M.)  
 2 MR. MARCANTONIO: If you guys are ready,  
 3 we'll start the meeting. Peter, are you guys all  
 4 set?  
 5 MR. RUGGIERO: Yes.  
 6 MR. MARCANTONIO: We'll call the meeting  
 7 to order. Roll call. Mr. DiNunzio.  
 8 MR. DiNUNZIO: Here.  
 9 MR. MARCANTONIO: Mr. Kearns.  
 10 MR. KEARNS: Here.  
 11 MR. MARCANTONIO: Mr. Naylor.  
 12 MR. NAYLOR: Here.  
 13 MR. MARCANTONIO: Mr. Juhr.  
 14 MR. JUHR: Here.  
 15 MR. MARCANTONIO: Mr. Denizard.  
 16 MR. DENIZARD: Yes.  
 17 MR. MARCANTONIO: We have to disclose  
 18 there are no compensation or pension credits  
 19 received by the Board members. Today is the  
 20 appeal of the Planning Board decision of  
 21 August 16th, a continuation, I should say of an  
 22 appeal of the Planning Board's decision of  
 23 August 16th, 2007. Narragansett Improvement  
 24 Company, Rankin Path Realty. Location, Douglas  
 25 Pike, Angela Way, Brookside Drive, Leonard Drive,

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1 Rankin Path; assessor's Plat 14, Lots 17, 19, 20,  
 2 29, 31 through 34, 36, 88, 93, 107, 123, 125, 128,  
 3 135, 136, 139, 140, 141, 144, 145, 159, 20, 2, and  
 4 242. Voting members tonight will be Mr. DiNunzio  
 5 as our first alternate filling in for  
 6 Mr. Scarpelli, who is sick, Mr. Kearns, Dean  
 7 Naylor will be filling in for Mr. Denizard, who  
 8 Mr. Kelly said could sit up here, and Mr. Juhr,  
 9 and myself. And if we're all set, we'll start to  
 10 get --  
 11 MR. KEARNS: Mr. Chair. Can I ask why  
 12 Mr. Denizard is not voting?  
 13 MR. MARCANTONIO: We have a letter here  
 14 that we're going to put in. I don't know if you  
 15 got one or not or if I just got it. Basically,  
 16 it's he's not happy that Mr. Denizard talked about  
 17 the deed, so rather than spending all night going  
 18 back and forth, I think we have Mr. Naylor who was  
 19 here and could easily fill Mr. Denizard's shoes;  
 20 and Mr. Denizard agreed to let Mr. Naylor fill his  
 21 shoes.  
 22 MR. KEARNS: Can I ask --  
 23 MR. RUGGIERO: Here I am.  
 24 MR. KEARNS: Do you find that the  
 25 reason -- you read the letter, I assume?

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1 MR. RUGGIERO: Yes.  
 2 MR. KEARNS: You found the reasoning in  
 3 the letter to be compelling?  
 4 MR. RUGGIERO: Here are the  
 5 circumstances. There's an allegation that because  
 6 the deed was sought, and that's outside of the  
 7 record of the hearing of the appeal, that that in  
 8 some way taints Mr. Denizard's impartiality in the  
 9 matter. It's not for me to decide, it's not for  
 10 Mr. Kelly or anyone else to decide whether he's  
 11 impartial. That's his personal decision, and, if  
 12 challenged, for a court of law to make that  
 13 decision. The problem is, and my recommendation  
 14 is, it would taint the hearing at this point based  
 15 on the allegation and the conduct. My suggestion  
 16 is, because there are a sufficient number of  
 17 voting members, why, you know, run the risk of  
 18 that, and just take the alternate that's available  
 19 and dispense with this matter.  
 20 MR. KEARNS: Okay, thank you.  
 21 MR. MARCANTONIO: And we have a list of  
 22 things that we received, and I would like to have  
 23 them all put on the --  
 24 MR. RUGGIERO: Yes, that would be  
 25 appropriate.

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1 MR. MARCANTONIO: Here are the things we  
 2 want put on the record. Copy of the waiver of the  
 3 state law. Number 2, the request for Mr. Kelly to  
 4 submit a letter for Mr. Ruggiero on 3/2 --  
 5 MR. JUHR: Mr. Chairman, are you marking  
 6 them as exhibits?  
 7 MR. MARCANTONIO: I am marking them --  
 8 MR. RUGGIERO: These would be C. We only  
 9 had A and B so far, so this would be a compendium  
 10 of Exhibit C.  
 11 MR. MARCANTONIO: ...as mentioned in his  
 12 testimony of March 13th. And Number 3, which was  
 13 3/28, the second request for information, Mr.  
 14 Ruggiero to Mr. Kelly, requesting, wrong data sent  
 15 first time. And Number 4, memo from Mr. Dougherty  
 16 in support of the Planning Board decision.  
 17 Number 5, March 19th letter from Mr. Kelly,  
 18 reference, Rankin Estates, Matt Shaw in support of  
 19 denial of the Planning decision. 6,  
 20 November 15th, '07 transcripts. 7, pages missing  
 21 from previous transcripts. Master plan,  
 22 informational meeting, Pages 41, 96, and 105. 8,  
 23 minutes, November 15, 2007. 9, Mr. Kelly's letter  
 24 to Bob Benoit, March 26, 2007 with copy of  
 25 HP and HC, Mr. Sanderson's letter. 10, Kelly's

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1 letter to North Smithfield Planning Board,  
 2 August 16th, archaeological survey. And  
 3 Number 11, the letter that was received from  
 4 Mr. Kelly today, the conduct of the town, North  
 5 Smithfield Zoning Board of Appeals concerning the  
 6 appeal of Rankin Path in which he prefers  
 7 Mr. Denizard not participate, this letter here  
 8 (indicating). And Number 12, transcripts of  
 9 March 13th, 2008.

10 MR. JUHR: Mr. Chairman, I notice that  
 11 our secretary is not here taking minutes, will we  
 12 take the stenographer's notes? Do we need to  
 13 request a transcript of these minutes to document  
 14 what goes on tonight?

15 MR. MARCANTONIO: Um-hmm.  
 16 MR. JUHR: Okay, thank you.  
 17 MR. MARCANTONIO: Mr. Kelly, all set?  
 18 MR. KELLY: After the other side  
 19 finishes, I have a few comments.  
 20 MR. MARCANTONIO: Pat, I think you were  
 21 up here, and Mr. Cardello came up, and  
 22 Mr. Phillips came up, so, I don't know where --  
 23 MR. DOUGHERTY: I believe that I  
 24 concluded my remarks at that time. There was just  
 25 an issue raised by counsel as to how the decision

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1 had been adopted, whether or not it had  
 2 been adopted -- the procedure for adopting. I  
 3 think Mr. Cardello was just stating -- which  
 4 meeting was that?

5 MR. CARDELLO: I don't remember the date.  
 6 Just to clarify --  
 7 MR. JUHR: He needs to be sworn in.  
 8 MR. DOUGHERTY: It's not testimony, it's  
 9 just procedure.  
 10 MR. CARDELLO: I had signed that decision  
 11 with the approval of the Board, it was brought up  
 12 at a Board meeting. All the members had read it,  
 13 reviewed it, made comments. I had some  
 14 last-minute comments, they all reviewed those. I  
 15 signed the decision. I think the minutes of that  
 16 meeting, November 15th, were submitted to the  
 17 Board. That's why I stood up, just to clarify  
 18 that.

19 MR. MARCANTONIO: For the record, that  
 20 was Mr. Cardello, I know you know Mr. Cardello.  
 21 THE REPORTER: Could I have your name,  
 22 sir?  
 23 MR. DOUGHERTY: Certainly,  
 24 Patrick Dougherty.  
 25 THE REPORTER: No, Mr. --

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1 MR. CARDELLO: Joseph Cardello,  
 2 C-A-R-D-E-L-L-O.  
 3 THE REPORTER: Thank you.  
 4 MR. DOUGHERTY: And naturally, I think I  
 5 addressed all of the questions that the Board had  
 6 for me. If there are any more, I'd be more than  
 7 happy to --  
 8 MR. JUHR: Mr. Chairman, does the  
 9 stenographer need to clarify who Mr. Cardello is?  
 10 MR. DOUGHERTY: She just did.  
 11 THE REPORTER: I have his name. If you  
 12 want more than that, you need to put it in the  
 13 record.  
 14 MR. CARDELLO: Planning Board Chairman.  
 15 THE REPORTER: Thank you.  
 16 MR. MARCANTONIO: Mr. Phillips.  
 17 MR. PHILLIPS: I have nothing further,  
 18 unless there are any questions.  
 19 MR. KELLY: I would like the Board to ask  
 20 Mr. Phillips a question as to whether or not he  
 21 was aware that the property was included in the  
 22 plan that was submitted for this master plan, that  
 23 had not been in the original plan.  
 24 MR. MARCANTONIO: Anyone on the Board  
 25 want to ask the question that Mr. Kelly mentioned?

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1 Or can Mr. Kelly ask him? Mr. Kelly, can't you  
 2 ask him?  
 3 MR. KELLY: I didn't know what your  
 4 procedure was.  
 5 MR. MARCANTONIO: Mr. Kelly, why don't  
 6 you come up and ask --  
 7 MR. NAYLOR: Mr. Chairman.  
 8 MR. RUGGIERO: I was going to say,  
 9 Mr. Chairman, it's the Board's prerogative, if you  
 10 want to ask the question or not.  
 11 MR. NAYLOR: Isn't that new evidence, or  
 12 something?  
 13 MR. RUGGIERO: It's all right.  
 14 MR. MARCANTONIO: Mr. Kelly, why don't  
 15 you get up and ask Mr. Phillips what you want to  
 16 ask him so we make sure, word for word, it's done  
 17 correctly.  
 18 MR. KELLY: At the last meeting,  
 19 Mr. Kearns had a lot of questions about the  
 20 addition of the property in the application that  
 21 was filed in 2006 as opposed to the application  
 22 and plan that was filed in November 2005, the one  
 23 that was sent back because of the moratorium, and  
 24 Mr. Dougherty made a big point of the Applicant  
 25 not disclosing that, and I'd like to know whether

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1 Mr. Phillips, as the Director of Planning, or head  
 2 of the Planning Department, or Town Planner, knew  
 3 about this situation and that there was land in  
 4 the 2006 plan that was not included in the 2005  
 5 plan.  
 6 MR. DOUGHERTY: If I may, Mr. Chairman.  
 7 The only issue I have about this is, there are  
 8 allegations going back and forth. You're really  
 9 constrained by what is in the record. The  
 10 Applicant has said that they knew about this.  
 11 Well, there's nothing in the record that I saw to  
 12 point to that shows that they did. We argued that  
 13 they didn't, and that there wasn't any evidence.  
 14 That's what your record is. And now, what I'm  
 15 hearing is they're looking to supplement a record.  
 16 Frankly, I don't care either way. I don't think  
 17 that there's anything to lose, but I don't think  
 18 it's appropriate for your review unless there's a  
 19 motion to supplement a record pending, which there  
 20 isn't.  
 21 MR. KELLY: My point is that there was an  
 22 allegation by Mr. Dougherty for some reason, and  
 23 Mr. Kearns seemed to be buying into this, that the  
 24 Applicant had not acted honestly or forthright in  
 25 making a big disclosure. Well, first off, I don't

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1 think the disclosure is necessary, it's in the  
 2 plan, looking at that plan and what was submitted,  
 3 one could easily see that the prior plan was  
 4 different from the new plan. And the only  
 5 difference that that makes in any event is that if  
 6 there was additional land in the application, it  
 7 would be subject to the 2006 regulations instead  
 8 of the 2003 regulations; doesn't make the  
 9 application void in any kind. We had the absolute  
 10 right to file an application that included  
 11 additional land. That additional land would be  
 12 subject to the new regulations. Now,  
 13 Mr. Dougherty made the point that we didn't  
 14 disclose. There's nothing in the record either  
 15 way, but the plans speak for themselves. The 2005  
 16 plan has certain lots and plat numbers, and the  
 17 2006 has them, and there's one, there is one  
 18 additional parcel of land. Now, if that was a big  
 19 issue, then the Planning Board should have just  
 20 made the determination, if it was going to be  
 21 grounds for them to deny, which, this was never  
 22 discussed at the Planning Board, by the way. They  
 23 should have made a point to have a discussion  
 24 about the application of the new regulations to  
 25 this other piece of property. That's the point.

