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5 1 Mr. Afran, you're up, sir. 2 MR. AFRAN: Thank you. Give me one moment. 3 Good evening. I'm sorry I'm late. 4 CHAIRMAN BAGOFF: Okay. No problem. We 5 understand. 6 MR. AFRAN: Huge amount of rain and traffic. 7 We're not going to be very long, we're 8 finishing essentially with cross, so. I realize there's 9 nothing else tonight on this case but we won't be that 10 long. 11 I'm sorry, just need one more minute. 12 Q. Mr. DeFeo, good evening. 13 A. Good evening. How are you, sir? 14 Q. Good. How are you? 15 Before I go further, did you have a chance to 16 look at that exhibit we posted -- 17 CHAIRMAN BAGOFF: Mr. DeFeo, you're reminded 18 you are under oath. 19 THE WITNESS: Yes, sir. 20 CHAIRMAN BAGOFF: Thank you. 21 I'm sorry, go right ahead, Mr. Afran. 22 Q. My voice is not so good so I may not be able to 23 project too much. 24 So Mr. DeFeo, did you have a chance to look at 25 the tree plan that was posted, I'm referring to at the	7 1 the tree plan information and the only other relevant 2 information on the document would be the test sites that 3 are marked out in the cross hatching. But the actual 4 development plan, which you was a single family housing 5 project, has no relevance to what we're saying, so. 6 Q. So you had a chance to look that over? 7 A. I have. 8 Q. Okay. 9 Have you ever seen that before it was posted? 10 A. No. 11 Q. Okay. 12 Now, when you did your work in terms of the, you 13 did -- your tree survey was in 2019, what was the year 14 for it? 15 A. 2019. 16 Q. That was where those spot checks were done, that 17 was the year 2019, correct? 18 A. Correct. 19 Q. Now, when you did that what other tree surveys 20 for this property had you been familiar with? 21 A. I'm not certain I understand the question. 22 Q. Well, at the time you supervised the 2019 survey, 23 had you been familiar with any other tree surveys or 24 tree plans for this property? 25 A. No, it wouldn't have been relevant even if I had.
6 1 last meeting? 2 A. If you are referencing -- what plan specifically, 3 the one that you posted on the website? 4 Q. Right. It was from 2010. 5 A. Yes. 6 MR. PLOCKER: Can we mark it if it hasn't 7 been marked. Just so there's a clear record. 8 MR. AFRAN: Absolutely. 9 MR. PLOCKER: I'm not sure if it was or not. 10 MR. AFRAN: It wasn't offered yet, so we 11 didn't have it marked yet. 12 MS. McGOVERN: That would be O-2 -- 3, I'm 13 sorry. Tree plan, and what's the date on that? 14 MR. AFRAN: Just call it 2010 Tree Plan. 15 MS. McGOVERN: Okay. 16 (2010 Tree Plan is marked as Exhibit O-3 for 17 identification.) 18 MR. AFRAN: It has other information but I 19 think that's sufficient. 20 MS. McGOVERN: That's your purpose for it, 21 right? 22 MR. AFRAN: Yeah. And as I noted in my 23 communication, we're not offering it for purposes of the 24 application -- the development application is a part of 25 that. That was the 2010 proposal. We're using it for	8 1 I didn't know of any. 2 Q. Why wouldn't they be relevant in your opinion? 3 A. In my opinion because I was asked to look at this 4 property for the first time in terms of doing an 5 analysis, therefore I would've developed and utilized 6 our own methodologies and done a use study, a study that 7 was current, because it would've been relevant to the 8 site plan as it was proposed. 9 Q. Well, the trees on the site are on the site 10 regardless of what plan someone's proposing. So why 11 wouldn't looking at an earlier tree survey not be 12 relevant? 13 A. It would depend how the survey was done. You're 14 asking relevance, did I look at this particular 15 submission. First, this is a statistically invalid set 16 of data. There is nothing in this form exhibit, I 17 believe we called O-3. 18 MS. McGOVERN: Yes. 19 Q. O-3, yes. 20 A. Exhibit O-3 is statistically flawed. It does not 21 meet the standards of a forest tree study in any way, 22 shape are form, either statistically or in methodology. 23 There is no methodology provided within what I have. 24 Therefore, even if I had seen it I would have rejected 25 it out of hand. This particular study used three plots

9 1 of 10,000 square feet with no methodology stating how 2 they selected the plots. Utilizing this method -- they 3 utilized approximately 2.2 percent of the property, I 4 don't know if they selected the plots because they saw 5 heavy tree growth or not. 2.2 percent utilizing a tree 6 survey is statistically invalid. Proper tree surveys 7 must use anywhere, depending on the method, between four 8 and five percent and the plots must be randomized. 9 There's no evidence that these plots are randomized. 10 Our tree study was utilized creating randomized plots on 11 -- excuse me, on the current site plan, which is why we 12 focused on the area of disturbance. We used 22 plots 13 and overall sampled approximately four percent of the 14 property utilizing what's then continued a mean system 15 utilizing a rolling mean, which is considered a 16 statistically valid method of reducing the number of 17 plots you might use. So let me explain that. We might 18 have used 50 plots had we wanted to get five percent. 19 But after seeing 22 plots and using the rolling mean 20 method of analysis, which is all explained in the tree 21 report, what we determined is there's no variability. 22 We don't need to do more plots to get the same numbers 23 to get to the same end. This tree study, or whatever 24 you wish to call it, you can call it a tree study, but I 25 wouldn't give it that credibility, this particular	11 1 even if I had seen it, again, for the reasons cited. 2 It's statistically invalid. It does not have 3 methodology, does not cover sufficient quantity of area. 4 It's not non bias, it has no randomization and as far as 5 site plan, that isn't near what we're working off of. 6 Having said all that -- 7 Q. You said -- go ahead. 8 A. -- it does anything, it comes up with a number of 9 trees per acre that could be higher depending on how you 10 read it. If that's true and it was accurate then it 11 would only corroborate my study which says the forest 12 isn't defined and that the number of trees per acre is 13 defined because trees are dying. And we know ash are 14 dying and we know that for a fact and we know beech will 15 be. So, yes, I did review it after you had posted it 16 and I discount it completely. 17 Q. Why do you say there's an indication it would 18 mean trees are dying, explain that? 19 A. Well, if it shows a higher concentration and some 20 people may say, depending on how you choose to read 21 this, you can pick and choose numbers off of this thing 22 any way you like. But the simple fact is it's a 23 statistically invalid and meaningless piece of paper. 24 Q. Why don't you answer my question. Why do you say 25 it means trees are dying?
10 1 drawing used 10,000 square foot plots, which might tell 2 me more about trees in that 10,000 square feet, because 3 again, that's 10,000 square feet, but did not utilize 4 sufficient quantity or covering of land and does not 5 explain it used a rolling mean. There's no proof of non 6 bias, as far as I can tell it could be a bias plot. And 7 one of the interesting elements of it as well is it 8 either misidentifies trees by species because it 9 recognizes a bur oak. A bur oak is not indigenous in 10 our area, so either they missed identified it, and it's 11 very common to misidentify oaks by the way, that's not 12 unusual in the woodland area. So either they 13 misidentified it or someone put it there. As to why 14 someone would put it there, I don't know. 15 Q. Put what, on the chart or on the grounds? 16 A. No, the bur oak. Identifying one of the trees as 17 a bur oak. Bur oak is not indigenous to our area. 18 Q. Well, that doesn't mean that it's not growing. 19 We have lots of things that aren't indigenous. 20 A. That's true. But bur oak is not that common a 21 find. It's more likely it's an indicator that it's 22 misidentified. My point being, there are enough flaws 23 in this entire methodology that it had no validity to 24 me. This has no validity in my mind and therefore I 25 wouldn't have used it, even if it had been submitted,	12 1 A. If it shows a higher concentration of trees, my 2 study, the study we did, would show fewer trees per 3 acre, if it does that then my point being, all it would 4 mean -- so for example, if you read off of this, Exhibit 5 O-3. By the way, I'm using what is off the website, is 6 that allowable, Counsel? 7 Q. We'll put it up on the screen eventually. 8 A. I just opened it up. 9 Q. It's the same document. I have no problem with 10 that. Go ahead. 11 A. Okay. You know, this is showing here average of 12 trees certain size, 2 inches or greater. Two inches are 13 not trees technically, that's another flaw with the 14 study. It shows 558 trees per acre then it shows 182 15 trees per acre 6 inches or greater. That -- okay, so 16 it's 182, it's actually showing less trees per acre than 17 we calculated and as I stated earlier -- 18 Q. Well, that's because you're taking away all the 2 19 inch trees? 20 A. Two inch are saplings. They are not trees nor 21 are they defined as trees in the ordinance in West 22 Orange. 23 Q. Well, that's the category you're referring to is 24 2 to 6 inches? 25 A. I understand that.

1 **Q.** You would agree 4 and 6 inches are trees by every
2 definition?

3 **A. Absolutely, but I would also say I have no**
4 **methodology. There's no methodology explaining what**
5 **trees are what. Where do they draw the line between 2**
6 **and 4. As I said, this document is not, in my opinion,**
7 **worth the, I hate to say paper because it's not printed**
8 **on paper, but not worth the paper it's printed on.**

9 **Q.** Now, you say it means trees are dying because
10 they have more trees than you found. Is that the basis
11 of your reason?

12 **A. I didn't say that. I said if, if it was**
13 **accurate. If the high number was accurate.**

14 **Q.** Let me just say for sake of argument it's
15 accurate for my question, you said it would mean the
16 trees were dying and confirms your view of a dying
17 forest, isn't that what you said?

18 **A. No, not exactly what I said. You're taking it**
19 **out of context.**

20 **Q.** I'm using the very words you gave us. If there's
21 a different context that you intended, please give it to
22 us?

23 **A. I'll try to explain it again.**

24 **Q.** No, just answer my question.

25 **A. I am.**

1 **Q.** Why do you say, if their studies accurate it
2 means the trees are dying. Why do you say that?

3 **A. Our study is statistically valid. Our study**
4 **shows fewer trees per acre. Our study utilizes a**
5 **highest number of trees per acre in order to make the**
6 **greatest impact possible on the site and still came in**
7 **at a lower concentration. Oddly enough, depending on**
8 **where the 558 and 182 fall where we go from 4 inches or**
9 **other, then the interesting element of it is the 2 to 6**
10 **you almost have to discount out of hand because there's**
11 **no methodology saying where's the 4, 5 and 6. We don't**
12 **know.**

13 **Q.** Well, that doesn't matter --

14 **A. There's no number.**

15 **Q.** -- if you're counting 2 to 6 inches?

16 **A. If you're counting 2 to 6 inches it's inaccurate.**
17 **It doesn't comply with the West Orange Tree Ordinance.**
18 **The tree is defined as 4 inches DBH or greater, anything**
19 **less is not a tree, it's a sapling.**

20 **Q.** That ordinance is -- what ordinance is that, do
21 you have the number in front of you?

22 **A. I don't have it. I don't know the West Orange**
23 **Tree Ordinance number.**

24 **Q.** Is that the ordinance number --

25 **A. I don't know.**

1 **Q.** Is that the -- okay. The current ordinance in
2 force?

3 **A. Almost any tree ordinance in the State of New**
4 **Jersey, anyone who does forestry work defines a tree as**
5 **4 inches DBH or greater. Anything less than that is a**
6 **sapling.**

7 **Q.** When you referred to the tree ordinance you mean
8 the one that's enforced currently now?

9 **A. To the best of my eye I would agree. Now, when**
10 **this was done I can't tell you, but in relation to the**
11 **work I was doing, the initial ordinance from that time**
12 **of 2019, we wouldn't have focused on, to much other than**
13 **that. So my point being, even if the thing was**
14 **accurate, which it's not, it is statistically invalid**
15 **and it is an invalid document. It has no meaning from**
16 **the perspective of trees per acre in my professional**
17 **opinion.**

18 **Q.** I appreciate hearing that, you said it several
19 times. I asked a simple question. Why do you say this
20 means the trees would be dying? It's a simple question.

21 **A. Because if you have a higher count from -- this**
22 **actually was done in --**

23 **Q.** 2010 approximately.

24 **A. The tree study was done in 2007, if I recall.**
25 **Looking at this plan, I have to look at it again, but my**

1 **recollection in reading this it was done in 2007.**

2 **Q.** We'll settle that date --

3 **A. Let me just say that, that makes it 12 years old**
4 **from the time it was done to when we performed our**
5 **study. We also did a quick update, as you know, and**
6 **didn't find any significant visual difference in 2019 to**
7 **2024, but if the tree count went down per acre that**
8 **would indicate there are less trees.**

9 **Q.** That would assume your count is accurate --

10 **A. Correct.**

11 **Q.** -- as well?

12 **A. And our count is accurate.**

13 **Q.** Now, if theirs is the accurate count that would
14 mean no evidence one way or another about trees dying?

15 **A. But there is no, if their count is accurate, this**
16 **study did flawed. It would never stand up to any**
17 **scrutiny by any professional forester, arborist,**
18 **botanist or biologist.**

19 **Q.** You had the study several weeks already, did you
20 trouble yourself to contract Mr. Anderson and get the
21 information about how this survey was done?

22 **A. I have been away for a week. I did -- Mr.**
23 **Anderson and I have played telephone tag, we did speak**
24 **briefly but, and I said I've never seen this before,**
25 **Paul. And he said, no, you haven't. And we went from**

17 1 there. And I guess the best I sign would be, he doesn't 2 know, I don't think, know how this was done. I don't 3 know if he does, I can't speak for him. 4 Q. Well, Mr. Anderson signed it, okay. You saw his 5 signature there, right? 6 A. Engineers sign work other people do in their firm 7 all the time. 8 Q. Did you ask Mr. Anderson -- 9 A. I don't know. 10 Q. Did you ask Mr. Anderson for the tree study? The 11 actual documentation and notes underlining this 12 document. 13 A. This is what I was provided. This is what I 14 reviewed. 15 Q. Now try answering the question given, please. 16 It's not that difficult. Did you ask -- 17 A. I did. 18 Q. Did you ask Mr. Anderson for the underlying 19 documentation? 20 A. I did not ask for anything further than what I 21 was provided. 22 Q. So you can declare that this study is invalid 23 statistically, invalid scientifically, invalid 24 arboreally and you never even asked for any of the 25 information underlying it, is that your testimony?	19 1 what you're discussing? 2 MR. AFRAN: I mean, Mr. DeFeo made a 3 reference to what's in his tree report, yet he's never 4 testified to it before. It's never been produced as an 5 exhibit. I have no idea what he's talking about. 6 A. I believe it has been -- I'm almost positive it 7 was submitted at your request. 8 Q. I don't have it. I've never seen it. 9 A. I answered that. 10 Q. Do you have it in front of you right now? 11 MS. McGOVERN: Tree report complete. File 12 updated. 13 THE WITNESS: No, there's the update and then 14 I believe there was the original. 15 Q. Why -- okay. So we'll go back to that. Let me 16 ask you a question. Where, if you go back to your 17 presentation, right. 18 A. Yes. 19 THE WITNESS: Is this working? 20 Q. Go to the page with the spot study 21 identification. No, the circles. 22 A. That? 23 Q. Yes. Thank you. 24 A. Yeah. 25 Q. Now, what's the actual geographic area covered by
18 1 "Yes" or "no", is that your testimony. 2 A. I do not need to see the underlying report 3 because enough information is given here to tell me just 4 looking at these three plots you have not statistically, 5 not you personally of course, it has not statistically 6 covered sufficient land area to be accurate. It's that 7 simple. 8 Q. Now, you said you have a tree report that 9 referred to the rolling mean, I think. Am I using the 10 right terminology? 11 A. There are methodologies that you utilize -- the 12 tree study that I posted, to answer your question, you 13 asked me to post it, I posted it. 14 Q. What day, was that the October 16, 2024 report? 15 A. No, I believe -- I'd have to look and see the 16 filing. 17 Q. You haven't used that in your testimony, as far 18 as I know. Is that something before the board? 19 A. I believe, correct me if I'm wrong, I was asked 20 after one or -- I don't remember which hearing, to post 21 the original tree study from 2019, my recollection, and 22 I know I submitted that. 23 MS. McGOVERN: It's on a November 6 report, 24 I think. I see it starts with, "I have attached more 25 documents. The original tree study conducted" is that	20 1 each of your test areas? 2 A. Test areas 100 -- they're 10 by 10. 3 Q. 10 by 10? 4 A. Roughly 100 square meters. 5 Q. I'm sorry, meters or feet? 6 A. 100 square feet. 10 by 10. 7 Q. Each ones 10 by 10 square feet? 8 A. Approximately. 9 Q. Okay. 10 And how many do you have? 11 A. 22. 12 Q. 22. And so 100 times 22 is 22,000. You're 13 saying you did a 22,000 square foot survey -- excuse me. 14 I'm going to use my phone and do this, because I don't 15 claim my math's great but -- 16 CHAIRMAN BAGOFF: Mr. Afran, 2,200? 17 Q. 2,200 square feet. 18 Well, that's very interesting. You said that 19 this survey was how many square feet? 20 A. Each plot was 10,000. 21 Q. Square feet? 22 A. I'm sorry. 10,000, yeah. 23 Q. Well, that's a heck of a lot more than you did? 24 A. I'll explain again how this works. 25 Q. No, no, no, don't go explain anything. Answer

21

1 the question. Isn't that a lot more than what you did?

2 **A. Yes, I said that early on.**

3 **Q.** No, you said earlier that they did 2 percent and

4 you did 4 to 5 percent of the site.

5 **A. Again, I will try to explain the difference.**

6 **They used 30,000 square feet of 113 acres, that was**

7 **their study area. We had a very defined study area**

8 **because we had an up to date site plan. So we used a**

9 **defined study area based on the approximate 27 acres**

10 **being disturbed. We randomized the selection, not in**

11 **the field, that selection was randomized using GIS data**

12 **before we went to the field. That's how you ensure**

13 **randomization. We're not looking at the woods which**

14 **indicates bias.**

15 **Q.** Let's go back to the size issue. You're saying

16 that, when you said you did 4 to 5 percent it was of the

17 27 acres and their 2 percent was of the whole 113 acres,

18 is that the idea of what you're saying?

19 **A. Correct.**

20 **Q.** Okay.

21 So in reality they actually tested far more

22 forest than you did, but your percent of the area of

23 disturbance is higher than their percent of the whole

24 property, is that what you're saying?

25 **A. What I was saying, I'm sorry, and by the way I**

22

1 **misstated, I apologize. I had so many numbers in my**

2 **head I misstated the numbers.**

3 **Q.** You're the scientist, you tell us?

4 **A. They actually studied about 0.6 percent and we**

5 **did about 2.2 percent. The difference being if you take**

6 **a 10,000 square foot, plot clearly within the 10,000**

7 **square feet, you have a better chance, so I identified**

8 **all the trees within the 10,000 square feet, just a**

9 **bigger plot. So on the specific 10,000 square feet you**

10 **might get more detailed information about the**

11 **speciation. But from a statistical study standpoint,**

12 **you pick your plots randomizing them. Randomizing them**

13 **makes them more accurate in any statistical analysis --**

14 **Q.** Mr. DeFeo, I really don't mean to interrupt you.

15 You said this many times. I have some questions I'd

16 like to get to. All right.

17 Now, what do you mean by, randomized? What does

18 that actually mean. You keep using the phrase,

19 randomized, the selection is randomized. Who did the

20 selection of your spot checking, your 10 by 10 squares?

21 Who selected those sites.

22 **A. I will explain it again.**

23 **Q.** No, no, it's a simple question. Who selected the

24 sites?

25 **A. And I have explained it and I'm going to explain**

23

1 **it again. I answered your question before and I'll**

2 **answer it again.**

3 **Q.** Mr. DeFeo, you haven't answered that question at

4 all. It's a simple question. Who selected the sites

5 that we're looking at on the screen?

6 **A. I will answer your question again. We selected**

7 **that working with Davies, they were charged, find me a**

8 **randomized study plot. They use a GIS methodology which**

9 **means you don't go to the forest first, you use**

10 **satellite imagery, you use a GIS randomized plot system,**

11 **so it random -- the computer helps pick the plots**

12 **randomly. Randomizing means I have no bias, so when you**

13 **see a particular circle we just pick a circle. It's**

14 **sort of like, I don't know, if you're dividing something**

15 **up amongst friends and you have a bunch of numbers in a**

16 **hat and you close your eyes and pick a number out of the**

17 **hat, it's randomized. You have a random chance equally**

18 **of any one of those circles being picked. That is what**

19 **randomizing means.**

20 **Q.** So you closed your eyes and like pin the tail on

21 the donkey you just point your finger and all of a

22 sudden all of those spots ended up on the exact area of

23 disturbance. Is that what you're calling randomized?