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1 And if Mr. -- since it's been alleged that we  
 2 didn't disclose it, we disclosed it by way of the  
 3 plans, if you look at the plans, there's  
 4 additional land on the 2006 application, so it was  
 5 shown on the plan. But Mr. Dougherty brought up  
 6 the issue about us not disclosing it. I would  
 7 like to know whether or not the Planning Director  
 8 knew about it, and I think the Board should know,  
 9 since this has been raised by Mr. Dougherty and  
 10 was raised in the decision, but was never, ever  
 11 discussed before the Planning Board.  
 12 MR. KEARNS: Mr. Chair.  
 13 MR. JUHR: I have a question, Mr. Chair.  
 14 MR. MARCANTONIO: Mr. Juhr.  
 15 MR. JUHR: Mr. Kelly, was this a revised  
 16 plan, second plan? It says right on the plan that  
 17 it's revised.  
 18 MR. KELLY: Yeah?  
 19 MR. JUHR: So it was a revised plan?  
 20 MR. KELLY: Correct. So, in terms of  
 21 disclosure, it's right on the plan, it's a revised  
 22 plan, and it has additional land in it which the  
 23 original application we tried to file did not  
 24 include. So, in terms of the non-disclosure issue  
 25 and us not disclosing, or, I don't know,

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1 Mr. Kearns seemed to be thinking out loud that we  
 2 didn't have the right to file the application, we  
 3 absolutely did. And what should have happened is,  
 4 the Planning Board should have, if there was an  
 5 issue with that, they should have looked at it to  
 6 see if the 2006 regulations made any matter  
 7 whatsoever in regard to that additional land.  
 8 MR. JUHR: As I recall it, Mr. Kearns was  
 9 explaining that you seemed to use both. You  
 10 seemed to use that fact to your advantage in one  
 11 situation and to your disadvantage in another.  
 12 Mr. Kearns.  
 13 MR. KEARNS: My question was, my thinking  
 14 out loud was to say, you know, what constitutes  
 15 having to go back and say, well, this master plan  
 16 is different than what was on the Board that the,  
 17 was brought to the Courts, and was approved to be  
 18 heard in front of the Planning Board, the 2005  
 19 plan. So they made changes and submitted a plan  
 20 in 2006. So we're supposed to say, well, you  
 21 know, find out what the differences are, there was  
 22 no communication in terms of a memorandum, a  
 23 letter, or any other communication to my  
 24 knowledge, anyway. Yes, perhaps the Planning  
 25 Director did recognize the fact that there was an

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1 extra lot on this plan. I still say, you know,  
 2 that, that not only was that piece of property  
 3 subject to different regulations, but I think on a  
 4 larger scale, and, you know, at what point does  
 5 the Applicant's submission, which was supposed to  
 6 have been done on a prior, from a prior date, get  
 7 changed enough so that we have to have a, you  
 8 know, another full disclosure with another  
 9 submission of a narrative which describes the new  
 10 plan, and which describes any changes that might  
 11 have been to that plan. So, you know, Mr. Kelly,  
 12 you can say, you know, I just added this one lot,  
 13 it was in the plans, you know, the Planner knew  
 14 about it. You know, I still think there are  
 15 additional items that, because of the addition of  
 16 that land, there should have been some other  
 17 communication regarding the impacts of the  
 18 additional land on your development.  
 19 MR. KELLY: What regulation might that  
 20 be?  
 21 MR. KEARNS: What regulation what?  
 22 MR. KELLY: What subdivision regulation  
 23 might that be?  
 24 MR. KEARNS: That what? That you changed  
 25 your plan, and when you changed your plan --

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1 MR. KELLY: We didn't change a plan,  
 2 Mr. Kearns, you don't understand. We attempted to  
 3 submit a plan. It was rejected --  
 4 MR. KEARNS: In 2005.  
 5 MR. KELLY: Excuse me. It never got to  
 6 the Planning Board as far as I know. It was  
 7 rejected and sent back by Mr. Phillips. The  
 8 record will reflect that. So there was never any  
 9 presentation to the Planning Board. To my  
 10 knowledge, there was never even an application  
 11 submitted to the Planning Board. After we went to  
 12 Court, the Court said, okay, the plan that you --  
 13 the proposed subdivision that you presented and  
 14 the land included in that subdivision shall be  
 15 considered under the 2003 regulations. That was  
 16 an agreement, actually, it's a consent order. The  
 17 town, through Mr. Hadden (phonetic), representing  
 18 the Town Council, agreed to that.  
 19 MR. KEARNS: Sure, 2005.  
 20 MR. KELLY: As I said before, the issue  
 21 concerning the additional land was well known.  
 22 And if the Board had a problem with it, they  
 23 should have said, okay, in regard to this  
 24 additional land, the 2006 regulations apply, and  
 25 we find that, in regard to that particular land,

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1 you don't meet this, this, and this subdivision or  
 2 provision of the regulation. As we sit here  
 3 today, I don't know, the Planning Board doesn't  
 4 know, and neither do you know, whether there would  
 5 be, there is anything in regard to the additional  
 6 land that doesn't meet the 2006 regulations.  
 7 That's what should have been done. That's my  
 8 whole point. That should have been reviewed by  
 9 the Planning Board, there should have been some  
 10 findings, there should have been a discussion,  
 11 there wasn't. They were just hell-bent on denying  
 12 this. And they didn't take the time to take a  
 13 look at that particular piece of property to make  
 14 the findings required. So you can't, in my  
 15 opinion, you don't have the ability to review that  
 16 issue because there is no evidence in the record  
 17 indicating one way or the other whether this land,  
 18 the additional land does meet or doesn't meet the  
 19 2006 regulations. That's my point.  
 20 MR. MARCANTONIO: Go ahead, Mr. Juhr.  
 21 MR. JUHR: Just a point to clarify, the  
 22 original master plan submission that I have in  
 23 front of me has sheets 1 through 9, submitted  
 24 November 2005, 11/1/05, master plan submission.  
 25 This document here is master plan submission, has

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1 the same original date, 2005, and on 10/3/06, it  
 2 says, master plan resubmission, not revised plan,  
 3 but resubmission, so it's a resubmission of the  
 4 original?  
 5 MR. KELLY: That's correct.  
 6 MR. JUHR: Okay.  
 7 MR. KELLY: At resubmission, it's  
 8 revised.  
 9 MR. MARCANTONIO: Mr. DiNunzio.  
 10 MR. DiNUNZIO: I'm just trying to follow  
 11 this. In the memorandum of the 19th -- and point  
 12 Number 5, there is a, "moreover, the Planning  
 13 Board's own attorney, Robert Rossi was well aware  
 14 of the after-acquired property." So, I don't  
 15 quite understand why you want Mr. Phillips to say  
 16 something when the point you raised here is that  
 17 Rossi was aware, because apparently, there were  
 18 some letters exchanged, but those have never been  
 19 submitted.  
 20 MR. KELLY: They're not part of the  
 21 record.  
 22 MR. RUGGIERO: If I could draw the  
 23 Board's attention, have you the decision letter,  
 24 the findings of fact and the decision letter from  
 25 the Planning Board, on page 25, they made a

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1 determination that there was after-acquired  
 2 property in the application. The question before  
 3 you is whether that was clear error, prejudicial  
 4 procedural error, they made a factual finding that  
 5 that was the case, there's no debate about that.  
 6 Now whether or not they had sufficient evidence in  
 7 the record to make that determination is for you  
 8 to judge. That's your role tonight, not to  
 9 determine what fact existed. The fact exists  
 10 there was after-acquired property, they refer to  
 11 it as the Denoyer lot, I believe, and that's on  
 12 Page 25.

13 MR. KELLY: My point is that that was  
 14 never discussed at any of the Planning Board  
 15 meetings. That was added into the decision by  
 16 Mr. Rossi after all the hearings were concluded.  
 17 And my other point is, so what? So what? I have  
 18 the right to add additional property at any time  
 19 during the proceedings.

20 MR. KEARNS: And any amount?  
 21 MR. KELLY: Absolutely.  
 22 MR. KEARNS: Double the amount?  
 23 MR. KELLY: I can double the size of that  
 24 before master plan approval, that's correct.  
 25 Before there was a vote on master plan, yes or no,

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1 I could add whatever I wanted to. I would  
 2 probably have to go back to a preapplication  
 3 stage, but I could add whatever I wanted to. It's  
 4 not like the Zoning Board where you have an  
 5 application for variance for a house, and then you  
 6 come in for the house next door, it's doesn't work  
 7 that way. I can add land to a subdivision  
 8 application at any time before it's approved.  
 9 There's no restriction on the amount of land. And  
 10 the narrative we submitted addresses all the lots.

11 MR. KEARNS: Addresses all the lots?  
 12 MR. KELLY: Correct. If you read it, you  
 13 would see that it did.  
 14 MR. KEARNS: I did read it.  
 15 MR. MARCANTONIO: Anyone else have any  
 16 questions?  
 17 (NO RESPONSE)  
 18 MR. MARCANTONIO: Mr. Kelly, I have a  
 19 quickie here. I get confused --  
 20 MR. KELLY: Do I understand you're not  
 21 going to ask Mr. Phillips --  
 22 MR. MARCANTONIO: I have a question for  
 23 you first. When you say it's not in the record,  
 24 so, the other day when you were telling us about  
 25 something not in the record --

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1 MR. KELLY: Well, it's not in the record  
 2 in terms of a discussion before the Planning  
 3 Board. It's certainly in the record because it's  
 4 in the plan.  
 5 MR. MARCANTONIO: Okay, in the plan.  
 6 MR. KELLY: Yes, it's on the plan.  
 7 MR. MARCANTONIO: This record stuff,  
 8 because I was asking for things and I couldn't  
 9 have them because it wasn't in the record. I was  
 10 getting a little confused as to what's in the  
 11 record and what isn't in the record.  
 12 MR. KELLY: The designation of the  
 13 Denoyer property is in the record. It's included  
 14 in the resubmission. My point is that the  
 15 addition of additional land that wasn't in the  
 16 original application doesn't make the plan  
 17 defective. It's not like we didn't have the right  
 18 to do it, we certainly did. The Planning Board  
 19 should have taken a look at that property, and  
 20 said, okay, it does or does not meet our current,  
 21 our 2006 regulations. There's no discussion about  
 22 that in the, at the Planning Board meetings.  
 23 MR. DOUGHERTY: If I may, the only point  
 24 I'd like to make with regard to that is that when  
 25 you're going to add additional land to a proposed

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1 master plan submission and subdivision, I think  
 2 there is an implied obligation to inform the  
 3 committee or the Board that's reviewing it that  
 4 you're adding that land. There was a consent  
 5 order. This was a very unusual process that took  
 6 place that applied previously expired subdivision  
 7 regulations -- rather, not expired, but  
 8 subdivision regulations that had been amended  
 9 since that original submission. But, in this  
 10 case, there is all kinds of talk about how they  
 11 knew about it, how it was in there. That was  
 12 discovered in the final stages of this hearing  
 13 process, and reviewed in preparation of the  
 14 decision. But one of the things that I keep  
 15 hearing is about all these letters, and I stated  
 16 on the record that the town would certainly  
 17 stipulate to including these supposed letters that  
 18 went to Mr. Rossi about the additional land, and  
 19 they're not here because we're unable to find them  
 20 on this side. I requested Mr. Rossi to supply us  
 21 with letters to that effect, as well. So, keep  
 22 that in mind when you are deliberating the issue.  
 23 I believe there is an obligation to inform the  
 24 Board that you are adding additional property.  
 25 And certainly you can, you can enlarge the scope

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1 of it, but you have to tell the Board that you're  
 2 doing it. You have to inform them in some manner  
 3 so that they can understand what is being done,  
 4 and the scope of the original submission is  
 5 enlarged. That's all I have to say.  
 6 MR. MARCANTONIO: Mr. Phillips.  
 7 MR. KELLY: Can we swear him in?  
 8 MR. NAYLOR: Mr. Chairman. I'm viewing  
 9 this as new testimony if we're swearing him in,  
 10 and I don't think that's appropriate for the  
 11 record.  
 12 MR. RUGGIERO: The only question you need  
 13 to answer in this evening as part of this appeal  
 14 is whether the Planning Board decision is  
 15 supported by the weight of the evidence, or was  
 16 clear error. I don't know how this would  
 17 constitute prejudicial procedural error, maybe it  
 18 does, but those are your requirements. There's a  
 19 finding of fact in the record. It doesn't matter  
 20 who knew what when, there's a finding of fact that  
 21 after-acquired property was included in this  
 22 submission. So the issue before you is, was it  
 23 improper to be contained in this decision letter  
 24 based on Mr. Kelly's arguments. That's all that  
 25 matters. The transcripts speak for themselves.

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1 You can glean from those transcripts that that  
 2 issue did not come out in the discussions in any  
 3 of the transcripts, but it is a finding of fact.  
 4 So it was discovered, the Planning Board voted on  
 5 this finding of fact at their November meeting,  
 6 and Mr. Kelly admitted it was on the plans. So  
 7 the next question is, what does it mean with  
 8 regard to the appeal. There's no dispute about  
 9 that.  
 10 MR. NAYLOR: I understand that --  
 11 MR. JUHR: Aren't there outstanding  
 12 letters that were corresponded between the  
 13 parties?  
 14 MR. RUGGIERO: No, Mr. Dougherty just  
 15 spoke to that.  
 16 MR. JUHR: Did I misunderstand?  
 17 MR. DOUGHERTY: After the meeting, I  
 18 requested Mr. Rossi review all of his files in an  
 19 attempt to find these letters.  
 20 MR. KELLY: This is new evidence right  
 21 here.  
 22 MR. DOUGHERTY: Then don't take it as  
 23 evidence, but you keep talking about these  
 24 letters --  
 25 MR. KELLY: I don't keep talking about

Page 24

1 them, I mentioned them last time. You keep  
 2 talking about them.  
 3 MR. RUGGIERO: I suggest to the Chair to  
 4 move on from this point, frankly, because the  
 5 evidence is the evidence, the facts are the facts,  
 6 and you should deliberate on those matters.  
 7 MR. MARCANTONIO: So, we don't have to  
 8 hear from Mr. Phillips?  
 9 MR. RUGGIERO: No, not at all, it's not  
 10 going to change the facts.  
 11 MR. MARCANTONIO: Okay. I take that  
 12 advice. Anyone else have any questions?  
 13 (NO RESPONSE)  
 14 MR. MARCANTONIO: I have a few questions.  
 15 These are things that I've been looking for. We  
 16 put in the record the waiver, the waiver law, copy  
 17 of. I have a question on that. Then I also have  
 18 a question on the letter from HP and HC, agreement  
 19 for your proposal as mentioned in that testimony  
 20 of August 16th. I believe we asked for it again,  
 21 and then, if I go back to the testimony,  
 22 Mr. Kelly, you basically said to us that, "We  
 23 received this letter after the 16th, so, it wasn't  
 24 on the record, and we don't have to provide for  
 25 it," is that still what we're doing today?