24 **A. No, I'll try and explain it again.**

25 **CHAIRMAN BAGOFF: I think he said the**

24

1 **computer randomized it.**

2 **MR. AFRAN: No, he didn't say that. He said**

3 **we use GIS.**

4 **CHAIRMAN BAGOFF: He just said the computer**

5 **randomized.**

6 **MR. AFRAN: No, he didn't say that. They**

7 **used GIS to do a randomized identification. That's not**

8 **what he said.**

9 **CHAIRMAN BAGOFF: With a computer.**

10 **MR. AFRAN: Did the computer pick the sites**

11 **or did the people you work with pick the sites? Let's**

12 **start with that.**

13 **COMMISSIONER KLEIN: The dots? The number**

14 **of dots, not the circle. The number of dots you're**

15 **talking about. 1-40, 50 whatever it is?**

16 **THE WITNESS: The computer picks those.**

17 **COMMISSIONER KLEIN: And you told it to pick**

18 **it within the yellow shape?**

19 **THE WITNESS: Right.**

20 **COMMISSIONER KLEIN: Okay. Thank you. Got**

21 **that so far.**

22 **THE WITNESS: That's what makes it**

23 **randomizing.**

24 **COMMISSIONER KLEIN: Who picked the black**

25 **circles? I'm trying to get to it. He started a half an**

25 1 hour late, I'm just trying to get to the point. 2 THE WITNESS: The foresters office, the 3 foresters team then looks at all those dots, says, Okay 4 how do we get a good cross section of that yellow area 5 and let's start with the first 22 circles. And that's 6 what you do. Notice there are 55 circles there, that's 7 because in a purely statistical basis you wind up 8 covering the right percentage, you would go 55. You 9 circle the first 22 and then when you're in the field 10 and you start seeing the data coming in, you start to 11 run randomly what they call a running mean, and that 12 running mean says, you know, statistically nothing is 13 changing here. There is no reason to keep bringing 14 circle in spots because nothing is really statistically 15 different. So therefore you stop and run the running 16 mean and do a statistical analysis. But everything in 17 terms of that selection is randomized. There's no, ooh, 18 let's take plot 16 because it gives us better trees. 19 Whereas this, from this particular study that you 20 reference and provided to me, I have no way of knowing 21 why those three 10,000 square foot plots were picked and 22 I don't know that anyone would at this point after 17 23 years. 24 Q. Let me just summarize -- 25 COUNCIL PRESIDENT RUTHERFORD: Did you ask	27 1 just done by a landscaper, that's one thing Paul did 2 tell me. He said this was done by a landscaper or 3 landscape company or something along those lines. 4 Q. He didn't say that -- 5 A. Not by a forester. 6 Q. He didn't mean a landscaper as in a guy who 7 pushes the lawnmower? 8 A. I don't know what he meant. It was a landscape 9 company. He said it was not a forester, because I did 10 ask that question, by the way. Did they use a forestry 11 company that understands this type of analysis and he 12 said, no. 13 Q. Mr. Anderson? 14 A. It is my recollection -- that's my recollection 15 of my discussion with what he said. 16 Q. And you have no knowledge as to who did the study 17 we're talking about? 18 A. No, and I don't really care because it's 19 statistically an invalid study. 20 Q. And -- fine, you've made this point. Thank you. 21 Now, I want to clarify something on the question 22 of randomization. We're looking at the, I'll call it, 23 we don't have page numbers, I'll call it, I think it 24 says, Tree Survey Plots? 25 A. I'm sorry. Up here, is that what you're asking?
26 1 Paul Anderson? 2 THE WITNESS: No. 3 COUNCIL PRESIDENT RUTHERFORD: Right. Than 4 you can't really make that statement if you did not 5 inquire about it. You're making a statement -- 6 THE WITNESS: I said, I have no way of 7 knowing. 8 Q. Say that again. 9 A. I said, I have no way of knowing if it's a 10 randomized study because the methodology should be 11 provided on that sheet and it's not. 12 Q. Well, it's not provided on the document we're 13 looking at that you gave us? 14 A. This is a PowerPoint, it's just meant to be an 15 overview. It's not meant to be testimony. 16 Q. Well, the point is you suggested they did not do 17 a randomized study. The did not do as statistical 18 analysis. 19 A. I have no evidence they did, that's correct. 20 Q. Because you didn't bother finding out, isn't that 21 correct? 22 A. No, because it doesn't say -- it would have said 23 it on this plot sheet. When you submit a plot sheet of 24 that detail you should say whether it's a randomized 25 study. I don't know -- as far I understand this was	28 1 Q. Uh-huh. 2 Look at the screen, yes. 3 A. Which one? 4 Q. Go back to where we were. 5 A. Oh, I'm sorry. 6 Q. I didn't ask you to change it. 7 It says, Tree Survey Conducted December 10, 2019. 8 That's the page. 9 A. Yes. 10 Q. Now, zero in on it so we could see the circles 11 better. Now, there are light green lines all over, 12 that's the area of disturbance of the proposed property, 13 is that correct? 14 A. Correct. Based on the planning that we had at 15 that time, yes. 16 Q. It's the only disturbance on the plan sheet? 17 A. Yes. 18 Q. Yes. 19 Now, so when you say, the computer did a 20 randomized selection, the computer was told to select 21 only within the area of disturbance, isn't that correct? 22 A. Correct. 23 Q. I want to clarify this because if it's reviewed 24 by another body we need to make sure this is 25 understandable.

29 1 So when you say, randomization, the computer 2 chose randomized spots within those light green lines, 3 fair to say? 4 A. Yes, it was given parameters. That's what you do 5 with a computer, correct. 6 Q. And then, and it seems to be fairly evenly 7 distributed numbers throughout the green lines, would 8 you agree with that? 9 A. I haven't plotted the distance between it, the 10 computer will pick whatever distance it deems necessary. 11 Q. Mr. DeFeo, you're looking at it with your eyes 12 like I am. I'm asking you a question. 13 A. I haven't measured it. 14 Q. Mr. DeFeo -- 15 A. But I would say it seems it's very evenly 16 distributed. Yeah, I would say that. 17 Q. That wasn't so hard. Thank you. That's all I'm 18 asking. 19 And then I want to clarify exactly the next 20 stage. Then people you work with, you or others, chose 21 numbers that the computer picked and took a selection, 22 is that correct? 23 A. Yes, in order to maximize the distribution of the 24 study. 25 Q. Right. In other words, the computer chose random	31 1 I apologize. 2 MS. McGOVERN: This is O-3, right? What we 3 have up on here. 4 MR. AFRAN: I can't see very well, but looks 5 like it is. 6 THE WITNESS: Oh, you're asking me. 7 MS. McGOVERN: No, I just want the exhibit 8 number for the record. It's O-3. 9 MR. ALPER: Mr. DeFeo, I don't know this IS 10 really relevant, but if you're, if you should do the 11 math in metric, the 100 meter plots instead of 100 12 square foot plots, does that change the percentage of 13 the acreage that you cover? 14 THE WITNESS: No, it doesn't really change 15 it, because we work off conclusions. I just misstated 16 it. 17 Q. Exhibit O-3 doesn't indicate feet or meters -- 18 A. I apologize. 19 Q. -- so I'm assuming they used meters as well, but 20 doesn't change it one way or the other. 21 All right. So if we could zero in -- well, first 22 let's leave it like that for the moment. 23 Mr. DeFeo, you see in the screen there are three 24 square areas. One in the top center, one on the left 25 bottom and one in the middle right, do you see those?
30 1 numbered sites and they look fairly evenly distributed 2 within the green lines? 3 A. Correct. 4 Q. You directed it to do that and then your staff or 5 people you work with chose circled areas within that, 6 fair to say? 7 A. That's fair, yes. 8 Q. And each of those circled areas represents a 10 9 by 10 section? 10 A. Correct, 100 square feet. 11 Q. Okay. Good. 12 Now, let's turn to the tree survey from 2010, 13 Exhibit O-3. If you can put that on the screen. 14 A. I don't have that. 15 Q. No. Thank you. 16 A. I'm sorry, just so I can correct the record. I 17 keep saying 100 square feet, it's 100 square meters. 18 It's 10 meters by 10 meters, I'm sorry. I've been 19 traveling to Europe and back and I don't know whether 20 I'm metric or English right now. 21 Q. So wait a minute. Your survey -- 22 A. 100 square meters, sorry. 10 meters by 10 23 meters, that's the standard. I apologize. 24 Q. They're in metric not feet, correct? 25 A. That's metric. That's what we should be using.	32 1 A. Yes. 2 Q. Okay. 3 Those are the crosshatched areas on the printed 4 exhibit and that represents the areas they surveyed in 5 2007 to 2010, right? 6 A. Yes. 7 Q. And so on the actual exhibit when you zero in on 8 it, they're diagonal lines, they're not crosshatched, 9 they're diagonal lines. So these three squares, those 10 are the 10,000, I'm assuming it's meters as well, square 11 meters? 12 A. I think they have it as 10,000 square feet. 13 Q. I don't know whether it is or not. Let's assume 14 feet for the sake of argument. All right. 15 A. Okay. 16 Q. Those are the 10,000 square foot areas that you 17 referred to earlier, correct? 18 A. Yes. 19 Q. Okay. Good. 20 So now if we could now zoom in on -- 21 A. 10,000 square feet. 22 Q. Yeah. So actually if we look at the right side, 23 now this is another development plan for single family 24 homes, but you can see basically the square area on the 25 right side is essentially in, roughly, in the middle of

1 where Building D would be on this present plan. If we
2 can move over to the right and up a little bit. So
3 that's roughly, that's kind of near the ridge, that's
4 roughly where Building D would be in part on the plans,
5 right?

6 **A. I don't know.**

7 **Q.** Okay.

8 But -- so let's move down to the text on the
9 bottom of the document, if you can. Now, if we could --
10 let me just open my copy which I can see more easily.
11 Now, they find, if you look at, if we could zero in a
12 little more on that text. If you could make it a little
13 bigger.