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1 MR. KELLY: It's after the vote was  
 2 taken.  
 3 MR. MARCANTONIO: Okay, so we're not  
 4 going to get that. Okay. And then, this is what  
 5 I had before you people started to discuss things.  
 6 I had a letter to Rossi that he wanted, you wrote  
 7 a letter to Rossi many times, or something like  
 8 this, how he would proceed with the additional  
 9 land that was added in, and as I heard tonight,  
 10 you haven't got any letters to that effect,  
 11 either, right? Or any e-mails, or --  
 12 MR. KELLY: I think we need to stick to  
 13 the record. I don't want to have a procedural  
 14 issue where we're -- we're obviously going from  
 15 here to Superior Court, and I just went through a  
 16 situation where there was discussion about  
 17 supplementing the record, and it was not  
 18 well-received, and it complicated things, and  
 19 really caused a problem with the appeal.  
 20 MR. RUGGIERO: I think the answer is no,  
 21 Mr. Chairman, to that question.  
 22 MR. MARCANTONIO: Yeah, I was just going  
 23 to say. I'm just going from the records trying to  
 24 get things, so, that's another no that I don't  
 25 have there. Then I've got -- this is a simple

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1 thing, I think. As I was going through this  
 2 stuff, letter from Rossi that you people had  
 3 referred to many times that you got it just prior  
 4 to the August 2nd meeting. However, when I went  
 5 through the transcripts, you did correct  
 6 yourselves here, saying that you received this on  
 7 July 2nd. It's just that, when I got a letter  
 8 from Matt Shaw, he was still referring to the  
 9 August 2nd letter, but you did correct it, and say  
 10 that you did receive this on July 2nd, so the  
 11 letter from Mr. Rossi in reference to the HC and  
 12 HP, about their findings, you did get this letter  
 13 on July 2nd. So all this information, you say you  
 14 just received it before the August 2nd meeting,  
 15 you know, isn't -- but you did correct this.  
 16 MR. KELLY: We're referring to the letter  
 17 from, that -- I don't know if it was Mr. Rossi who  
 18 sent it, or Mr. Phillips who sent us a copy of a  
 19 letter from the Rhode Island Historical Cemetery  
 20 Advisory Committee. Is that the letter you're  
 21 referring to?  
 22 MR. MARCANTONIO: Yep.  
 23 MR. KELLY: Yeah, here is a letter from  
 24 Mr. Rossi.  
 25 MR. MARCANTONIO: Prior to the August 2nd

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1 letter, I mean August 2nd meeting. But, going  
 2 through the transcripts, you already admitted in  
 3 in the transcripts that you received this July  
 4 2nd, which was the proper date.  
 5 MR. KELLY: Yep, and I would like to  
 6 address that since that's been -- it's an  
 7 opportune time to do that. The Rhode Island  
 8 Historical Advisory --  
 9 MR. MARCANTONIO: Can I just -- one more.  
 10 MR. KELLY: Okay. I do want to address  
 11 that issue.  
 12 MR. MARCANTONIO: You guys keep confusing  
 13 me, and I can't read my letters. Then there's  
 14 another letter I'm looking for, Mr. Kelly, a  
 15 letter that you said you would send to us.  
 16 MR. KELLY: You have that letter.  
 17 MR. MARCANTONIO: No, no, the letter  
 18 Kelly's office sent to HC and HP, you said that  
 19 you would submit this letter. This is on Page 65  
 20 of our transcripts. I can go back and dig it out.  
 21 You said that you would submit it. This is a  
 22 letter you submitted to HC and HP in reference to  
 23 the study, the survey that they would do. I'll  
 24 dig it out for you.  
 25 MR. KELLY: That's not part of the

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1 record, either.  
 2 MR. MARCANTONIO: But you said you would  
 3 submit this to us in the transcripts. I'll dig it  
 4 out.  
 5 MR. RUGGIERO: Which date, Mr. Chairman?  
 6 MR. MARCANTONIO: This is in our  
 7 transcripts Page 65, March 13th.  
 8 MR. RUGGIERO: This is the last one.  
 9 MR. KELLY: I think that that's -- we're  
 10 looking for that now. It's not part of the  
 11 record --  
 12 MR. MARCANTONIO: "Yes, we can submit  
 13 it." You said that you would submit it, right  
 14 here. This is your proposal. And basically, what  
 15 the letter to HP said that was we include exactly  
 16 what I offered the Board, was that we would do an  
 17 archaeological study --  
 18 MR. KELLY: That's right. The letter is  
 19 basically identical, it may even just be a copy of  
 20 the letter I sent to the Board in which we said  
 21 that we would do an archaeological survey at  
 22 master plan.  
 23 MR. MARCANTONIO: But I would like to  
 24 have the letter that you sent.  
 25 MR. KELLY: I'm looking for it.

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1 MR. MARCANTONIO: That's the end of my  
 2 five questions.  
 3 MR. KELLY: We don't have it with us.  
 4 That was sent to RIHPC, it wasn't sent to the  
 5 Board. It's basically the same letter that we  
 6 sent to the Board of what we proposed.  
 7 MR. MARCANTONIO: I was looking for it  
 8 with somebody else's name on it, you know. You  
 9 know what I mean, that's what I'm looking for.  
 10 MR. KELLY: I know I don't have it here  
 11 with me.  
 12 MR. MARCANTONIO: Okay.  
 13 MR. KELLY: The letter to the RIHPC is  
 14 basically identical to, and it may be just a copy  
 15 of the same letter that we sent to the Planning  
 16 Board on August 2nd, 2007, in which we proposed a  
 17 detailed study, as I previously mentioned to you,  
 18 and that study was for an archaeological survey of  
 19 the proposed roadways, areas of disturbance at  
 20 master plan, and that each phase was then brought  
 21 back to the Planning Board at preliminary, we  
 22 would do a complete archaeological study of the  
 23 entire area.  
 24 MR. MARCANTONIO: I was just looking for  
 25 the letter sent to them.

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1 MR. KELLY: I'm sorry, I don't have it  
 2 with me. While we're on that point, and I think I  
 3 made this point the last time, and I don't want to  
 4 take a lot of time, but the RIHPC did not request  
 5 nor suggest an archaeological study of this site  
 6 prior to approval of anything, prior to master  
 7 plan, prior to preliminary, or prior to final.  
 8 What they suggested and recommended was an  
 9 archaeological study prior to any development.  
 10 MR. MARCANTONIO: This is Mr. Sanderson's  
 11 letter you're referring to?  
 12 MR. KELLY: Correct. Sanderson's letter,  
 13 November 6, 2006, which we didn't receive until  
 14 2007, and he does not request an archaeological  
 15 study prior to the approval.  
 16 MR. MARCANTONIO: That's --  
 17 MR. KELLY: If I could finish. Prior to  
 18 the approval, prior to any approval.  
 19 MR. MARCANTONIO: That's in the record,  
 20 we discussed that.  
 21 MR. KELLY: Well, it's important.  
 22 MR. MARCANTONIO: You and I went through  
 23 that the last time, it's on the record. I was  
 24 looking for the letter that, was basically got  
 25 after the record, and we don't have it. That's

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1 what I was looking for. Then I was also looking  
 2 for the one you said you were given, I don't have  
 3 that one, either.  
 4 MR. KELLY: In regard to the letter you  
 5 pointed out that we received on July 2nd, which I  
 6 corrected and said, I originally said August 2nd  
 7 because I had the dates confused with the letter  
 8 we sent to the Planning Board which suggested how  
 9 we would proceed on an archaeological survey, even  
 10 though, I'm sure you read in the transcripts  
 11 Mr. Phillips admitted an archaeological study of  
 12 any site is not required prior to master plan.  
 13 And if you take a look at the checklist to master  
 14 plan, you will not see the requirement of an  
 15 archaeological study. You'll see a requirement  
 16 for historical cemeteries, and you'll see a  
 17 requirement for other things. Just to let you  
 18 know, and I think it's important that you're aware  
 19 that under state law, and I'm referencing this  
 20 registration of two cemeteries, NS52 and NS53, by  
 21 the RI Advisory Commission on Historical  
 22 Cemeteries, the Rhode Island Advisory Commission  
 23 on Historical Cemeteries has no power other than  
 24 to keep a database. They do not have any  
 25 authority under state law to register or designate

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1 any area as an historical cemetery. The only  
 2 entity that has authority under state law to  
 3 register an historical cemetery is a town or city  
 4 clerk. And that is under 23-18-10.1. So this  
 5 so-called letter of registration from Evelyn  
 6 Wheeler, the chair of this Commission, is, in my  
 7 opinion, under the law, meaningless. If there was  
 8 an historical cemetery on that site, the only  
 9 entity that could register it or record it is the  
 10 town clerk, or city clerk where located. And if  
 11 you take a look at the legislation concerning the  
 12 Rhode Island Advisory Commission on Historical  
 13 Cemeteries, it has no authority whatsoever to  
 14 designate or register historical cemeteries. I  
 15 would like to, if I can, I just have a few minutes  
 16 of rebuttal on what was said, if I may.  
 17 MR. DOUGHERTY: Could I just clarify one  
 18 thing?  
 19 MR. MARCANTONIO: Yes.  
 20 MR. DOUGHERTY: The statute that's cited  
 21 talks about registering and who has power to  
 22 register a cemetery. But when it comes to  
 23 protection of cemeteries, the town councils are  
 24 empowered to --  
 25 MR. KELLY: I agree with that.

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1 MR. DOUGHERTY: But furthermore, it's not  
 2 whether or not they're registered, it's whether or  
 3 not they're even suspected. A suspected burial  
 4 site of Native Americans or suspected cemeteries.  
 5 But just because a cemetery or burial site is not  
 6 registered, it doesn't render it nonexistent, and  
 7 not subject to inquiry and protection under the  
 8 regulations.  
 9 MR. MARCANTONIO: Thank you.  
 10 MR. KEARNS: Mr. Chair.  
 11 MR. MARCANTONIO: Go ahead.  
 12 MR. KEARNS: I have some questions for  
 13 Mr. Dougherty. I don't know what the appropriate  
 14 time would be, but, whenever that is.  
 15 MR. RUGGIERO: Mr. Chairman, if I could,  
 16 Mr. Kelly should go last. So, if there are  
 17 questions, because he has the burden here, and so  
 18 he should go last.  
 19 MR. KEARNS: There's two issues on timing  
 20 that I just would like to be clear on. And one is  
 21 the fact that, and Mr. Kelly is hanging a lot of  
 22 the acceptance of this subdivision plan, this  
 23 master plan approval on the fact that there was no  
 24 letter of incompleteness sent to him by the Town  
 25 Planner. And when the time ran out for that

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1 letter to be sent, then by the virtue of law, the  
 2 time limit ran out. So, he had quote/unquote  
 3 approval because there was no action taken. Now,  
 4 my question is, is there anything in the record  
 5 that gives any indication of why that plan was not  
 6 acted upon by the Planner?  
 7 MR. DOUGHERTY: Well, there were issues  
 8 brought up with that. I think in my memo, I even  
 9 referenced something that, the plan, or the  
 10 checklist, which was deemed essentially  
 11 incomplete, and there were some issues raised by  
 12 the Planner in a letter that I believe is in the  
 13 record, the November 9th, 2005 letter that  
 14 accompanied a return submission stated that there  
 15 were -- hold it, I'm sorry. Oh no, I'm sorry, the  
 16 certificate of incompleteness on the original one  
 17 was dated June 19th, 2006. And DiPrete  
 18 Engineering responded by a letter dated October  
 19 4th of 2006. And they raised the issue of missing  
 20 stone walls and foundations and stone mounds.  
 21 They responded back that all of the stone walls  
 22 were on the plans. That was it. There was no  
 23 offered response for locating the burial grounds  
 24 and the formations. So, if an Applicant is going  
 25 to come before you -- and you can say, look, you

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1 didn't put everything on. If they come back and  
 2 say, we did, we're done, this is everything, you  
 3 have it. Then that's theirs. If it becomes known  
 4 later on in the course of the proceedings, which  
 5 it certainly did in this application, that there  
 6 are other significant features that were mandated  
 7 by subdivision regs and that were mandated by the  
 8 checklist to be included on that. Just because  
 9 you don't respond within the time period for  
 10 having a checklist, or submitting the things  
 11 pursuant to the checklist, it doesn't mean that  
 12 the physical characteristics of the site change.  
 13 And that's what you're getting goaded into, I  
 14 think, here, by the arguments, is, because the  
 15 town didn't rub our nose in it, then we get by on  
 16 that one. We won because you didn't fulfill our  
 17 obligations on the time limits. The fact of the  
 18 matter is, when you look at the master plan  
 19 submission, was it adequate, and did they do what  
 20 they had to do under the subdivision regs, and I  
 21 think here, it's clear that they didn't.  
 22 MR. KEARNS: I have one more. The other  
 23 timing issue is the decision that was made by the  
 24 Planning Board on the date that made the decision.  
 25 My understanding is, and I'm not clear on what the

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1 timing was, that if the decision was not made on  
 2 that particular date, then some rights would go to  
 3 the Applicant just by virtue of the fact that  
 4 there was no decision made. And so, so that, in  
 5 further, if the Applicant was granted a, an  
 6 extension, or, both parties agreed there should be  
 7 an extension, would that change that bellweather  
 8 time limit?  
 9 MR. DOUGHERTY: Absolutely. There's a  
 10 case, a Tiverton case that came down in the last  
 11 year-and-a-half, New England Development. And it  
 12 was a large scale shopping plaza that was proposed  
 13 to be sited in the town of Tiverton, and the issue  
 14 was exactly what you're talking about. It was the  
 15 timing under state law for the Board to take  
 16 action on a plan for master plan submission. And  
 17 the Applicant argued that because the Board didn't  
 18 have a written decision done by that set-in-stone  
 19 date, which in this case, the time for taking  
 20 action was August 17th; after it had been given  
 21 extensions by the various parties involved; that  
 22 if the Board had not take an action, then that  
 23 would be deemed to be granted. They would have a  
 24 vested right in that. But what happened was, the  
 25 Board in that case, took a vote, but then they

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1 didn't have a written, signed decision adopted by  
 2 the Board until quite some time later. And that  
 3 issue went all the way up to the Supreme Court,  
 4 and our Supreme Court reviewed the statutes, and  
 5 definitively stated that the action was at least  
 6 the taking of a vote; that it didn't have to be  
 7 the entry and recording of a written, final  
 8 decision, which is similar to what took place  
 9 here. But if the Board had not taken action, and  
 10 there hadn't been a stipulation extending the time  
 11 or a waiver of that time requirement, then the  
 12 Applicant would be able to argue that they had  
 13 rights in their master plan submission, and it  
 14 would have been deemed granted by default.  
 15 MR. KEARNS: So those rights by default  
 16 would mean that they would be able to go to  
 17 preliminary?  
 18 MR. DOUGHERTY: Sure, yeah.  
 19 MR. KEARNS: Their master plan would be  
 20 deemed accepted if the Board did not take either a  
 21 positive or negative action on the plan?  
 22 MR. DOUGHERTY: Yes.  
 23 MR. KEARNS: At that point.  
 24 MR. DOUGHERTY: Yes. That's why the  
 25 dates are so -- you'll find in any number of

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1 applications for subdivision master plan  
 2 submissions in any one of the cities and towns.  
 3 Oftentimes, there are severe time constrains on  
 4 citizen boards who have to go through hoops to  
 5 accommodate their regular business, and schedule  
 6 extra meetings, sometimes on an expedited  
 7 meetings. But an Applicant can always waive those  
 8 time limits, and many times they do. But in this  
 9 case, the waiver came with some conditions, it was  
 10 a limiting amount. What they were proposing to do  
 11 was not something that the Board was amenable to,  
 12 and they decided to take a vote on the application  
 13 on its merits.  
 14 MR. KEARNS: Thank you.  
 15 MR. MARCANTONIO: Anybody else have any  
 16 other questions?  
 17 (NO RESPONSE)  
 18 MR. MARCANTONIO: Mr. Kelly, one more  
 19 question for you. I wrote it down. When you were  
 20 talking about waivers, and I took some notes on  
 21 that.  
 22 MR. KELLY: Waiters or waivers? You need  
 23 waiters when you leave tonight.  
 24 MR. MARCANTONIO: I have a little hearing  
 25 problem so I can't smile at your jokes because I

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1 don't hear them correctly sometimes. I got notes  
 2 down here, waivers were never voted on, state law  
 3 says they have to vote on them. I was very  
 4 concerned about our Board doing the proper thing,  
 5 so I asked Mr. Ruggiero to get me a copy of the  
 6 waivers, modification, reinstatement. Then when I  
 7 read this, I felt as though, am I reading the  
 8 right thing?  
 9 MR. KELLY: I don't know what you have.  
 10 MR. MARCANTONIO: This is (showing  
 11 document) --  
 12 MR. KELLY: Take a vote on the waivers.  
 13 A separate vote. That's our point, there was  
 14 never any discussion.  
 15 MR. MARCANTONIO: That was your point,  
 16 and when I read this, I don't come to the same  
 17 conclusion that you come to, so I asked  
 18 Mr. Ruggiero to enlighten me on the subject  
 19 matter. And, would you enlighten me again on this  
 20 subject matter?  
 21 MR. RUGGIERO: Yeah.  
 22 MR. KELLY: I didn't get a copy of that.  
 23 MR. RUGGIERO: That's just out of the  
 24 general laws. Of course I didn't keep a copy.  
 25 MR. RUGGIERO: Mr. Benoit has it. This

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1 is the provision in 45-23-62, and in b, it talks  
 2 about waivers and modifications. And Mr. Kelly is  
 3 correct, it provides that the Planning Board does  
 4 have the authority to grant waivers and  
 5 modifications from the requirements. And it talks  
 6 about the grounds and so forth. And it also  
 7 requires that a vote be taken on any waivers, but  
 8 it doesn't say when the vote needs to be taken,  
 9 only that a vote must be taken. So, you know, you  
 10 can argue academically about these things, but  
 11 when there's a motion to deny presented, it  
 12 certainly is a known necessity to vote on a  
 13 waiver. So it's a semantic argument at this  
 14 point. But if they were inclined to grant the  
 15 master plan approval, they would have had to  
 16 address those issues, they would have to make a  
 17 motion and vote on the three waivers requested.  
 18 MR. JUHR: So, Mr. Ruggiero, you're  
 19 saying that the fact that they denied the  
 20 application, in essence is the same as --  
 21 MR. RUGGIERO: The waiver question never  
 22 arose because they weren't voting on approving the  
 23 master plan. Only if they were approving it,  
 24 would they need an affirmative vote on the  
 25 waivers, because they could not approve it without

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1 the waiver.  
 2 MR. MARCANTONIO: So, you're saying our  
 3 Planning Board did nothing wrong.  
 4 MR. RUGGIERO: I'm just saying they  
 5 followed the law on that.  
 6 MR. RUGGIERO: You have to make that  
 7 decision.  
 8 MR. MARCANTONIO: Just going by the law  
 9 here. Everybody has a different interpretation.  
 10 Okay. Mr. Kelly.  
 11 MR. KELLY: Just a couple of points in  
 12 regard to some of the things that Mr. Dougherty  
 13 has mentioned. We received that letter, the  
 14 letter from the Historical Advisory Commission  
 15 designating historical cemeteries on or about  
 16 July 2nd. And there is evidence in the record  
 17 indicating, testimony from Mr. Bradley, our  
 18 engineer, that he tried to locate those particular  
 19 areas. They were given GPS coordinates, he tried  
 20 to locate them, but could not locate these  
 21 particular stone mounds. And at the hearing, I  
 22 think it was August 16th, Mr. Melly acknowledged  
 23 that with the movement of satellites, these  
 24 designates, these coordinates could be different  
 25 from up to a thousand, it could be an error of up

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1 to a thousand feet. There was an effort to locate  
 2 them, we couldn't locate them. And we tried to  
 3 get a meeting with Mr. Gagnon of the Conservation  
 4 Commission and a meeting with Mr. Melly out at the  
 5 site, but we weren't able do that until  
 6 August 14th, two days before the hearing. We  
 7 didn't learn of the exact location until that  
 8 time. Now, in regard to the PAL report, from our  
 9 point of view, in fact, if you take a look at the  
 10 letter that Mr. Dougherty pointed out where  
 11 Mr. Phillips asked for some additional  
 12 information, in that letter, the incompleteness  
 13 letter, Mr. Phillips asked for a resubmission of  
 14 the PAL report, he asked for it, which we  
 15 submitted, so we thought that that was, in fact,  
 16 the extent of that issue, and that the PAL report  
 17 would cover it. Now, we didn't find out until  
 18 later in July about the issue concerning that this  
 19 issue was still an issue and this letter from the  
 20 cemetery. And in terms of the timing of this, the  
 21 Board really needs to focus on the time frame.  
 22 We're being told about the time constraints, and  
 23 the Planning Board had to act. The deadlines for  
 24 the Planning Board to act are for the benefit of  
 25 the Applicant, not the Planning Board. And as

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1 Mr. Dougherty said, the Applicant can waive them.  
 2 And we offered to extend the deadline to  
 3 October 1. We did not agree with the information  
 4 that the Planning Board was requesting at that  
 5 time, and I'm going to get into that in a little  
 6 more detail just reviewing the transcript with  
 7 you. Mr. Dougherty cited portions of the  
 8 transcript of what occurred on August 16th, but  
 9 didn't get to the rest of the transcript when  
 10 there was an actual conclusion to it in regard to  
 11 what was being required. Now, I mentioned to you  
 12 last time that I thought it was three or four days  
 13 before the hearing is when we were told that there  
 14 was to be a requirement for an archaeological  
 15 study, et cetera, at master plan. I refer you to  
 16 the August 14th, 2007 memo to the Planning Board  
 17 from Michael Phillips. It's entitled,  
 18 "Archaeological Survey for Rankin Estates." And  
 19 he recommends that the Board require the Applicant  
 20 to complete background research to the entire  
 21 property, field investigations, et cetera, et  
 22 cetera, of the entire site. That's the third  
 23 paragraph on Page 2.  
 24 MR. RUGGIERO: Mr. Kelly, is it the 9th  
 25 or the 14th?

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1 MR. KELLY: August 14th, 2007, memo to  
 2 the Planning Board members from Mr. Phillips.  
 3 It's entitled "Archaeological Survey for Rankin  
 4 Estates."  
 5 MR. RUGGIERO: Just for the record, we  
 6 have a memo, and I think it says August 9th on it.  
 7 Mr. Phillips just indicated to me that it may  
 8 be --  
 9 MR. PHILLIPS: In the decision, it's  
 10 referred to -- the date is incorrect but it's the  
 11 same memo.  
 12 MR. RUGGIERO: Just so we're clear -- it  
 13 does say August 9th on the memo but the decision  
 14 refers to a memo dated August 14th.  
 15 MR. MARCANTONIO: Mine says August 14th  
 16 on it.  
 17 MR. RUGGIERO: Could I just see that, if  
 18 I may. I think that was in the decision. Do you  
 19 have the actual letter? I have the actual letter  
 20 of the 9th.  
 21 MR. KELLY: Can I see the memo dated  
 22 August 9th?  
 23 MR. MARCANTONIO: I have the 14th.  
 24 MR. RUGGIERO: There are different dates.  
 25 MR. MARCANTONIO: Mine says the 14th.

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1 MR. RUGGIERO: We better get to the  
 2 bottom of this.  
 3 MR. RUGGIERO: There's two copies.  
 4 There's a copy with each date.  
 5 MR. JUHR: Two memos with different  
 6 dates.  
 7 THE REPORTER: Mr. Marcantonio, is this  
 8 on the record? Could you please either speak up  
 9 or go off the record?  
 10 MR. MARCANTONIO: We can go off the  
 11 record right now.  
 12 MR. RUGGIERO: Why don't we examine it on  
 13 the record so it's just in there; what was going  
 14 on to determine these two memos.  
 15 MR. MARCANTONIO: He's in charge.  
 16 MR. RUGGIERO: I think the record should  
 17 just reflect that the two attorneys of the parties  
 18 are reviewing the two memos with a different date.  
 19 MR. DOUGHERTY: It appears to be the same  
 20 memo, it's just a continuation --  
 21 MR. MARCANTONIO: This is mine, right?  
 22 MR. DOUGHERTY: Yes, this is yours.  
 23 There's a continuation on the bottom of the  
 24 paragraph. The August 9th --  
 25 MR. RUGGIERO: Are the parties in

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1 agreement that the content of the letters are the  
 2 same?  
 3 MR. KELLY: Yeah.  
 4 MR. JUHR: What is the the actual date?  
 5 MR. RUGGIERO: There seems to be two  
 6 letters in circulation, one dated August 9th, one  
 7 dated August 14th, but they have the same content.  
 8 MR. JUHR: I'd like to know for the  
 9 record what day it was actually created.  
 10 MR. RUGGIERO: Mr. Phillips could answer  
 11 that if he knows.  
 12 MR. KEARNS: Mine has initials on it.  
 13 MR. RUGGIERO: Mine does, too.  
 14 MR. KEARNS: And the one that I saw from  
 15 the 14th, do they have initials on the 14th one?  
 16 Because Mr. DiNunzio's does not. Just the one  
 17 from the 9th, so, if that makes any difference --  
 18 MR. KELLY: For the record, the only one  
 19 of the Applicant has is August 14th, 2007.  
 20 MR. RUGGIERO: You can proceed then,  
 21 Mr. Kelly, as long as we're clear.  
 22 MR. KELLY: Thank you. There's been a  
 23 lot of discussion about timing. And I think it's  
 24 important that the Board take into consideration  
 25 timing as the record will reflect. This Applicant

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1 sought to file at a master plan, a plan,  
 2 subdivision application in early November 2005.  
 3 It was returned because of a building moratorium,  
 4 a subdivision moratorium that was enacted within  
 5 the space of seven days by both the Planning Board  
 6 and the Council. The developer took issue with  
 7 it, and the matter eventually, in August of 2006,  
 8 was resolved by way of the consent order. So, we  
 9 have a situation where the town delayed the  
 10 submission of this application by approximately  
 11 ten months. It was then submitted in October of  
 12 '06. And hearing was held, another hearing was --  
 13 and in the fall of '06, and then in January '07,  
 14 the Planning Board voted at the direction of its  
 15 counsel to provide that it would be heard under  
 16 the 2006 regulations despite the fact there was a  
 17 court order indicating that it was to be heard  
 18 under the 2003 regulations. That delayed the  
 19 application again from January to June. And at  
 20 the January meeting, when that vote was taken, I  
 21 asked that the application be held in abeyance.  
 22 And we proceeded to court, took some time, we had  
 23 several hearings. The Court ultimately found, and  
 24 the Planning Board did not take any appeal, that  
 25 the application, that the Planning Board had to