14 CHAIRMAN BAGOFF: Mr. Afran, are you going
15 to make this somewhat cohesive with what we're looking
16 at today? If there's not going to be a nexus with
17 looking at something because the original plan had
18 single family homes, this is not that plan.

19 MR. AFRAN: The trees are the same, sir.

20 CHAIRMAN BAGOFF: I'm sorry.

21 MR. AFRAN: It's a survey of trees.

22 CHAIRMAN BAGOFF: Right, it's a survey of
23 trees, as we see it is an overlay of single family
24 homes. So the understanding of the two different
25 applications before us, the application before us is one

1 thing that these trees, that his study shows in the area
2 of disturbance. These seem to be outside the area of
3 disturbance for today. I just want to see if there's a
4 nexus somewhere that we can say, I'm relating it because
5 of this.

6 MR. AFRAN: Well, I certainly think the
7 square on the right side is probably the area of
8 Building D, but the other two -- and the one in the
9 center is probably in the area of disturbance of the
10 center building. The one to the far left is probably
11 not --

12 CHAIRMAN BAGOFF: Are we going to get to
13 something the board can use? Some information we want
14 to see or hear.

15 MR. AFRAN: If I could, you'll see we're not
16 referencing it specifically to the area of disturbance.
17 We're looking at the quantum of trees.

18 CHAIRMAN BAGOFF: Okay.

19 MR. AFRAN: That's the purpose.

20 MR. PLOCKER: How is that relevant for these
21 proceedings?

22 MR. AFRAN: Because -- well, that's why Mr.
23 DeFeo is here.

24 MR. PLOCKER: Well, it seems like it doesn't
25 like the tree number in the ordinance, which is in the

1 ordinance, which could have been challenged. We're not
2 here to challenge ordinances or question the propriety
3 of the zoning ordinance.

4 MR. AFRAN: I don't know if Mr. Plocker's
5 referring to --

6 CHAIRMAN BAGOFF: We'll give some latitude.
7 The board has to hear how it's relevant. Go along,
8 we'll see if the board finds more information that is
9 relevant.

10 MR. AFRAN: Yeah, I'm sorry, if we could
11 just zero in as much as possible. We only need the
12 numbers, if we could. The whole thing, if we move
13 across we need it large enough to see. If we could now
14 move over to the left. We'll start with the left side.

15 **Q.** Now, I just want to clarify the numbers. Now Mr.
16 DeFeo, you said you think this is an invalid study?

17 **A. Yes.**

18 **Q.** I want to introduce the numbers on this study and
19 compare them to yours. It's the same forest, right?

20 **A. I'm sorry, say that again.**

21 **Q.** It's the same forest, right?

22 **A. The forest, the forest hasn't moved, but it's**
23 **certainly evolved in whatever happened in 12 years and**
24 **trees have died.**

25 **Q.** Well, you testified several times already there

1 was no major die off of trees through observation?

2 **A. Other than ash.**

3 **Q.** Other than ash, right. As far as the rest of the
4 forest goes it's a stable forest at this point?

5 **A. Stagnant. You keep saying stable, I'll tell you**
6 **it's stagnant.**

7 **Q.** But no major die off as you testified, correct?

8 **A. Except for ash.**

9 **Q.** Whatever trees were noted, other than say bore
10 ash as an occasionally casualty, in 2007 and 2010, they
11 should still be there today, all though may have grown
12 bigger, fair to say?

13 **A. Possibly. I have no way of knowing.**

14 **Q.** Well, you said there was no major die off on this
15 site, so the trees that were there in that period
16 probably are still there today, isn't that fair to say?

17 **A. Again, I have no way of knowing. I haven't seen**
18 **individual trees. You're asking me to be clairvoyant**
19 **and telling you what the exact trees are in a given plot**
20 **on a map that's statistically invalid.**

21 **Q.** I didn't ask you about exact trees in any map. I
22 simply said to you, if it's true as you said that
23 there's been no major die back of trees on this site
24 over the last decades --

25 **A. Other than bore ash.**

1 **Q.** Other than bore ash we heard. Then the trees
2 that were there on the 2010 survey probably are still
3 there, isn't that a fair statement?

4 **A. Possibly. Sure, probably. Maybe. That's why we**
5 **did an independent tree study in 2019 to make certain**
6 **that we had accurate data. This document is completely**
7 **inaccurate and therefore I discount every bit of data in**
8 **there.**

9 **Q.** Even though you never spoke to anybody who did
10 the survey?

11 **A. Doesn't matter. It's a statistically invalid**
12 **document because it did not study sufficient quantity of**
13 **areas, nor does it give you the calculation methodology**
14 **nor anything else. Simple fact is when you have**
15 **something that uses such a very small nonrandomized, as**
16 **far as I can tell, system it is statistically invalid**
17 **and therefore I discount this.**

18 **Q.** Can I go to my question now?

19 **A. It's your time.**

20 **Q.** Now, you projected 211 trees per acre on average,
21 isn't that correct?

22 **A. I think it was 212, but it's been a while since I**
23 **looked at that sheet. 212.**

24 **Q.** 212. Okay.

25 Now, on the basis of that, you calculated for the

1 entire property 25,440 trees, is that correct?

2 **A. I would have to look at the slide to give you**
3 **that. Hang on. Sounds about right.**

4 **Q.** I'm reading it from your slide?

5 **A. I'll take your word for it, you wouldn't lie to**
6 **me.**

7 **Q.** Now, that was your count of 4 inch trees and
8 greater?

9 **A. Correct.**

10 **Q.** Now, this study, if you look on the document,
11 came up with an average of 558 trees per acre, you see
12 that?

13 **A. I do.**

14 **Q.** Okay.

15 So that's almost three times larger than your
16 average calculation, correct?

17 **A. Yeah.**

18 **Q.** Now, they yield a total of 63,361 trees in a
19 range between 2 inches and 6 inches. And they reveal a
20 total of 20,666 trees 6 inches and higher, for a total,
21 and I've done the math, I don't think it's on there, but
22 those two figures together equals 84,027 trees?

23 **A. I'll believe your math.**

24 **Q.** What happened to 60,000 trees?

25 **A. This report is statistically invalid and**

1 **therefore -- you familiar with GIGO, garbage in, garbage**
2 **out? There's garbage data in and garbage data out. I**
3 **do not give any credibility to this report because the**
4 **data is flawed. The methodology is flawed. The study**
5 **area is flawed. Ergo it is statistically invalid and**
6 **therefore it has -- these numbers are meaningless.**

7 **Q.** Why is the study area flawed?

8 **A. Well, as I stated earlier, there are three 10,000**
9 **square foot plots, that sounds very impression by the**
10 **way. And if I wanted to know what 10,000 square foot**
11 **looked like, it's good, but statistically it's 0.61,**
12 **roughly, percent of the area of study. That is a**
13 **statistically invalid tree study. Ergo the conclusions**
14 **it draws must be statistically invalid.**

15 **Q.** Your percent of the area of study is much, much
16 smaller, isn't it?

17 **A. No, my percent of the area of study that we did**
18 **was approximately a little better than 2.2 to 3 percent**
19 **approaching 4 using a running mean, which is acceptable**
20 **in the industry as a statistically valid study.**

21 **Q.** You get 2.2 percent only because you're measuring
22 against the area of disturbance. Whereas in this study
23 they were measuring against the whole plot of the
24 forest, isn't that correct?

25 **A. You're defining your study area as when you do a**

1 **forest survey --**

2 **Q.** Mr. DeFeo, you have a constitutional problem
3 answering "yes" or "no" to any question?

4 You defined --

5 **A. Mr. Afran.**

6 **Q.** -- you define 2.2 percent of the area of
7 disturbance and their -- and then you're saying their
8 percentage is based on the whole 100 acres of the
9 forest, isn't that correct?

10 **A. Mr. Afran, I'm going to answer your question**
11 **again, as I'm under oath and I have to speak to my best**
12 **professional ability here. A "yes" or "no" answer may**
13 **not be true. Ergo, yes, I have a constitutional problem**
14 **giving you a "yes" or "no" answer if it's not true. Let**
15 **me answer your question.**

16 **Q.** No, let me repeat the question. You have said
17 that your study covers 2.2 percent --

18 **A. Approximately.**

19 **Q.** -- approximately of the study area, correct?

20 **A. Uh-huh.**

21 **Q.** An you said --

22 **A. Yes, I'm sorry.**

23 **Q.** And you said their study covered 0.6 percent of
24 the area of study, correct?

25 **A. Correct.**

41 1 Q. And so you're saying you covered much more area 2 in your study than they did. Isn't that what you're 3 saying? 4 A. Yes, of our study area we covered a higher 5 percent, correct? 6 Q. Correct. 7 A. Which is statistically valid. 8 Q. But when you say 2.2 percent you mean of only the 9 area of disturbance of the proposed development, is that 10 correct? 11 A. That is what we were asked to focus on, correct. 12 Yes. 13 Q. And when you say, they have 0.6 percent of the 14 area of study, they're using the entire forest of 15 approximately 120 acres, correct? 16 A. This is a totally different site plan. 17 Q. Mr. DeFeo, answer my question. 18 A. I'm trying to. 19 Q. The 0.6 percent that they're studying was of the 20 whole site, correct? 21 A. Of 113 acres, that's correct. 22 Q. Correct. 23 So when you say you have a higher percentage, you 24 actually have a lower percentage of the whole forest 25 study but a higher percentage of your own area of study	43 1 geographically smaller are but still extrapolated the 2 whole forest. Is that pretty much what we're all saying 3 here? 4 MR. AFRAN: That is one interpretation, 5 that's correct. Mr. DeFeo extrapolated the whole forest 6 by taking sites only in the area of disturbance. 7 Whereas this average from 2010 extrapolates the whole 8 forest by taking three areas in different parts of the 9 forest. Mr. DeFeo limited it to the present area of 10 disturbance. 11 Now, my question to Mr. DeFeo -- 12 CHAIRMAN BAGOFF: Those also, but truth be 13 told, it's also different areas in the forest. The 14 first study in 2010 took three areas. 15 MR. AFRAN: Obviously, correct. 16 CHAIRMAN BAGOFF: Three different areas. 17 Mr. DeFeo also took three different areas in a smaller 18 geography but there's multiple different areas. Can we 19 agree on that? 20 MR. AFRAN: No, we can't. Because Mr. 21 DeFeo's -- 22 CHAIRMAN BAGOFF: I want the board to, this 23 is important that the board understand. 24 MR. AFRAN: Mr. DeFeo took areas from the 25 area of disturbance.
42 1 that you focused on, is that correct? 2 A. Yes. Mr. Afran, you seem to have a 3 misunderstanding of the statistically methodology. 4 Q. I don't need you to worry about what I understand 5 and don't understand. Let me just ask my questions, 6 please. All right. 7 So I want to be clear for the record, they 8 studied much more square footage or meters of the forest 9 than you did, but your study area is a larger percentage 10 of the area of disturbance, whereas their's was of the 11 whole forest, correct? 12 CHAIRMAN BAGOFF: Wait, wait, hold it. I 13 think everyone's getting confused here. There's two 14 studies. Both have extrapolated, based on their 15 methodology, I'm not saying one is right or wrong, I'm 16 just staying there was a methodology used, they 17 extrapolated and neither one looked at every tree in the 18 forest but each study extrapolated based on statistical 19 averages that they used, whatever each group felt was 20 reasonable in their hands based on their expertise, and 21 extrapolated the whole forest and they said based on 22 these areas, so one had three -- in the 2010 study with 23 a different project was the three areas, they used a 24 larger surface area and extrapolated the whole forest. 25 Mr. DeFeo, with computer modeling, picked 22 areas in a	44 1 CHAIRMAN BAGOFF: Yes. 2 MR. AFRAN: That's where trees were going to 3 be removed, so that's what he studied. 4 CHAIRMAN BAGOFF: The area of disturbance -- 5 MR. AFRAN: Of this current application. 6 CHAIRMAN BAGOFF: The area of disturbance in 7 2010 was the area that you saw on those blocks. 8 Different areas of disturbance. 9 MR. AFRAN: Well, in 2010 they were building 10 a subdivision throughout much of the forest. 11 CHAIRMAN BAGOFF: But if you look at the 12 houses, because I was on that board, the area where you 13 see the, if you can pull that up again. These are 14 housing units. So the disturbance, those plots were 15 also, based on what I see here and my understanding of 16 what you're all saying, the area of disturbance was 17 different. So this plots three areas, larger areas, but 18 they were still disturbed areas. We're using 19 terminology, disturbance, that areas disturbed, that 20 areas disturbed and that areas disturbed. Is that 21 something we can agree on? 22 MR. AFRAN: No, we can't. I don't know 23 you're correct. 24 CHAIRMAN BAGOFF: You're saying that there 25 is no disturbance in these three areas?

45 1 MR. AFRAN: No, I'm not saying that at all. 2 CHAIRMAN BAGOFF: I'm trying to understand. 3 MR. AFRAN: What we have on the screen is 4 the 2010 study for a subdivision of, let's call it 150 5 houses for sake of argument. Obviously the disturbance 6 goes throughout the site. What we have here in the 7 current development plan is an area of disturbance of 8 roughly in the center of the forest. 9 CHAIRMAN BAGOFF: Lower concentration. 10 MR. AFRAN: Correct. 11 So there's a different area of disturbance on the 12 current plan versus the one from 2010. 13 CHAIRMAN BAGOFF: Agreed. 14 MR. AFRAN: However, our purpose is not to 15 compare the two developments. Our purpose is to show 16 that there's another study that this developer did that 17 shows three times more trees on this site than Mr. DeFeo 18 identified. 19 CHAIRMAN BAGOFF: I understand. 20 MR. AFRAN: That's where we're going. 21 CHAIRMAN BAGOFF: I understand that. But we 22 have to agree that these are in areas of disturbance for 23 that plan? 24 MR. AFRAN: They're not disturbed areas, 25 they were forest then and they're forest now. That's	47 1 testified about that, it seemed too me like once you 2 came back to your actual calculation of 2.2 percent, 3 which would be less than the 4 to 5 percent you claimed 4 would be necessary for the study to be valid? 5 THE WITNESS: But as I also stated then, 6 however, it's a however, you would do that unless you're 7 running a mean calculation that specifies I don't need 8 to do more study because nothings changing 9 statistically. So a running a mean says you don't have 10 to get to that number. 11 COUNCIL PRESIDENT RUTHERFORD: Okay. By 12 running mean you mean as you analyze you have one then 13 analyze the second and third and as you get that mean it 14 stays within a certain number of variance you don't need 15 to go further? 16 THE WITNESS: Correct. And you look at it 17 statistically and if it has a high level of confidence 18 you don't need to keep going and doing that work. 19 COUNCIL PRESIDENT RUTHERFORD: Okay. 20 Now, the follow-up question would be to you, 21 Mr. Afran. Do you have the methodology that was used 22 for this 2010 study? 23 MR. AFRAN: I do not have that. And my 24 purpose is simply to show there's two studies with 25 vastly different numbers of trees.
46 1 the difference in terminology. They would've been 2 disturbed on that plan. 3 CHAIRMAN BAGOFF: Yes. 4 MR. AFRAN: Correct. Just like the areas of 5 disturbance here will be disturbed if it's ever done. 6 CHAIRMAN BAGOFF: So both would have been 7 disturbed because neither one is disturbed at this time 8 but both, if done, would have been disturbed? 9 MR. AFRAN: Correct. But that's not really 10 relevant to counting trees. 11 CHAIRMAN BAGOFF: That's okay. I'm trying 12 to understand where we're going. 13 MR. AFRAN: Yeah. 14 COUNCIL PRESIDENT RUTHERFORD: Mr. Chair, I 15 have a question. 16 CHAIRMAN BAGOFF: Yes, sir. Council 17 President Rutherford. 18 COUNCIL PRESIDENT RUTHERFORD: Mr. DeFeo, 19 you said that there needs to be a 4 to 5 percent area of 20 study in order for the study to be valid, at least 21 that's my recollection of your earlier testimony? 22 THE WITNESS: That's correct. Unless 23 there's a running mean methodology utilized, which this 24 study did. 25 COUNCIL PRESIDENT RUTHERFORD: When you	48 1 CHAIRMAN BAGOFF: So that's the reason of 2 diversion. We want to hear somehow there's one site 3 that shows X amount of trees and one site shows more 4 than X amount of trees? 5 MR. AFRAN: That's correct. That's our 6 purpose. That's our purpose. 7 CHAIRMAN BAGOFF: Thank you. 8 MR. AFRAN: And we'll have our own experts 9 later in the case, but our purpose right now is to show, 10 since Mr. DeFeo is here, I don't want to make him keep 11 coming back unless he plans to be here. 12 CHAIRMAN BAGOFF: Okay. 13 Q. Now Mr. DeFeo, in terms of the 22 study areas on 14 your study, how many of those study areas did you 15 actually count and include in your final results? 16 A. I'm sorry, how many -- 17 Q. You said there was about 22 study areas you 18 studied, 10 by 10 plots. 19 A. Yeah. 20 Q. How many of those study areas did you actually 21 include in your final calculation and results? 22 A. The 22 is what was used in the final calculations 23 and results. There were 50 plots actually put on the 24 site by the computer, but 22 were actually physically 25 surveyed.

1 **Q.** I thought you answered, in terms of Council
2 President Rutherford's question, I thought you just said
3 once you see everything's looking the same you stop
4 counting. That would imply you stopped using some of
5 the site and only used a few?
6 **A.** No, we stopped at 22 because to do the 5 percent
7 we would have to do the 55, but after doing 22 we run it
8 by the mean, we don't have to keep going to 55.
9 **Q.** That's what I wanted to clarify.
10 **A.** I wasn't clear -- I probably wasn't clear on
11 that.
12 **Q.** Okay.
13 So you did 22?
14 **A.** Yes.
15 **Q.** Good.
16 So the 212 figure is based on the calculation for
17 22?
18 **A.** Correct. That's correct.
19 **Q.** Great. Thank you.
20 Now, the calculations, if we -- well, I think we
21 have the number, but the calculations would be 84,027
22 trees on the site from the 2010 study and your study
23 indicated 25,440 trees. Now, obviously one differential
24 on the two studies is they were including trees between
25 2 and 4 inches and you started at 4 inches, correct?

1 **A.** Because trees -- a plant under 4 inches is not a
2 tree.
3 **Q.** You did not include trees between 2 and 4 inches,
4 is that correct?
5 **A.** Because anything under 4 inches is not a tree. I
6 did not include plants under 4 inches because that's
7 statistically invalid.
8 **Q.** Now, I understand you say it's statistically
9 invalid and that's fine. Now, this survey from 2010 was
10 actually done by the developer who's here today on this
11 application, correct?
12 **A.** I don't know who did the survey.
13 **Q.** It's presented by the same developer in 2010 as
14 is here today, correct?
15 **A.** I believe so. It's my understanding.
16 **Q.** Now, a developer, without any criticism of
17 developers, obviously in presenting a major plan has
18 some incentive, if possible, to downplay the number of
19 trees being lost?
20 **CHAIRMAN BAGOFF:** Let the record show Mr.
21 Cardoza joined the board and that Council President
22 Rutherford joined earlier.
23 **COMMISSIONER CARDOZA:** I've been listening
24 the entire evening.
25 **MS. MCGOVERN:** Listening in the car?

1 **MR. CARDOZA:** Yes.
2 **CHAIRMAN BAGOFF:** Okay. Thank you.
3 **Q.** I will withdraw the other questions. I'll move
4 onto other questions. I'll use it later.
5 What I'd like to ask you is this, aside from your
6 criticism of this study in 2010, and due to the fact you
7 don't have any actual documentation from it, are you
8 able to offer any other explanation as to why they have
9 60,000 more trees than you have?
10 **A.** It's statistically error flawed, so I can't tell
11 you that.
12 **Q.** Well --
13 **A.** I haven't seen the calculation.
14 **COUNCIL PRESIDENT RUTHERFORD:** They don't
15 have 60,000 more trees. So it's 2 inches and greater
16 and then 6 inches and greater. So the 2 inches and
17 greater include the 20,000 number.
18 **MR. AFRAN:** I don't think so. I think it's
19 two categories, separated into 6 and 6 and higher.
20 **MR. ALPER:** It's 2 to 6.
21 **COUNCIL PRESIDENT RUTHERFORD:** It's 40,000
22 more trees.
23 **MR. AFRAN:** I noticed that, but when I read
24 it, it looks like they created two categories.
25 Minimally there's 40,000 more trees, fair to say?