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1 adhere to the consent order. So we have eight  
 2 months, then approximately six months that the  
 3 town, and the Planning Board, the Planning Board  
 4 delayed this application. So, during that time  
 5 period of January to June, since the determination  
 6 had not yet been made over confident that the  
 7 Planning Board would have to comply with a consent  
 8 order. My client did not do subsequent  
 9 engineering work. It would be foolish to do so  
 10 until it received the final determination from the  
 11 Court. So we had a significant period of time  
 12 that the application was delayed by the Planning  
 13 Board. And then, when the Applicant requested an  
 14 extension of, to October 1, to supply additional  
 15 information that was requested in the memo which  
 16 we just talk about of August 14th, and at the  
 17 meeting on August 16th, we were denied that  
 18 opportunity. And I'd like to focus you on what  
 19 was really said during the hearing on August 16th,  
 20 and what was really offered by the Applicant as  
 21 opposed to the excerpts that were read to you by  
 22 Mr. Dougherty. To shorten this up, I marked out  
 23 the areas which were left out. If you recall,  
 24 Mr. Dougherty referenced Page 94, this is the  
 25 transcript of August 16th, you already have it,

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1 it's part of the record. And Mr. Dougherty  
 2 focused on Mr. Cardello saying, "So it's not  
 3 necessarily an archaeological study but a thorough  
 4 survey." Then, Mr. Rossi, on Page 95 says, "The  
 5 town really should have its own archaeologist make  
 6 that investigation and do so at the cost of the  
 7 developer." Okay? And then, later on, you can  
 8 see where I say, "I have agreed that we would  
 9 locate those items identified by Mr. Melly. We do  
 10 not agree they're historical cemeteries; we do not  
 11 agree with him on that. I don't think we need to  
 12 get into what will be a protracted issue if we're  
 13 telling you that we do not want to disturb them  
 14 and will design around them." Flipping to  
 15 Page 97, after a long colloquy about whether  
 16 they're historical cemeteries or not, I said that,  
 17 to, "avoid having to determine whether they are or  
 18 not, by showing them on the plan and avoiding them  
 19 in the subdivision and complying with the law.  
 20 And in terms of historic cemeteries, if there are  
 21 historic cemeteries, we'll show them. But, as I  
 22 said, we will show the mounds, even though we  
 23 don't agree that they are historic cemeteries as  
 24 defined by statute." And then, on Page 99,  
 25 Mr. Phillips states, "Just a clarification that

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1 Mr. Kelly indicated he was going to locate mounds  
 2 and other features. Does that mean the whole site  
 3 or does that mean back to your proposal meaning  
 4 the roads and detention ponds?" "We're prepared  
 5 to locate any alleged historic cemeteries."  
 6 "Property line to property line." "Yes. We are  
 7 prepared to locate the mounds and stone walls and  
 8 the foundations even though they're not required  
 9 by your regulations." And then on Page 100,  
 10 "We've agreed to locate the foundations." Then,  
 11 if you skip over, Page 107, "The engineers have  
 12 been out there looking for them and they couldn't  
 13 find the coordinates. Mr. Melly just agreed that  
 14 they could be off by a thousand feet. It's a  
 15 large site. We did our best. We found some. I  
 16 have records of the engineers being out there  
 17 looking for them. And in regard to receiving  
 18 Dr. Melly's report, we received it on August 10th,  
 19 which was how many business days ago, three or  
 20 four. So to suggest, you know, that we had time  
 21 to go out and plot all this stuff after we  
 22 received it from Dr. Melly, it's not correct.  
 23 It's not enough time." Then on the next page,  
 24 109, we get into another colloquy, and I indicated  
 25 Item 20 on the checklist, item 21 is what we would

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1 comply with. "Though we think we've already  
 2 complied with that, we will go back and take  
 3 another look and provide the information that we  
 4 received on August 10th from Dr. Melly; and then  
 5 be sure that we comply with Item 5 under C,  
 6 constraint opportunity map, in regard to historic  
 7 structures, foundations, and stone walls." And  
 8 then at the bottom, Mr. Phillips, there's another  
 9 colloquy about, "We're going to locate," you can  
 10 see that on Line 18, Page 110. "Unique, natural,  
 11 and/or historic features including stone walls."  
 12 "Including stone mounds." "We'll show the stone  
 13 mounds on the plan." And Mr. Cardello said, "All  
 14 stone mounds." "Every one we can find. And then  
 15 at Item C -- Item 5, we will locate those items  
 16 under your checklist of Page 23 of the regulations  
 17 applicable to this project." And then went on to  
 18 say, once again, "Mr. Cardello, we disagree  
 19 whether stone mounds need to be shown, but we're  
 20 agreeing to show them. What more do you want? I  
 21 have the right to make my position known,"  
 22 Mr. Cardello was upset that we didn't agree that  
 23 they were historical cemeteries. We still  
 24 disagree they are, which brings up the point,  
 25 Dr. Melly did what I would call a drive-by

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1 observation, and then criticizes the PAL report  
 2 because they didn't excavate the mounds. Mr.  
 3 Dougherty criticizes the PAL report for not  
 4 excavating the mounds sufficiently, but, in fact,  
 5 Dr. Melly, according to his report, never touched  
 6 them, he just looked at them. So, "The PAL report  
 7 said they were just piled up there by farmers. So  
 8 that's our position, but we will show them on the  
 9 plan." How much clearer could this be? We asked  
 10 for an extension, and we're agreeing to show the  
 11 mounds and everything else they asked for. Now,  
 12 and then, if you go to Page 114, "We're going to  
 13 go out and look for mounds, whatever we find,  
 14 we'll plot them on the plan. That's what the  
 15 regulations require." And then Mr. Rossi says, as  
 16 you can see, he starts talking, Page 114, Line 10.  
 17 "If they are historic cemeteries, they need to be  
 18 all identified so they can all be protected as is  
 19 required of this town under state law. Now, the  
 20 statute reads 'suspected.' Now, I think, you  
 21 know, it's not the threshold. So my opinion is  
 22 that this Board has an obligation as part of the  
 23 town to try to protect historic cemeteries. Now,  
 24 someone has to go out there with criteria,  
 25 identify each and every one of these mounds, and

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1 then put them on a map." And, "We have to have  
 2 criteria. Now, Dr. Melly, I believe, he's got  
 3 criteria. I think he stated them in his report,  
 4 in a prior report. My suggestion is Dr. Melly has  
 5 already been hired by the town, and I don't see  
 6 any reason why he can't go out there and identify  
 7 these mounds. "At which point the engineer will  
 8 go out and survey them and locate them on the  
 9 plan." "Yes. Locate these mounds under what he  
 10 believes he has the criteria, and so we can do  
 11 these in an orderly fashion." And I said, "That's  
 12 not required by the regulations, number one."  
 13 Mr. Cardello referred to a survey. And  
 14 Mr. Dougherty tried to pooh-pooh that, saying  
 15 that, "We only asked for a survey." If it looks  
 16 like a duck, quacks like a duck, walks like a  
 17 duck, it's a duck where I come from. If you have  
 18 an archaeologist do a survey as opposed to a  
 19 registered land surveyor, it's an archaeological  
 20 survey. Mr. Phillips stated, and the regulations  
 21 will clearly show that no archaeological study is  
 22 required at master plan. I then went on to say,  
 23 "We have offered to comply with your regulation  
 24 and locate, even though we don't believe they're  
 25 historic cemeteries, and locate" the mounds and

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1 look for those, "that Dr. Melly has identified in  
 2 his report." And then the Board went on to vote.  
 3 And then, on Page 120, there's another discussion  
 4 and in terms of historical cemeteries or suspected  
 5 cemeteries, we said that, "that's the definition  
 6 we're prepared to comply with." And the Board  
 7 then went on, and I made it clear that I was  
 8 changing my proposal. And I said that, "And then  
 9 a study would be done at that point, which is what  
 10 I propose." In other words, we would locate all  
 11 these mounds, and we would locate them all before  
 12 we came back, and then do an archaeological study  
 13 of the entire site. So, I said, "And then a study  
 14 would be done at that point, which is what I  
 15 propose." Because, remember, in my letter of  
 16 August 2nd, I had said, "We will do an  
 17 archaeological study now in conformance with the  
 18 RIHPC requirements, even though the RIHPC said,  
 19 'You don't -- we just want to be sure a study is  
 20 done before development,'" here we are at master  
 21 plan. And the other part of my proposal was, when  
 22 we come back from any preliminary approval, on any  
 23 phase of this subdivision, we will then do a  
 24 complete archaeological study of the entire site,  
 25 or portion of, or phase that's before the Board.

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1 So, I said, I want to make it clear, after we  
 2 locate all the mounds, "And then a study would be  
 3 done at that point, which is what I propose. You  
 4 want to get it done now," referring to an  
 5 archaeological study, "and I've offered to change  
 6 my proposal to have those mounds and anything that  
 7 might fit within a historical cemetery definition  
 8 under state law located on the entire site before  
 9 we come back." So, contrary to the  
 10 characterization of what was said at the meeting,  
 11 the transcript speaks for itself. We absolutely  
 12 said that we would locate any of these mounds, and  
 13 we would locate anything else that fits within a  
 14 historical cemetery definition, which, according  
 15 to Mr. Rossi's statement on the record was even a  
 16 suspected cemetery. We wouldn't pay for Dr. Melly  
 17 to do it because we don't think he's an expert, we  
 18 still don't think he's an expert, and there's  
 19 nothing in the regulations requiring an  
 20 archaeological study at master plan. And by the  
 21 way, on the record, in the transcript, Dr. Melly,  
 22 who is going to get hired for this, agreed with me  
 23 that an archaeological study of that site would  
 24 cost a hundred thousand dollars. That's what we  
 25 didn't agree to. Who was going to get the hundred

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1 thousand dollars? Dr. Melly. Not me, not the  
 2 Applicant. The Board was proposing that we pay  
 3 Dr. Melly to go out. Now, no one in their right  
 4 mind would pay a doctor to operate on them if they  
 5 didn't think they were a doctor. We don't think  
 6 he's a qualified archaeologist on this particular  
 7 issue. He may be the smartest guy in the world on  
 8 South American Indians. We don't think he's  
 9 qualified in this area of the world, in Rhode  
 10 Island, and he has no prior experience on  
 11 archaeological studies. That's what we disagreed  
 12 with, that's what we refused to do, pay Dr. Melly  
 13 to do an archaeological survey for a hundred  
 14 thousand dollars. It's not record, I spoke from  
 15 the podium, Dr. Melly was in the audience,  
 16 "Wouldn't an archaeological study cost at least a  
 17 hundred thousand dollars?" He said, 'Oh yeah, at  
 18 least.' So there is a very good reason why we  
 19 didn't want to do an archaeological study.  
 20 Mr. Kearns said, well, why would you be  
 21 adversarial with the Board? Because the Board  
 22 wanted to us spend a hundred thousand dollars for  
 23 an archaeological study that, one, Mr. Phillips  
 24 agreed on the record wasn't necessary at master  
 25 plan; and Number 2, it's not required by the

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1 regulations; and Number 3, certainly, the Board at  
 2 that point, at a master plan doesn't have the  
 3 authority to order an archaeological survey that  
 4 would cost a hundred thousand dollars. We didn't  
 5 even know at that point whether we had a project.  
 6 There hadn't been any approvals whatsoever. In  
 7 fact, there had been a lot of discussion about the  
 8 roadways, et cetera. And we anticipated that the  
 9 Board would say, we don't like this location, or  
 10 have some discussion about not liking this  
 11 location, not liking the location of detention  
 12 ponds. We anticipated that this would be a plan,  
 13 and this is the way that the Planning Board  
 14 operates in any other jurisdiction, and I'm sure a  
 15 review of the records would show that this is the  
 16 way a Planning Board normally acts when there's  
 17 not a room full of people opposed to the project,  
 18 and that is, there's an evolving process of  
 19 give-and-take, and changing the things that the  
 20 Planning Board doesn't like, or its consultants  
 21 don't like. Yes, we did hear about the detention  
 22 ponds from Mr. Smith. That was a minor issue at  
 23 the time if you read the transcript of  
 24 August 16th. And if you look at the memo of  
 25 Mr. Phillips, you'll see on August 14th, this

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1 archaeological survey idea was brought up, two  
 2 days before the hearing. We didn't get  
 3 Dr. Melly's report until August 10. Now, there's  
 4 also the discussion about the roadways. Roadway  
 5 profiles aren't required at master plan. And we  
 6 told them on August 2nd, we won't be able to do  
 7 five miles of engineering of roadway profiles  
 8 within two weeks. So, we requested the extension,  
 9 and we offered to locate the mounds, and we  
 10 offered to locate everything else that they asked  
 11 for. What we refused to do, and I am absolutely  
 12 confident that we're justifiable in doing it, is  
 13 to spend a hundred thousand with Dr. Melly, who we  
 14 disagree is an expert in this area, for a study  
 15 not required by the regulations. We did, my  
 16 August 2nd letter, specifically says, "We will do  
 17 an archaeological study now, where we're proposing  
 18 roads," to see if there's anything there,  
 19 for where we're proposing detention ponds. And at  
 20 preliminary, we'll do the full archaeological  
 21 study you want. So I think it was error and  
 22 arbitrary and capricious for the Board to not  
 23 allow us that opportunity. There was no harm, no  
 24 foul to them. And you have the Planner, saying an  
 25 archaeological study isn't required at that stage.