1 **COUNCIL PRESIDENT RUTHERFORD:** Yes, sir.
2 **Q.** Now, if they're right and it's 40,000 more or
3 60,000 more on average, based on the average, that means
4 that your calculation of 6,390 trees to be removed would
5 be wrong, right?
6 **A.** You're asking me a hypothetical. If somebody's
7 right, somebody's wrong. I can't argue a hypothetical.
8 **Q.** Well, let's assume for example that there are
9 40,000 more trees or 60,000 more trees, we know at least
10 40,000 from this study on this chart. If they're right
11 that means the figure that you relied on, 6,390 trees to
12 be removed is wrong.
13 **A.** Again, you're asking -- sorry. You're asking a
14 hypothetical and hypothetically if one is right, one is
15 wrong. Their's is right, mine is wrong. Mine is right,
16 their's is wrong.
17 **Q.** Now, you would agree that a developer, I'm not
18 criticizing developers, but generally they have an
19 interest in downplaying the number of trees destroyed,
20 is that fair to say?
21 **A.** I can't speak for what a developer would or
22 wouldn't do.
23 **Q.** Well, it's good public relations if a developer
24 destroys fewer trees than more, that's agreed?
25 **A.** It's a fair argument.

1 **Q.** So if a developer presented this study in 2010
2 showing vastly larger number of trees than you found,
3 shouldn't we at least give some credence to that as
4 having some reliability since it really works against a
5 developer?

6 **CHAIRMAN BAGOFF:** I'm sorry, I think we're
7 going down a realm where we don't want to be. Ask him
8 about the trees in his study. You're asking
9 hypotheticals about who said what in 2010. Let's not go
10 there.

11 **Q.** Well, let me ask it this way. Mr. DeFeo, you
12 said you worked on forestry, on tree matters and tree
13 plans before, right?

14 **A. Yes.**

15 **Q.** Generally would a developer present a study that
16 they didn't have confidence in, in your experience?

17 **A. Again, it's the same question with different --**

18 **Q.** You worked with other developers, right? Haven't
19 you.

20 **A. I haven't worked with developers. I usually work**
21 **for towns or environmental commissions, not with -- not**
22 **for developers per se, on clearing trees, no.**

23 **Q.** Okay. Then I'll move on.

24 **A. I have not.**

25 **Q.** Thank you. I'll move on.

1 Now, if it turns out this study is correct and
2 yours is wrong, that means that the entire premises of
3 this application with respect to trees is vastly
4 understated, isn't that fair to say?

5 **MR. PLOCKER:** Now I'm going to object to
6 that question, because the tree count and tree removal
7 and replacement process that the site plan application
8 adheres to is set forth in the ordinance. So I don't
9 think that is a proper question for Mr. DeFeo.

10 **MR. AFRAN:** Well, he's here to speak in part
11 to the idea of compensating for certain number of trees
12 by putting a deer fence in.

13 **MR. PLOCKER:** We're going to comply with the
14 ordinance, Mr. Afran.

15 **MR. AFRAN:** The actual tree loss is much
16 more. That also pulls into doubt a lot of the premises
17 on which Mr. DeFeo's reporting.

18 **MS. McGOVERN:** Case law says the planning
19 board has no jurisdiction to override the ordinance.

20 **MR. AFRAN:** I'm well aware of that.

21 **MS. McGOVERN:** So they have to take the
22 ordinance, enforce the ordinance and see if the
23 application that's submitted is in keeping and matches
24 up to the ordinance. What it sounds like, and I may be
25 incorrect, but it sounds like what you're trying to do

1 is to prove that the ordinance should never have been
2 passed. And that's not for this board to --

3 **MR. AFRAN:** That wasn't actually in my mind.

4 **MS. McGOVERN:** Okay. Well, the point is
5 that they have to take the ordinance the way it is.

6 **MR. AFRAN:** Well, let me do it differently.

7 **Q.** Mr. DeFeo, the ordinance refers to the number of
8 trees to be lost on this proposal, doesn't it?

9 **A. I don't have the ordinance in front of me, but go**
10 **ahead.**

11 **Q.** Well, Mr. Plocker just said we're dealing with
12 the ordinance. There's a figure of lost trees in the
13 ordinance, isn't that correct?

14 **A. I don't have the ordinance in front me. You're**
15 **asking about the ordinance.**

16 **Q.** Let me put it differently. That figure of lost
17 trees is based on your average of 212 trees per acre,
18 isn't that correct?

19 **A. I don't have the ordinance in front me.**

20 **Q.** I didn't ask you that. I just asked you another
21 question. I heard you.

22 **A. The tree study was provided to the Township as**
23 **part of the negotiation, that's all I know. I can't**
24 **speak to other -- the specifics of the ordinance is not**
25 **in front of me, I can't speak to it.**

1 **COMMISSIONER KLEIN:** He asked a math
2 **question. Ask him again.**

3 **A. Ask me again.**

4 **Q.** Do you agree, and it's referenced in your own
5 papers, there will be 6,390 trees destroyed by the
6 project, isn't that correct?

7 **A. I believe the initial removal, I believe that's**
8 **correct. I don't have my slide in front me, but I**
9 **believe that's correct.**

10 **Q.** Now, that's based on an average figure of 212
11 trees per acre of disturbance, isn't that correct?

12 **A. Yes. I've testified that before, yes.**

13 **Q.** Now, to the extent that's in the ordinance, for
14 example that figure is based on your 212 per acre
15 calculation, correct?

16 **A. Correct, which is the highest number of the**
17 **various ranges we had.**

18 **Q.** But if your study is wrong and the 2010 study is
19 right, then an actual number of lost trees to be
20 destroyed will be much higher, isn't that fair to say?

21 **A. If the math is different than the math is**
22 **different, correct.**

23 **Q.** Okay.

24 **A. The math is the math. What variables you put in**
25 **the formula determine the outcome.**

1 **Q.** So if they have 2 or 3 times more trees on the
2 site calculated and they're right, that means the
3 average lost trees will probably be closer to 15,000
4 rather than 6,390?

5 **A. Seeing this is a statistically flawed study, I do**
6 **not think they're right. But if their math is correct,**
7 **obviously the math is the math. You put in a variable,**
8 **the variable gives you a result. You change the**
9 **variable the result changes.**

10 **Q.** So if their study is right, that means you get a
11 lot more trees lost then you're using?

12 **A. If their math is correct then there would be a**
13 **higher tree removal theoretically per acre of the**
14 **survey, correct.**

15 **Q.** I didn't ask if the math was correct. I simply
16 put of point to you. If their study is right then
17 there's going to be a lot more lost trees, correct?

18 **A. But their study is predicated on math. So their**
19 **math has to be correct. For their math to be correct**
20 **their variables and inputs to do the calculations for**
21 **total trees, the variables they enter, must be correct.**
22 **If they're wrong then it's wrong.**

23 **Q.** I'll move on. It's not my purpose in life to
24 beat the horse dead. I'll move on.

25 Now, what's interesting to me is that you knew

1 about the 2007 plan when you did your own tree report,
2 isn't that correct?

3 **A. This document, 0-3?**

4 **Q.** That's not what I asked you.

5 **A. I'm asking you for clarification.**

6 **Q.** I'm asking the questions. You knew about the
7 2007 development proposal from the developer?

8 **A. Yes. I knew there were prior development**
9 **proposals, yes.**

10 **Q.** And you knew there was a 2007 proposal, correct?

11 **A. I couldn't speak to the year, but I knew there**
12 **was a prior one. I couldn't speak to the year.**

13 **Q.** Well, it's actually, it says here, West Essex
14 Highlands Affordable Housing Development 2023
15 Presentation. You recall that, right?

16 **A. As I said, I knew there were prior plans. I just**
17 **couldn't speak to the exact year off the top of my head.**

18 **Q.** Okay.

19 And that document you refer and actually put on
20 the site plan, 2007 Housing Development Plan, on this
21 site, correct?

22 **A. If you show me the document, which one that**
23 **occurred. I have done several presentations, I'm not**
24 **sure which one you're talking about.**

25 **CHAIRMAN BAGOFF:** Mr. Afran, you entering

1 **that document into the record?**

2 **MR. AFRAN: I think -- I think it's already**
3 **entered.**

4 MS. McGOVERN: Yeah, identify it so we know.
5 You're holding onto something.

6 MR. AFRAN: Yeah, I will in a second. I'm
7 sorry, it is very hard to work on this station. I need
8 a moment to get the right page.

9 MS. McGOVERN: Sure.

10 **Q.** Mr. DeFeo, I'm showing you what we'll mark as
11 O-4. And its headed, as I said, West Essex Highlands
12 Affordable Housing Development 2023 Presentation.
13 Public information presented by William DeFeo, Lead AP
14 Environmental Compliance Officer, West Orange. Do you
15 recall that?

16 **A. Yes.**

17 **Q.** Okay.

18 (West Essex Highlands Affordable Housing
19 Development 2023 Presentation is marked as Exhibit O-4
20 for identification.)

21 MS. McGOVERN: Counsel, we need a
22 description better. You went really fast.

23 MR. AFRAN: I apologize.

24 MS. McGOVERN: You need to give a copy to
25 Jamilet so we have it for the record.

1 MR. AFRAN: The documents headed, West Essex
2 Highlands Affordable Housing Development 2023. And it
3 has some other text, but then towards the bottom it
4 says, Public Information Session, May 10, 2023.

5 Presented by Wayne DeFeo, Environmental Compliance
6 Officer, West Orange.

7 MS. McGOVERN: Okay.

8 MR. AFRAN: Sorry I spoke to quickly.

9 MS. McGOVERN: Thank you.

10 **Q.** Mr. DeFeo --

11 MS. McGOVERN: Do you have an extra copy?

12 MR. AFRAN: I think we do. I can give you
13 this one.

14 MR. PLOCKER: Is this part of the document
15 posted? It is not. Okay. I was just wondering.

16 MS. McGOVERN: To be fair Mr. Afran, before
17 you give to it Jamilet, would you give it to the
18 applicants attorney to take a look so he can see what
19 you're cross examining.