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1 So I don't think any practical person would spend  
 2 a hundred thousand dollars on a study that didn't  
 3 need to be done, wasn't required by the  
 4 regulations, by someone they had no confidence in,  
 5 and didn't believe was an expert. You certainly  
 6 wouldn't, I wouldn't, and that's what it boils  
 7 down to here. Yes, there are a couple of stone  
 8 walls that might not have been on the project?  
 9 Yes. Was that a reason to deny? I don't think  
 10 so. Was there a detention basin in an area they  
 11 didn't want? Yes. Is that a reason to deny? No.  
 12 It's a reason to give a continuance for the  
 13 Applicant to correct those issues. The Planning  
 14 Board delayed us 14 months, and wouldn't give us a  
 15 five-week extension to comply with some of the  
 16 requirements that came up in the June and August  
 17 meetings. Was there a discussion about it? Was  
 18 there a prior letter in November about stone walls  
 19 and other items? Yes. Is that a reason to deny?  
 20 No. This is a master plan where the only thing  
 21 that's really being determined is where the  
 22 roadways would go, and other improvements such as  
 23 detention ponds, et cetera. We're not even  
 24 locating houses at that point in time. And they  
 25 had comments. We anticipated the roadway would

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1 get modified some way; the detention ponds would  
 2 get modified in some way; and we were prepared to  
 3 do that. We just weren't given the opportunity,  
 4 even though the Planning Board delayed us 14  
 5 months.  
 6 MR. JUHR: Mr. Chairman.  
 7 MR. MARCANTONIO: Mr. Jühr.  
 8 MR. JUHR: Mr. Kelly, you keep making  
 9 reference about Dr. Melly's qualifications, but  
 10 yet you haven't provided us any citations or  
 11 qualifications of this sort for your own experts  
 12 who wrote the PAL report, Alan Leveillee and  
 13 Joseph Waller.  
 14 MR. KELLY: We should have submitted  
 15 those credentials, we submitted that report, that  
 16 report was previously accepted by the Planning  
 17 Board.  
 18 MR. JUHR: But I mean, it's not even a  
 19 doctor, I don't even know if these guys are  
 20 engineers.  
 21 MR. KELLY: Well, Mr. Phillips asked for  
 22 that report. I assume that if he thought it  
 23 wasn't worth the paper it was written on, he  
 24 wouldn't have asked for it. And it was accepted  
 25 back in 2001. And in the 2001 decision, there's

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1 no reference to these Indian burial grounds  
 2 being reason for denial. It was accepted by the  
 3 Planning Board in 2001.  
 4 MR. JUHR: I --  
 5 MR. KELLY: You've pointed that out three  
 6 times.  
 7 MR. JUHR: Your own experts are lacking  
 8 credentials.  
 9 MR. KELLY: Okay, you don't know that  
 10 because they weren't submitted, but I do know that  
 11 that report was accepted in 2001 by the Planning  
 12 Board, and I do know that the Planner asked for  
 13 that report again, and never questioned it.  
 14 Nobody ever questioned the credentials of PAL  
 15 before the Planning Board. Take a look at the  
 16 transcript.  
 17 MR. JUHR: Okay.  
 18 MR. KELLY: There's no questioning of it,  
 19 and that's what you have to live by, not whether  
 20 the credentials are there. Nobody questioned the  
 21 credentials of PAL. I questioned the credentials  
 22 of Dr. Melly throughout.  
 23 MR. JUHR: I can only make a decision on  
 24 the record.  
 25 MR. KELLY: That's right. I don't think

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1 you can take a negative reference because the  
 2 credentials aren't there. If it wasn't raised  
 3 below, you're stuck with it.  
 4 MR. JUHR: Well, I mean, the same holds  
 5 true for Dr. Melly.  
 6 MR. KELLY: Absolutely.  
 7 MR. DOUGHERTY: Just a short rebuttal. I  
 8 think you can actually make a negative inference  
 9 on that because Dr. Melly brought up a number of  
 10 salient points that were deemed apparently sound  
 11 by the Planning Board when reviewing the  
 12 methodology and the manner in which the PAL report  
 13 was compiled, and the way they studied the area  
 14 and reported the study of the area. And  
 15 Dr. Melly's pedestrian view of the site is not to  
 16 be diminished as merely a walk and a skip in the  
 17 park. This is a gentleman with an eye toward, has  
 18 learned that he has a broad-based education in  
 19 this area, and an expertise to identify certain  
 20 things in there. He criticized the excavation,  
 21 but he didn't have to do his own excavation to  
 22 criticize that. He criticized the fact that they  
 23 did not go down deep enough, so it was not  
 24 scientifically or archaeologically sound to make a  
 25 determination that these were not burial sites

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1 simply because of the 30 to 35 centimeter depth  
 2 which they went down. So, the PAL report, it's up  
 3 to the Applicant, if that's what you're hanging  
 4 your hat on, you should substantiate that. Just  
 5 because the Planner asked for it, that piece of  
 6 information about a site, that doesn't render it  
 7 an expert report. The person putting that in, and  
 8 relying on that should be the one that submits  
 9 something that makes it expert testimony, or an  
 10 exhibit that's compiled by someone that's an  
 11 expert, and that's not it.  
 12 MR. KELLY: The simple answer to that is,  
 13 we didn't have a chance to. We got Dr. Melly's  
 14 report on August 10th, six days before the  
 15 hearing. Can't have an archaeological study done  
 16 in that time frame. And even so, at this stage,  
 17 we're not required to do an archaeological study.  
 18 We were prepared to do the survey and locate the  
 19 mounds. I said it six times. The issue was that  
 20 the Planning Board, Mr. Rossi, actually, not even  
 21 the Planning Board, insisted Dr. Melly do the  
 22 study. That's the nub of the issue here. It's  
 23 not whether they're historic cemeteries or not.  
 24 We didn't have the opportunity. They asked us to  
 25 locate them, we agreed to, but they wanted

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1 Dr. Melly to go out and do a survey. And that's  
 2 not required according to the Planner and the  
 3 regulations. Thank you.  
 4 MR. DOUGHERTY: Just one additional  
 5 thing. It wasn't Dr. Melly, it was Dr. Melly's  
 6 parameters for defining what these stone mounds  
 7 were.  
 8 MR. KELLY: That's not true.  
 9 MR. DOUGHERTY: It was stated by the  
 10 Planning Board Chairman in the record, the town's  
 11 representative. That's what Mr. Cardello stated.  
 12 MR. KELLY: That's not true. There was a  
 13 discussion about locating the mounds, doing the  
 14 survey, and he asked whether a town representative  
 15 could accompany us, and we said, "Absolutely."  
 16 Okay? And then, Mr. Rossi said, suggested that  
 17 Dr. Melly be hired, and to do it, because there  
 18 has to be certain criteria, and we have to use  
 19 Dr. Melly's criteria. Read the transcript.  
 20 Mr. Dougherty can misrepresent it all he wants. I  
 21 ask you to read it carefully. We never refused to  
 22 having a representative, we refused to pay  
 23 Dr. Melly a hundred thousand dollars to do an  
 24 archaeological survey not required by the  
 25 regulations.

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1 MR. MARCANTONIO: You're referring to  
 2 what number?  
 3 MR. KELLY: I'm referring to the  
 4 transcript you have before you.  
 5 MR. MARCANTONIO: What number, I'm  
 6 saying?  
 7 MR. KELLY: I offered to do all the  
 8 mounds.  
 9 MR. MARCANTONIO: I'm talking about  
 10 Mr. Rossi and Dr. Melly.  
 11 MR. KELLY: 115. We just heard  
 12 Dr. Melly... "Dr. Melly, I believe, do you -- he's  
 13 got criteria. I think he stated them in his  
 14 report, in a prior report. My suggestion is  
 15 Dr. Melly has already been hired by the town, and  
 16 I don't see any reason why he can't go out there  
 17 and identify these mounds." Page 115. And I  
 18 said, no, "That's not required by the  
 19 regulations," an archaeological survey. "We don't  
 20 accept Melly as an expert, so we're not going to  
 21 be bound by his determinations. We have offered  
 22 to comply with your regulation and locate, even  
 23 though we don't believe they're historic  
 24 cemeteries, and locate the mounds similar to those  
 25 that Dr. Melly has identified in his report," the

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1 one we got six days previously. That's right at  
 2 the top of 116, or it's at the bottom of yours.  
 3 And then at 121, Line 17, Mr. Rossi said, "the  
 4 bottom line is that I do not believe that the  
 5 developer should be choosing the archaeological  
 6 company or person to go out and identify mounds  
 7 that we have or has been given information to this  
 8 Board to suspect that they are containing American  
 9 Indians." So, you can see that. And then there's  
 10 further discussion. "We have to vote,"  
 11 Mr. Santa Anna says, "We have to vote on the  
 12 proposal as presented. Or if it falls short of,  
 13 what you're saying, is that bare minimum." "Yes,  
 14 it falls short." And then they voted it down.  
 15 And there's about six times in here I agreed to  
 16 locate all of these mounds, and anything else  
 17 identified by Melly as historical. We said we'd  
 18 use his, we'd identify the similar mounds as he  
 19 described in his report. I haven't read his  
 20 report lately but I think it does have criteria as  
 21 to why he thought they were historical cemeteries.  
 22 Pretty easy to follow. So, the real issue here  
 23 is, in our opinion, the Planning Board over  
 24 stepped its bounds; didn't have authority to  
 25 require an archaeological study of the entire

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1 site. The words that were picked out by  
 2 Mr. Dougherty in terms of survey, archaeological  
 3 survey, and Mr. Rossi insisted on it at two other  
 4 points in that discussion, where he said,  
 5 Dr. Melly has already been hired by the town, it  
 6 should be him. Then, on Page 121, he said it  
 7 again.  
 8 MR. MARCANTONIO: Any questions?  
 9 MR. KEARNS: Take a break, Vin?  
 10 MR. MARCANTONIO: Yeah, we're going to  
 11 have a five-minute break.  
 12 (OFF THE RECORD, 8:37 P.M. - 8:44 P.M.)  
 13 MR. MARCANTONIO: I'm still looking for  
 14 things. A few more minutes.  
 15 MR. KELLY: I just have a question. Are  
 16 you all set with the testimony part? The  
 17 presentation?  
 18 MR. MARCANTONIO: I don't know. Are you  
 19 guys? Got any questions in a minute or two?  
 20 MR. KELLY: I would just --  
 21 MR. RUGGIERO: Are you back on the record  
 22 now?  
 23 MR. KELLY: Yeah. The Applicant is  
 24 requesting in his appeal that this matter be  
 25 remanded back to the Planning Board for the

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1 Applicant to have a fair and sufficient time to  
 2 comply with the request of the Board in regard to  
 3 the location of mounds, as we offered to do; the  
 4 location of the other items that were requested,  
 5 the stone walls, there was also a request for  
 6 relocation of detention ponds; that would give the  
 7 Applicant a fair opportunity with sufficient time  
 8 to present this information to the Planning Board,  
 9 which is what we had requested on August 16th, an  
 10 extension of time to provide that information.  
 11 And I think it's very clear that the Board did not  
 12 have the authority to request an archaeological  
 13 study, to require one, or to hire Dr. Melly to do  
 14 one at our expense of one hundred thousand  
 15 dollars. Our request is that you remand the  
 16 matter back to the Planning Board for further  
 17 hearings, and give us an opportunity to present  
 18 the information that was requested in terms of the  
 19 mounds and the features which, I think, a stone  
 20 wall, and an old foundation on the site.  
 21 MR. JUHR: Mr. Kelly, is that on your  
 22 appeal in writing that you are asking us to  
 23 consider that?  
 24 MR. KELLY: It's in the memo.  
 25 MR. JUHR: Memo dated what day?

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1 MR. KELLY: We submitted an initial memo,  
 2 and then we submitted --  
 3 MR. MARCANTONIO: Memorandum in support  
 4 of appeal, right?  
 5 MR. RUGGIERO: He has that in his first  
 6 memorandum.  
 7 MR. MARCANTONIO: Appellant's memorandum  
 8 in -- for appeal.  
 9 MR. RUGGIERO: That's his request, on  
 10 Page 39 of that memo.  
 11 MR. JUHR: Okay, I see it.  
 12 MR. NAYLOR: I was, just to ask him,  
 13 since Mr. Kelly had his last words, before,  
 14 whether the lawyer for the town wanted the same  
 15 opportunity? Just to be fair.  
 16 MR. MARCANTONIO: Mr. Dougherty.  
 17 MR. DOUGHERTY: I'll always throw a  
 18 couple more in if I could. Just, if you look at  
 19 the record, you can argue as the Applicant has  
 20 done, you can say that they're looking for an  
 21 archaeological study, but that's not what was  
 22 required. It was simply, look at the words, the  
 23 meaning of the words, the location of the  
 24 significant features, the location of the stone  
 25 walls, the location of the stone mounds. Those

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1 are things that are supposed to be put on a plan.  
 2 So, you can call it what you want, but the record  
 3 is void of any evidence where Dr. Melly was  
 4 required to be hired by the Applicant to do a full  
 5 archaeological study. That's just simply not in  
 6 there. And as far as the -- and I'm not going to  
 7 go tit for tat on every counterpoint of this, but  
 8 as far as the request to remand it before the --  
 9 to let them locate the stone mounds, and all the  
 10 rest of it, why bother? You look at the grounds  
 11 that are stated in the decision, look at the  
 12 grounds on Page 21 through 24 that talk about the  
 13 failure to comply with the design standards, look  
 14 at the plans themselves. Do you think that there  
 15 was enough evidence in the record for a valid  
 16 finding that they didn't comply with the design  
 17 standards? If they didn't do that, this master  
 18 plan is out, anyway. That's just one basis upon  
 19 which to deny this. And then look at the findings  
 20 on, starting on Page 27 of the decision, regarding  
 21 the existing roadways. There was another failure  
 22 in there. So, let's not get caught up with  
 23 everything about this application being the stone  
 24 mounds because it's not. There's a plethora of  
 25 bases upon which to deny this master plan

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1 submission. That's all I have to say. Thank you.  
 2 MR. KELLY: If you take a look at the  
 3 checklist, the word stone mounds don't appear.  
 4 So, stone mounds aren't required by the  
 5 regulations. Take a look at it yourself, please.  
 6 That's a figment of Mr. Dougherty's imagination;  
 7 doesn't require stone mounds. It says historic  
 8 cemeteries. We disagreed there were historic  
 9 cemeteries, we still do, but we agreed to locate  
 10 them, I don't know what more we could do. We have  
 11 an archaeologist do a study, it's an  
 12 archaeological study, not a survey by a land  
 13 surveyor, and it's not a survey by an engineer.  
 14 It's an archaeological study, and it's not  
 15 required under the regulations, but we offered to  
 16 do it before preliminary on a phase-by-phase  
 17 basis, and at master plan for the roadways.  
 18 MR. DiNUNZIO: Mr. Marcantonio.  
 19 MR. MARCANTONIO: Go ahead.  
 20 MR. DiNUNZIO: I wonder if I can address  
 21 our counsel. The memo from the Applicant is  
 22 asking us to reverse the decision of the Planning  
 23 Board.  
 24 MR. RUGGIERO: Which --  
 25 MR. DiNUNZIO: The very conclusion of the

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1 memorandum.  
 2 MR. RUGGIERO: The date, though?  
 3 MR. DiNUNZIO: The memorandum --  
 4 MR. RUGGIERO: Because we have two.  
 5 MR. DiNUNZIO: It's titled, Appellant's  
 6 memorandum in support of appeal.  
 7 MR. RUGGIERO: If you go to the last  
 8 page, there should be a date. The very last page,  
 9 40, if that's the one you're referring to?  
 10 MR. DiNUNZIO: February 12th, 2008.  
 11 MR. RUGGIERO: Where were you just  
 12 reading from?  
 13 MR. DiNUNZIO: The conclusion. "For the  
 14 aforementioned reasons, this Zoning Board of  
 15 Appeals must reverse the decision of the Planning  
 16 Board and remand the Appellant's application for  
 17 master plan for further proceedings." If we  
 18 reverse the decision of the Planning Board, that's  
 19 an approval of the plan, isn't it?  
 20 MR. RUGGIERO: No. You may reverse a  
 21 decision, and overturn it in its entirety, and  
 22 order that the approval be granted; you may remand  
 23 the matter as a part of the decision, and order it  
 24 back to the Planning Board for further proceedings  
 25 consistent with whatever order and decision you

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1 make, or you could deny the Appellant's request if  
 2 you find that everything was done properly.  
 3 MR. DiNUNZIO: One more question. If the  
 4 Appellant's appeal is denied, can they reapply for  
 5 the same project?  
 6 MR. RUGGIERO: There's a case law and  
 7 decisional law on that, about repetitive  
 8 petitions, and it has to be either a substantial  
 9 change in circumstances, and that's a  
 10 fact-sensitive inquiry that the Planning Board  
 11 would have to undertake, and that could be from,  
 12 is it the same land, same proposal, it's  
 13 impossible to speculate on how that would come up.  
 14 In theory, no, they can't apply for the same  
 15 application.  
 16 MR. DiNUNZIO: But they could amend the  
 17 application and reapply?  
 18 MR. RUGGIERO: But the question is, it  
 19 has to be substantial. It can't just be a minor  
 20 change. And I'm paraphrasing, I'm not using the  
 21 usual terminology, but that is in essence what  
 22 they have to do.  
 23 MR. KELLY: Just for the record, I  
 24 disagree with that characterization.  
 25 MR. DiNUNZIO: Which?

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1 MR. KELLY: Mr. Ruggiero's  
 2 characterization of the law. I don't think that  
 3 applies to subdivisions.  
 4 MR. RUGGIERO: The decision of  
 5 administrative finality. We have a disagreement  
 6 about that.  
 7 MR. DiNUNZIO: Okay.  
 8 MR. MARCANTONIO: Mr. Ruggiero, we're  
 9 reading some of this data, can you remind us again  
 10 how to look at it?  
 11 MR. RUGGIERO: Article 10-6 of the  
 12 subdivision regulations, and if you recall, I  
 13 passed a handout to you at the beginning of the  
 14 meeting.  
 15 MR. KELLY: 2003 or 2006 regulations?  
 16 MR. RUGGIERO: The prior regulations. I  
 17 don't remember the date on those. The 2003  
 18 regulations. The standards are the same. And  
 19 they state that the, as established, "The Board of  
 20 Appeals review of a Planning Board decision on  
 21 matters subject to the regulations, the Board of  
 22 Appeals," which is you, "should not substitute its  
 23 own judgment for that of the Planning Board, but  
 24 must consider the issue upon the findings and the  
 25 record of the Planning Board." Goes on to say

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1 that, "The Board of Appeals should not reverse a  
 2 decision of the Planning Board except on a finding  
 3 of prejudicial procedural error, clear error, or  
 4 lack of support by the weight of the evidence in  
 5 the record." And in your voting, it's a vote of  
 6 three of the five voting members that is  
 7 sufficient to pass any motion.  
 8 MR. MARCANTONIO: Could you explain the  
 9 word prejudicial error?  
 10 MR. RUGGIERO: Something that would be  
 11 detrimental to the point where it was fatal. And  
 12 Mr. Kelly's characterization is that by -- for  
 13 instance, denying the extension request, that  
 14 procedurally, the Board could have done that, by  
 15 denying him the request, it proved to be fatal to  
 16 him. That's one example. Procedurally relates to  
 17 anything that involves a non-substantive issue.  
 18 Hearing times, settings, information, things of  
 19 that sort.  
 20 MR. MARCANTONIO: Give me an example. If  
 21 somebody has a right to do something, and they do  
 22 it, can that become a procedural error?  
 23 MR. RUGGIERO: It's all contextual, it  
 24 depends on the context in which it's done. An  
 25 unfair notice. Mr. Kelly is alleging in a fairly

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1 direct way that he had unfair notice of certain  
 2 requirements at the Planning Board hearing.  
 3 That's his allegation. You have to review the  
 4 transcripts of that meeting, documents submitted  
 5 previous to the meeting, and make a determination  
 6 based on the facts whether you believe that  
 7 allegation rings true. Was there an unfair  
 8 advantage going into the hearing, was he ambushed,  
 9 and not able to be prepared with the material that  
 10 was expected to be presented that evening. That's  
 11 a decision have you to make, and that could be a  
 12 prejudicial procedural error if you hold that,  
 13 what his statements are, are found in the record.  
 14 MR. MARCANTONIO: But we can't substitute  
 15 our judgment for theirs, just that they were doing  
 16 the right thing, how are with going to make a  
 17 judgment that they did one thing?  
 18 MR. RUGGIERO: Again, you have to look at  
 19 the facts. When it says you can't substitute your  
 20 judgment, it means, you don't have to agree with  
 21 the reason why someone did something so long as  
 22 the reason makes sense. It may not be the  
 23 decision you would have made in those  
 24 circumstances, but if it has any merit at all, you  
 25 can find that it was adequate at the time.

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1 MR. MARCANTONIO: Then you have to think  
 2 of the fact that the, as you just said, if  
 3 somebody got some information at the last minute,  
 4 but if there was other information that they  
 5 already had, and they didn't read, in their mind,  
 6 it wouldn't be prejudicial because they basically  
 7 had already satisfied their demands and their  
 8 demands were such --  
 9 MR. RUGGIERO: And that's part of your  
 10 fact-finding.  
 11 MR. MARCANTONIO: Okay.  
 12 MR. RUGGIERO: That's what you have been  
 13 doing through, by examining the record, to make  
 14 that determination between what you find to have  
 15 existed under the circumstances. You have to make  
 16 that finding of fact.  
 17 MR. MARCANTONIO: I have another question  
 18 for you. How do you weigh the information that's  
 19 mentioned in here, and then you don't get the  
 20 facts? I think there were three or four things  
 21 that, to me, were important, and they're in the  
 22 record, but not in the record; they're stated in  
 23 the record, but I never saw them because they  
 24 weren't available, how do you weigh that and be  
 25 fair?

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1 MR. RUGGIERO: You don't have, you have  
 2 to look at the evidence in the record. And if  
 3 something is absent. In other words, are you  
 4 saying there was a statement --  
 5 MR. MARCANTONIO: Yeah, four things I  
 6 asked for and they weren't there.  
 7 MR. RUGGIERO: Documentary evidence.  
 8 Again, you have to examine the record. If there's  
 9 some reason you would doubt the statement and the  
 10 lack of the documentary evidence --  
 11 MR. MARCANTONIO: Don't I have to go by  
 12 what's there in the record?  
 13 MR. RUGGIERO: The statement is part of  
 14 the record, too, even if there's no documentary  
 15 evidence to substantiate the statement. It's a  
 16 statement, you can take it for what it is. In  
 17 other words, if nobody contradicts the statement,  
 18 there's no evidence to the contrary, you can  
 19 accept it as a fact. They often say in court, you  
 20 don't have to bolster testimony that hasn't been  
 21 challenged.  
 22 MR. JUHR: I have a question now. There  
 23 was talk about a letter of correspondence, and  
 24 then there was no letter found, but yet it was  
 25 mentioned in the record.

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1 MR. RUGGIERO: If there's no letter in  
 2 the record, there's no letter. It's only a  
 3 statement. I think that's the Chairman's  
 4 question, how that applies.  
 5 MR. MARCANTONIO: I have another question  
 6 for you. We heard some testimony, if that's what  
 7 you want to call it, saying about Dr. Melly, that  
 8 they told him, we had to use Dr. Melly, and, when  
 9 I read this, I don't see that the Planning Board  
 10 said they had to use Dr. Melly. Shouldn't it be  
 11 the Planning Board that would have to make that  
 12 statement for that one person?  
 13 MR. RUGGIERO: For anything to be binding  
 14 on an Applicant, the Board has to take a vote. If  
 15 they just discuss matters, that's all they're  
 16 doing is discussing it. Whether one member or  
 17 three members, or even all five members discussing  
 18 it, that doesn't matter, that doesn't make it an  
 19 order. The Planning Board may only act by motion  
 20 and order. If they require someone to do  
 21 something, it has to be by way of motion.  
 22 MR. MARCANTONIO: Then I have another  
 23 question. There's reference to Mr. Hadden, I know  
 24 Mr. Hadden is not here, but the bottom line is, if  
 25 Mr. Hadden was aware of something, there's no

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1 proof that he was, would you classify that as  
 2 hearsay?  
 3 MR. RUGGIERO: You just have to take it  
 4 for what it is. Whatever you think it is by the  
 5 way it's stated in the record is how you have to  
 6 take it. He wasn't present, so you can't put  
 7 anything on that other than, again, a statement in  
 8 the record. Take it as you find it.  
 9 MR. MARCANTONIO: But it does help the  
 10 record if you have proof of what you said.  
 11 MR. RUGGIERO: That's for you to  
 12 determine.  
 13 MR. MARCANTONIO: Because everybody has a  
 14 different way of looking at things. Then, across  
 15 here, where, they were talking about gravel  
 16 removal or something like that, not too many  
 17 people mentioned gravel removal. And the word  
 18 gravel is only used one time, or something like  
 19 that. What happens to the word that means gravel,  
 20 banks or hills, eskers, that's all over the place.  
 21 MR. RUGGIERO: I'm not following the  
 22 question.  
 23 MR. MARCANTONIO: Well, in the last  
 24 memorandum we got -- I'll just go and get that  
 25 later or I'll screw myself all up. The last

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1 memorandum from Mr. Shaw, there was reference to  
 2 gravel, I think on the first page. Nowhere else  
 3 was the significance of gravel being mentioned, or  
 4 something of that nature. And when you go through  
 5 it, the whole hearing, a lot of times talking  
 6 about the eskers and how big they were and how  
 7 they didn't want them touched, they were trying to  
 8 protect them. So, do you use the word gravel or  
 9 do you use the word esker? That's what I'm  
 10 saying. Do they mean the same thing?  
 11 MR. RUGGIERO: I don't know the technical  
 12 meaning. You had the word material, gravel,  
 13 esker, I'm not sure if they're interchangeable,  
 14 Mr. Chairman. You have to, again, take them as  
 15 you find them in the transcript, and how they're  
 16 used.  
 17 MR. MARCANTONIO: Then when I read the  
 18 law on waivers, I find that to be a conflict.  
 19 MR. RUGGIERO: With?  
 20 MR. MARCANTONIO: With previous  
 21 statements. The way I read the law, I have to go  
 22 by my own judgments.  
 23 MR. RUGGIERO: Well, you can't interpret  
 24 the law but you can certainly read it for what it  
 25 says.

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1 MR. MARCANTONIO: Here is what I was  
 2 referring to, "The Planning Board made no findings  
 3 at the designing of the master plan in such a way  
 4 that the extraction of gravel will be maximized."  
 5 When I read it, they're talking about the eskers,  
 6 and how they want to protect them.  
 7 MR. RUGGIERO: That's your prerogative.  
 8 When you read the record, you can take that away  
 9 if that's your interpretation. That's part of  
 10 your search of the record.  
 11 MR. MARCANTONIO: I'm just trying to go  
 12 over these things and see whether I view them or  
 13 don't. The next one, "The Planning Board's  
 14 finding that there was improper inclusion of later  
 15 acquired land in derogation of the consent order  
 16 is in clear error as there was never any evidence  
 17 entered in the record or discussion by the  
 18 Planning Board concerning the same." Again, I  
 19 asked for letters and I got no letters. So,  
 20 somebody could be -- they could be 80 percent  
 21 right, but the fact I didn't get a letter, and I  
 22 have to make a decision makes it difficult for me  
 23 to make a decision with the 80 percent when I  
 24 don't have the complete -- I don't have a letter  
 25 here.