20 **Q.** Was -- Mr. Plocker had a good point, let me just
21 identify it.

22 Was this presentation the one you made at the
23 hotel?

24 **A. It appears to be. I don't have it in front of me**
25 **but that would be roughly the date I recall.**

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1 MS. McGOVERN: The PowerPoint?

2 MR. AFRAN: Looks like a PowerPoint. Most

3 things are PowerPoint's nowadays. It looks like it.

4 THE WITNESS: It's a PowerPoint if I did it.

5 MR. AFRAN: I have only one page I want to

6 show the witness.

7 MR. PLOCKER: What's the date on this? Is

8 it just 2023 --

9 MR. AFRAN: No, it says May 10, 2023.

10 THE WITNESS: I'd like to help. I think the

11 Mayor asked for public presentation.

12 MR. AFRAN: That's exactly what it says.

13 MS. McGOVERN: You only have one page?

14 MR. AFRAN: I'm just going to ask a question

15 on one page.

16 MS. McGOVERN: So what are we marking as

17 O-4? The page or the whole PowerPoint?

18 MR. AFRAN: Let's mark the cover and page

19 I'm directing him to.

20 MS. McGOVERN: Okay. Identify that?

21 MR. AFRAN: Which is the cover. I read

22 that, I'll do it one more time.

23 MS. McGOVERN: Oh, okay. I see. That was

24 West Essex Highlands Affordable Housing 2023, Public

25 Information Session, May 10, 2023 was the page that you

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1 were looking at?

2 MR. AFRAN: It's the cover of the document.

3 MS. McGOVERN: Oh, that's the cover. And

4 what's the page you're referencing?

5 MR. AFRAN: The page I'm referencing --

6 MS. McGOVERN: Hopefully it's numbered.

7 MR. AFRAN: The page I'm referencing in the

8 upper left corner it says, A Site Plan History Spanning

9 20 Years. Efforts to Protect the Forest. Under that it

10 says, year 2007 plan = single family homes. Site fully

11 developed. That's a description.

12 MS. McGOVERN: 2007 plan?

13 MR. AFRAN: Yes.

14 MS. McGOVERN: Okay.

15 MR. AFRAN: And I'm just showing this

16 witness one page.

17 MR. PLOCKER: Just for the record, Mr.

18 Bagoff -- Chairman Bagoff. Mr. Afran can provide

19 whatever he's marking as the exhibit, which is the cover

20 page and the particular page he's referring to. If he

21 could just disseminate that after the hearings over at

22 some point via e-mail so we all have the exhibit.

23 MR. AFRAN: Of course.

24 CHAIRMAN BAGOFF: Okay. Thank you, Mr.

25 Afran. Thank you, Mr. Plocker.

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1 Q. So I don't mean to crowd you. I'm standing next

2 to the witness. This is a 2007 development plan for

3 this project, for this property, correct?

4 A. Yes.

5 Q. That was in your May 10, 2023 report which you

6 gave in terms of the general discussions?

7 A. Yes.

8 Q. Okay. Thank you.

9 So at the time you prepared your tree report in

10 this case, you were well aware that the developer had

11 actually produced plans for a single family home project

12 in 2007, is that fair to say?

13 A. Yes.

14 Q. And in spite of that when you did your tree

15 report you did not bother to ask the developer for

16 copies of the reports they did on the tree survey at

17 that time?

18 A. Number one, I did not see the entire application,

19 so, no, I wouldn't have asked for those plans because I

20 was advised those plans were no longer valid. So

21 therefore to refer to them was meaningless. I did look

22 at the one drawing just to show the differential between

23 high density housing and that type of plan.

24 Q. Well, you knew that in any development plan

25 there'd have to be a tree removal plan proposed, right?

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1 A. There had to be something proposed, but I don't

2 know how far along that whole set went. I never saw the

3 entire set of drawings.

4 Q. So even though you were aware of a 2007

5 submission you did not ask for a tree study that was

6 produced by the developer at that time, is that correct?

7 A. No, because I wouldn't have taken anything

8 provided by the developer at all. I was asked to do an

9 independent study. So I wouldn't want to see prior

10 because it would have been prejudiced.

11 Q. Wouldn't want to be prejudiced by other

12 information?

13 A. Correct.

14 MR. AFRAN: We're getting close to the end.

15 Q. You would agree that under the ordinance, tree

16 ordinance in effect today in West Orange, there actually

17 has to be a tree plan identifying each tree and it's

18 species within the exact location that is to be

19 destroyed?

20 A. I'm not certain what ordinance is currently in

21 effect in West Orange. I know there was a discussion of

22 a new tree ordinance some year -- a year ago, I believe.

23 Within the last year. I don't know what ordinance is

24 currently the effect in West Orange.

25 Q. You haven't read the latest ordinance, is that

1 fair to say?

2 **A. No, as it currently -- I don't know if it's been**
3 **adopted. I read some earlier drafts but that's all I**
4 **looked at.**

5 **Q.** Well, in those earlier drafts didn't you inquire
6 that a detailed tree removal plan identifying each tree
7 and species and the location?

8 **A. I really don't recall the details of those old**
9 **drafts. I don't recall.**

10 **Q.** Okay.

11 So sitting here today you don't recall what was
12 adopted into law in the current tree ordinance?

13 **A. That's correct.**

14 **MR. PLOCKER:** How is the current tree
15 ordinance relevant? I'm sorry to object, obviously it
16 doesn't apply to us. We have our own tree removal
17 replacement provisions in this zoning ordinance.

18 **MR. AFRAN:** I'm glad Mr. Plocker raised the
19 question, because it does get to the point we're going
20 to face. The tree ordinance is a mandate of DEP, which
21 acts under it's authorizing statute. Enactments in
22 state are a product of statute as opposed to ordinance
23 following the time of decision rule, not the time of
24 application rule. And therefore since the tree
25 ordinance is mandated for each community by DEP and

1 Now, you recall under the present tree ordinance
2 in effect that no development project may destroy trees
3 closer than 100 feet to a ridge line?

4 **A. I really can't answer any questions on this**
5 **ordinance, I have not read the detailed new ordinance.**
6 **I don't know.**

7 **Q.** Then I will hold those questions for another
8 opportunity with another witness.

9 **MR. AFRAN:** Mr. Chairman, if I may have a
10 moment to check my notes.

11 (Whereupon, a short recess is taken.)

12 **Q.** Mr. DeFeo, if I was to ask you any specific
13 questions about requirements in the current tree
14 ordinance would your answer be the same, that you're not
15 familiar with it's contents at this point?

16 **A. Correct, I am not familiar with it.**

17 **Q.** Okay.

18 **MR. AFRAN:** Mr. Chairman, I will hold the
19 remainder of those questions on that point because the
20 witness says he's not competently familiar with its
21 contents, so there's no purpose in my going forward on
22 those questions.

23 **MS. McGOVERN:** Contents of the tree
24 ordinance?

25 **MR. AFRAN:** Yes.

1 DEP's acting under the statutory powers, a fair argument
2 lies in the fact that the application is governed by
3 this new ordinance because it follows the time of
4 decision rule. In addition any ordinance that is a
5 public, health, safety and welfare measure under MLUL
6 45:55D-10.5 is in fact -- sorry, 50-10.5, is in fact
7 time of decision not time of application. And so if the
8 tree ordinance, which is in effect one, flows from the
9 statutory power of DEP then it follows the time of
10 decision rule and it is binding on this application.

11 Alternately if it is a public, health, safety and
12 welfare measure, as was said in its text, then it also
13 binds this application because such case follows the
14 time of decision rule and this is an issue we will be
15 raising as we go further in the case.

16 **MS. McGOVERN:** What's the statute, 55 --

17 **MR. AFRAN:** I believe it's MLUL 40:55D, and
18 I believe it's 10.5.

19 **MS. McGOVERN:** 10.5. Okay.

20 **MR. AFRAN:** I may have cited it wrong but I
21 believe that's correct. And so our position is that the
22 new tree ordinance governs and binds this application.

23 **Q.** Now, I will ask one or two more questions.

24 **Mr. DeFeo,** if you don't recall the contents of
25 the ordinance just tell me and I'll move on.

1 **MS. McGOVERN:** You want him to come back?

2 **MR. AFRAN:** No, I don't think that's
3 necessary at this point. I would have liked him to
4 answer, but if he's not familiar with it at this point.

5 **MS. McGOVERN:** Okay, hold on. I just want
6 to make sure we're not requesting that he return another
7 day.

8 **MR. AFRAN:** Well, let me put it this way.
9 We will use our own experts for those purposes and it's
10 possible Mr. DeFeo on his own or through the boards
11 desire may want him to come back.

12 **MS. McGOVERN:** Understood.

13 **MR. AFRAN:** But I don't think we need to
14 bring him back for that. The ordinance speaks for
15 itself. If it applies it speaks for itself. I don't
16 need for Mr. DeFeo to come back.

17 **Hang on.** Just need two or three minutes to
18 make sure I'm done.

19 (Whereupon, a short recess is taken.)

20 **Q.** Yeah, I do have one more question for Mr. DeFeo.
21 You're presently the Township Environmental Compliance
22 Officer?

23 **A. That's the title where I submit my proposal, yes.**

24 **Q.** This particular proposal?