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1 MR. RUGGIERO: Well again, as I mentioned  
 2 to you, the Planning Board made that as a finding  
 3 in their decision letter. That was dated  
 4 November 15th, I think -- yes. So, whether it was  
 5 discussed at the meeting or not, and you can  
 6 appreciate this, I'm sure, it was made as a  
 7 finding. So, the question is, how should it be  
 8 treated now? Is that material now? Is that a  
 9 matter that deserves remand because it wasn't  
 10 discussed? And you heard the arguments on both  
 11 sides about that. But it's not a disputed fact.  
 12 There is after-acquired land in this application.  
 13 That's not disputed. It's on the application form  
 14 that was submitted by the Applicant, it was  
 15 identified by the Planning Board. It's your job  
 16 to determine, what does it mean? Did something  
 17 not happen that should have happened during the  
 18 process, or vice versa?  
 19 MR. MARCANTONIO: It's our job to  
 20 determine whether it was slipped in, or it was put  
 21 in on purpose, or put in as a -- said by someone  
 22 else. They knew about it in that case.  
 23 MR. RUGGIERO: Is it material to the  
 24 outcome? Is it a material issue? That's  
 25 something else you should consider about it. Not

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1 everything that is a fact is material. There are  
 2 many facts that are relevant, but they're not  
 3 always material.  
 4 MR. DINUNZIO: Mr. Marcantonio, I have  
 5 another question for counsel. Does the action of  
 6 the Planning Board have to be absolutely pristine,  
 7 without any error?  
 8 MR. RUGGIERO: I've never seen a Court  
 9 decision to that effect, and I hope we're never  
 10 given one.  
 11 MR. DINUNZIO: So it's the weight of the  
 12 decision?  
 13 MR. RUGGIERO: You have to look at the  
 14 cumulative -- there are certainly particular  
 15 actions that must be precise, but in its totality,  
 16 it need not be entirely precise. That's why, I  
 17 think, where it says that, "You shall not  
 18 substitute your own judgment." There's a degree  
 19 of latitude involved there. And for those  
 20 reasons, it must be reasonable. It has to be  
 21 based on the evidence, of course. But how you  
 22 view that evidence could vary from person to  
 23 person. The courts understand that.  
 24 MR. MARCANTONIO: And a classic example  
 25 of that would be, giving someone an extension,

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1 possibly could avoid -- a Board similar to ours  
 2 would give them a waiver or vote on a waiver. But  
 3 the bottom line is they have a right not to do it.  
 4 MR. RUGGIERO: They may have had the  
 5 right to do it, you have to make that decision.  
 6 MR. MARCANTONIO: May have.  
 7 MR. RUGGIERO: The Appellant in this case  
 8 is saying they improperly acted. And the town is  
 9 saying, no, we had every reason to do it in this  
 10 case, there was no improper reason why it was  
 11 done. That's your task tonight, to sort those  
 12 decisions out.  
 13 MR. MARCANTONIO: That's one of the  
 14 reasons I wanted to get the law on waivers. I  
 15 wanted to make sure that I was doing the right  
 16 thing. I wanted to make sure that I wasn't  
 17 putting my judgment for theirs.  
 18 MR. JUHR: Are you -- were you suggesting  
 19 that we go through the finding of fact as  
 20 presented by the Planning Board one by one?  
 21 MR. RUGGIERO: Actually, I think it might  
 22 not hurt -- Mr. Kelly's memorandum, the first one,  
 23 dated February 19th, sets out arguments, starting  
 24 on Page 25. And he's presenting his arguments  
 25 regarding why he thinks the Planning Board

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1 committed various errors. And I suggest to the  
 2 Board, if you feel comfortable doing this, to just  
 3 go through each one of those and have a dialogue  
 4 about the assertions that he's alleging, the facts  
 5 that you find in the record from the transcripts,  
 6 and the letters and the documents, and just sort  
 7 through each one of these individually, and then,  
 8 I think you'll start to get a sense of where,  
 9 individually, Board members are, and then,  
 10 collectively, as you go through these, and at some  
 11 point after you go through these, you should look  
 12 at his supplemental memorandum that I requested he  
 13 file stating forth his arguments against, and his  
 14 assertions of error. And then, individually,  
 15 decide if you want to vote on them one at a time  
 16 or do a collective --  
 17 MR. DiNUNZIO: With all due respect, that  
 18 procedure seems to me would be duplicating the  
 19 whole appeals process that went before the  
 20 Planning Board. If we're going to take up each  
 21 one of these items, and, in effect, debate each  
 22 one of these items, we're starting the whole  
 23 hearing from scratch again.  
 24 MR. RUGGIERO: Well, you wouldn't be  
 25 because all you're looking at is how the Planning

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1 Board ruled on these matters. Mr. Kelly's  
 2 arguments, in theory, each argument he presents is  
 3 a, you know, say a win or lose situation. He  
 4 could win or lose on each and every one of them,  
 5 or none of them. So, in fairness, I think you  
 6 should address every argument.  
 7 MR. DiNUNZIO: Clearly, we should address  
 8 them and consider them, and we already have in  
 9 each case. But, to initiate a public debate over  
 10 each item, we'll be here until the summer.  
 11 MR. RUGGIERO: Well, I hope you wouldn't.  
 12 And I'm into the suggesting you do that, not a  
 13 public debate, but have a dialogue amongst  
 14 yourselves.  
 15 MR. DiNUNZIO: I'm not sure the  
 16 distinction is clear.  
 17 MR. JUHR: Mr. Chairman, if we're going  
 18 to proceed in the manner that counsel is  
 19 suggesting, personally, I'm going need some time  
 20 to read the memorandum again, starting at Page 24,  
 21 compare it to the supplemental memorandum  
 22 submitted over the last week, and then compare it  
 23 to the findings of facts item by item, and I'll  
 24 need to take notes, so, there's just too much here  
 25 to do live, right now, for me. And so I'm

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1 suggesting that we close the testimony part of the  
 2 hearing and continue to a date certain.  
 3 MR. RUGGIERO: That's fine, Mr. Chairman.  
 4 Because, in rendering any decision, this Board  
 5 will need to make findings of fact, much like the  
 6 allegations being made about the Planning Board,  
 7 if you fail to make adequate findings of fact --  
 8 regardless of what decision you make, so I think  
 9 that's imperative. And that might be an  
 10 alternative to a public dialogue, so to speak,  
 11 ones where the members privately make their own  
 12 notes and come back to the meeting and you have a  
 13 dialogue at that point.  
 14 MR. JUHR: Personally, I think --  
 15 MR. RUGGIERO: It's really the pleasure  
 16 of the Board.  
 17 MR. MARCANTONIO: Make that a motion.  
 18 MR. JUHR: I'll put that in the form of a  
 19 motion; that we can close the testimony part of  
 20 the hearing tonight, and deliberate individually,  
 21 on our own regarding each of the findings of fact,  
 22 and come back to the meeting on a date certain  
 23 prepared to deliberate and discuss each item on  
 24 its own merits.  
 25 MR. MARCANTONIO: I think we would have

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1 to continue this.  
 2 MR. RUGGIERO: Yeah.  
 3 MR. MARCANTONIO: Because we don't want  
 4 to go out and put an ad in the paper.  
 5 MR. RUGGIERO: Just continue it to a date  
 6 certain. We have to pick a date and time and  
 7 place.  
 8 MR. MARCANTONIO: We had a date set but  
 9 you can't make that date.  
 10 MR. RUGGIERO: You were talking about the  
 11 8th, Mr. Chairman, yeah, I can't make that one.  
 12 MR. MARCANTONIO: Other than that, we  
 13 would have to go to our normal meeting.  
 14 MR. RUGGIERO: I would suggest -- I think  
 15 you're going to be -- I hate to speculate, but I'm  
 16 sure you're going to be hours. I can't imagine  
 17 it's going to go quick.  
 18 MR. MARCANTONIO: Well, we're trying to  
 19 get a date.  
 20 MR. RUGGIERO: Right.  
 21 MR. JUHR: The next scheduled meeting  
 22 date.  
 23 MR. RUGGIERO: The 15th, I can't make  
 24 that.  
 25 MR. BENOIT: The third Tuesday would be

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1 the 15th.  
 2 MR. MARCANTONIO: Anything else  
 3 scheduled?  
 4 MR. BENOIT: Not at this time.  
 5 MR. JUHR: Are you not available on any  
 6 Tuesday?  
 7 MR. RUGGIERO: Tuesdays tend to be bad  
 8 for me. I can do the 7th. The nights I have  
 9 available are the 7th, which is next Monday. I  
 10 have the 17th, which is a Thursday, and then the  
 11 30th. Those are the April dates that I have  
 12 available.  
 13 MR. MARCANTONIO: Bob, can you go and  
 14 check the calendar?  
 15 MR. RUGGIERO: The 7th, which is Monday,  
 16 the 17th which is a couple of Thursdays, and then  
 17 the 30th which is a Wednesday.  
 18 AUDIENCE MEMBER: The 17th is Planning  
 19 Board.  
 20 MR. MARCANTONIO: Mr. Kelly, what days  
 21 can you make it?  
 22 MR. KELLY: I can make it the 7th, I can  
 23 make it the 14th. I can't make it the 17th, and I  
 24 can't make it the 30th.  
 25 MR. MARCANTONIO: So the 7th and 14th are

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1 okay with you?  
 2 MR. RUGGIERO: No, not the 14th. 17th,  
 3 but then the Planning Board is meeting, and  
 4 Mr. Kelly can't make the 17th.  
 5 MR. JUHR: How does May sound?  
 6 MR. RUGGIERO: I don't know if it gets  
 7 any better.  
 8 MR. KELLY: April 7th is not -- how about  
 9 April 7th? Why can't it be on the 7th? This  
 10 thing has dragged on long enough. I'd like to see  
 11 it sooner than later  
 12 MR. DOUGHERTY: I'm not available on the  
 13 7th, I have something already.  
 14 MR. JUHR: What about the 14th?  
 15 MR. RUGGIERO: I can't do that.  
 16 MR. JUHR: 17th -- what's the Monday  
 17 before the 14th?  
 18 MR. RUGGIERO: The 7th.  
 19 MR. JUHR: I said, April 14th or 17th.  
 20 MR. RUGGIERO: 14th, I can't come.  
 21 MR. RUGGIERO: I only have three evenings  
 22 in April. I go out a lot.  
 23 MR. BENOIT: It says, dinner, dinner  
 24 dinner.  
 25 MR. RUGGIERO: I have one that I might be

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1 able to move on the 16th, which is a Wednesday. I  
 2 can probably move that. Is that any good?  
 3 MR. KELLY: I can meet the 16th.  
 4 MR. JUHR: 16th is good for me.  
 5 MR. DOUGHERTY: 16th.  
 6 MR. KELLY: As I understand it, there's  
 7 not going to be any more argument by anyone,  
 8 you're just going to deliberate and make a vote?  
 9 MR. MARCANTONIO: We're going to continue  
 10 because we don't want to readvertise it.  
 11 MR. BENOIT: Let me check if it's --  
 12 MR. KELLY: Excuse me, I have to run,  
 13 okay?  
 14 THE REPORTER: Mr. Marcantonio.  
 15 MR. MARCANTONIO: Yeah, go off the  
 16 record.  
 17 (OFF THE RECORD, 9:25 P.M. - 9:28 P.M.)  
 18 MR. MARCANTONIO: Can it be --  
 19 MR. BENOIT: All set.  
 20 MR. MARCANTONIO: Okay, just to make  
 21 sure, it's the 16th of April, right?  
 22 MR. BENOIT: Yep, Wednesday, April 16th.  
 23 MR. MARCANTONIO: You got that, Matt?  
 24 MR. RUGGIERO: 7:00 P.M., Mr. Chairman?  
 25 MR. NAYLOR: We have to vote on it,

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1 there's a motion on the floor.  
 2 MR. MARCANTONIO: Repeat the motion,  
 3 we're going to continue this meeting to --  
 4 MR. JUHR: Can you read it back, can you  
 5 read back my motion?  
 6 MR. MARCANTONIO: Is she reading the  
 7 motion? Why is it taking so long?  
 8 THE REPORTER: Because you guys have  
 9 talked a lot since then.  
 10 (REPORTER READ PENDING MOTION)  
 11 MR. MARCANTONIO: Continuation would be  
 12 Wednesday, April the 16th, as part of that motion.  
 13 MR. DiNUNZIO: I second the motion.  
 14 MR. MARCANTONIO: And the location would  
 15 be here, and Mr. DiNunzio seconded the motion.  
 16 (MOTION PASSED UNANIMOUSLY)  
 17 MR. NAYLOR: Motion to adjourn.  
 18 MR. JUHR: Second.  
 19 (MOTION PASSED UNANIMOUSLY)  
 20 (HEARING ADJOURNED AT 9:30 P.M.)  
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C-E-R-T-I-F-I-C-A-T-E

I, SHELLEY L. DEMING, Notary Public, do hereby certify that I reported in shorthand the foregoing proceedings, and that the foregoing transcript contains a true, accurate, and complete record of the proceedings at the above-entitled hearing.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of April, 2008.

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SHELLEY L. DEMING, NOTARY PUBLIC/CERTIFIED COURT REPORTER

MY COMMISSION EXPIRES: April 24, 2011

IN RE: Narragansett Improvement Co., Rankin Path Realty

DATE: March 31, 2008

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