25 **A. No.**

69 1 Q. So what do you mean, I'm sorry? 2 A. The environmental compliance officer proposal 3 works on ensuring compliance at the environment center 4 where the composting and recycling is collected. My job 5 is to, my contract there is to inspect it and ensure it 6 meets compliance with state regulations. 7 Q. So when you say you're the Environmental 8 Compliance Officer, as you did on O-4, you mean only 9 with respect to that limited function? 10 A. Well, I get called in under that title to do 11 other items as necessary that deal with environmental 12 issues. If there's an environmental question that 13 pertains to an area that the Township believes I can be 14 helpful, I'm called in for that, yes. 15 Q. I'm not trying to make light of anything and 16 please note I'm not trying to be sarcastic. Trees are a 17 fundamental part of the environment, we would agree, 18 correct? 19 A. I would say trees are a fundamental part of the 20 environment. I agree with you, yes. 21 Q. We reached a point of agreement. 22 Now, one would think as the environmental 23 compliance officer noting that trees are a large part of 24 that general subject area, that you should have read the 25 town tree ordinance?	71 1 even going to be adopted. My initial report -- 2 Q. Well -- 3 A. -- from a few years ago. 4 Q. Well, your report dated October 16. 5 A. Oh, I thought you meant the tree study. I'm 6 sorry. 7 Q. Tree study? 8 A. Yeah, I'm sorry. 9 Q. Well, you came here to testify over the last 10 several weeks and that was after the May 2024 adoption 11 of the current tree ordinance and you issued a report 12 dated October 16, 2024 and that was also after the date 13 of adoption. Now, didn't it occur to you to see what 14 happened to those drafts that you read, to see whether 15 they entered into law before you testified? 16 A. No. 17 Q. Why not? 18 MR. PLOCKER: In all fairness, our zoning 19 ordinance says this application, unless specifically 20 stated in the IH zoning ordinance that are applicable 21 here, that we are exempt from every regulation in the 22 West Orange Land Use Ordinance. It says it in our 23 ordinance. 24 MS. McGOVERN: I understand that and the 25 ordinance does say that and you also knew the tree
70 1 A. I read the drafts of the towns tree ordinance 2 when asked to read them for very specific comment. But 3 not, I'm not the town forester and I do not deal with 4 the tree ordinance. I have not been called to deal with 5 it, so I haven't had a to reason look at it. 6 Q. Did it occur to you that the current tree 7 ordinance might be relevant to this application? 8 A. Not to me because this ordinance was adopted 9 prior. I was working under the prior -- I was working 10 under the negotiated settlement system. 11 Q. Well, did someone say to you that the new 12 ordinance does not apply, the old ordinance does? 13 A. My work was completed prior to the new ordinance, 14 so it wouldn't have been anything to come up in 15 discussion. 16 Q. But you knew there was a new ordinance because 17 you read the drafts, is that correct? 18 A. I knew there was one being considered. I didn't 19 know what was ultimately going to be adopted, I wasn't 20 part of that process. 21 Q. And before you issued your report here and your 22 testimony you didn't think it necessary to look at that 23 ordinance? 24 A. My reports were issued prior to my reading even 25 the draft of the new ordinance. I had no idea if it was	72 1 ordinance was taken out of the Land Use Ordinance, so 2 this board doesn't have any, it doesn't -- 3 CHAIRMAN BAGOFF: Not a Chapter 25 anymore. 4 MS. McGOVERN: It's not a Chapter 25 5 anymore, so it's not part of Land Use. 6 MR. AFRAN: As a general ordinance under the 7 code. 8 MS. McGOVERN: Right, not part of the Land 9 Use Ordinance any longer. 10 MR. AFRAN: Well, any application for 11 development is governed by whatever tree ordinance is in 12 force in the general ordinance. 13 MS. McGOVERN: It's been removed from the 14 land Use Ordinance. 15 MR. AFRAN: I can tell you that it 16 specifically states that no application for development 17 will destroy trees closer than 100 feet from the ridge 18 line. 19 MS. McGOVERN: I will then tell you it's not 20 in Chapter 25, which is the Land Use Law Ordinance which 21 the board has to review to see whether it complied with 22 or if there's an issue with. 23 MR. AFRAN: I understand you point Ms. 24 McGovern, but I would differ only in that if there is a 25 general ordinance it still governs the developers

73 1 actions. 2 CHAIRMAN BAGOFF: But we're also saying 3 there's a tree ordinance for this zone that proceeds the 4 latest ordinance taking out Chapter 25. 5 MR. AFRAN: Granted the latest ordinance is 6 a product of statute or is a public health, safety, 7 welfare issue. It binds this application. 8 CHAIRMAN BAGOFF: You're arguing public 9 safety, health and public welfare, which ordinance was 10 never challenged in the IH-1 zone. So we're using that 11 because it was never challenged. So you're challenging 12 the ordinance? 13 MR. AFRAN: It's not that I'm challenging 14 the ordinance, there's a later ordinance that supercedes 15 it. Council spoke and passed another tree ordinance and 16 that tree ordinance governs everything in this town. 17 That's the point. 18 CHAIRMAN BAGOFF: Not the way the ordinance 19 was written, but this is not - 20 MR. AFRAN: It's a legal issue. 21 CHAIRMAN BAGOFF: Exactly. This is not the 22 venue to discuss that. Thank you for bringing that to 23 the board's attention. 24 MR. AFRAN: It'll come up again. 25 CHAIRMAN BAGOFF: I'm sure it will.	75 1 COMMISSIONER KLEIN: So you say it's 2 between, either between roughly, I'm going to use round 3 numbers, 6,000 trees that could possibly be disturbed 4 and removed, as many as 15,000 trees removed or 5 disturbed, somewhere in between. Are we going to 6 actually count the number of trees that are removed when 7 they actually -- if they were to approve this and were 8 to do construction, would they count the number of trees 9 4 inches or greater or whatever the number is and 10 quantify and say, ah, yeah, 6,100 trees? 11 THE WITNESS: As a rule, no. The answer 12 would be that, would depend on who ultimately does that 13 work. The monitor that is used would primarily be 14 concerned to make sure that tree removal does not exceed 15 the area of disturbance. 16 MR. KLINE: Okay. 17 THE WITNESS: Not counting every tree 18 internally, because it's -- that's just not feasible, 19 you know they're going to be removed. 20 MR. AFRAN: Actually, with respect, we have 21 a different interpretation of the current ordinance. I 22 know there's a dispute about whether they apply. If, if 23 the current ordinance applies, it actually requires 24 exactly what you asked. That each tree and species and 25 it's locations be marked before construction. Now, that
74 1 Q. So Mr. DeFeo, I asked you a question, I'm not 2 sure if you answered it. Not sure you had a chance to 3 answer with this colloquy, so just to be fair, why 4 didn't you think it necessary to check to see what 5 happened to the draft ordinance? 6 A. I didn't think it was -- it's not relevant to 7 the, as far as I understood it, it wasn't relevant to 8 the work that I had done because it was after the fact. 9 MR. AFRAN: Thank you. 10 I'm corrected by the professor that it was 11 adopted June 10, I believe it was adopted in May, but it 12 was adopted at some point. 13 We have no further questions. I thank Mr. DeFeo 14 for his he patience -- 15 THE WITNESS: Thank you. 16 MR. AFRAN: -- through these two days. 17 Mr. Chairman, at this point we have nothing 18 further at this stage. I know Mr. Plocker does not 19 either. 20 CHAIRMAN BAGOFF: Thank you. 21 You want to ask a question? 22 COMMISSIONER KLEIN: Yeah. I have a few 23 questions. 24 CHAIRMAN BAGOFF: You can ask your questions 25 then Council President Rutherford.	76 1 precedes the development plan to do precisely that. So 2 the current ordinance does require exactly what you 3 asked for. 4 COMMISSIONER KLEIN: Right. So then if it's 5 only 6,000, the way you say, then your replacement 6 numbers will work. If it turns out that it's a higher 7 number what would be the replacement or what would be 8 the mitigation if it were indeed 3, 4, 5, 6,000 more 9 trees than actually you estimate? 10 THE WITNESS: I defer to legal for that kind 11 of answer. I just don't know. 12 COMMISSIONER KLEIN: It's more a technical 13 question for you. You came up with a way, a certain 14 amount of deer fence and that -- 15 THE WITNESS: Right. I follow what you're 16 saying. 17 COMMISSIONER KLEIN: What if it's double? 18 What it's 12,000. 19 CHAIRMAN BAGOFF: Well, he said before, you 20 run the numbers. 21 COMMISSIONER KLEIN: Right. And then how 22 much -- is there enough area to make deer fence to be 23 able to mitigate the extra 3, 4, 6,000? 24 THE WITNESS: There really isn't much more 25 room. I mean, theoretically more deer fencing could be

77 1 put in. We had this discussion early on and the problem 2 with putting more deer fencing fundamentally is the 3 wetlands. So we get to a point where you start getting 4 into disturbing wetlands, which is intimately worse than 5 anything that's going to happen in the area of 6 disturbance. 7 MR. AFRAN: Well, we would also say that 8 becomes a somewhat synthetic devise. You add more 9 fencing to the development plan from the trees, so at 10 some point you can't put fences up just to prevent 11 development at the cost of not planting trees. 12 COMMISSIONER KLEIN: Oh, right. It's a 13 combination of deer fencing and planting new trees. 14 THE WITNESS: They have to put in trees 15 according to their plan. They have to use native 16 species and then the idea of that, of course, is what 17 that does over time is helps to populate, especially 18 deer fenced area, with seedling. 19 COMMISSIONER KLEIN: They could plant around 20 the perimeter of their disturbance, right? On the edge 21 of the, right. 22 THE WITNESS: Yeah, I'm not sure what their 23 final landscape plan is going to look like. Where the 24 trees will go exactly. 25 COMMISSIONER KLEIN: I'm saying they can	79 1 satellite imagery where we can identify trees of a 2 certain size that maybe we could save within that 3 disturbed area because they have some unique 4 characteristic and that might be a condition. That 5 would help to reduce that number further. 6 COMMISSIONER KLEIN: And then my other 7 question is, in your opinion what is the impact of 8 removing mature trees or trees in general within 100 9 feet of a ridge line? 10 MR. AFRAN: I'm sorry, I was distracted by 11 my clients. I didn't hear your question. 12 COMMISSIONER KLEIN: It was for him. 13 MR. AFRAN: I didn't hear it. 14 COMMISSIONER KLEIN: My question is, in your 15 opinion Mr. DeFeo, what's the impact, I guess, on the 16 ridge or on the slope of the ridge if you remove trees 17 within 100 feet of a ridge line? 18 THE WITNESS: To generalize things like that 19 are very dangerous, because it depends on the ridge line 20 and depends on the theology, it depends where the tree 21 is, it depends how it's growing. 22 COMMISSIONER KLEIN: Can you give a range? 23 THE WITNESS: Generally you wouldn't want to 24 do a -- generally try to avoid removal if you can, but 25 if you can't then you just want to be sure that you have
78 1 always throw in a few more trees. 2 THE WITNESS: The Chairman kind of asked this 3 question, I believe, I don't know how many hearings ago, 4 I lost track. Could the developer, and I believe I put 5 it in the supplemental report, get seedlings from the 6 state to help speed the process. 7 COMMISSIONER KLEIN: Right. 8 THE WITNESS: And my answer was, I believe 9 it was last hearing or the one before, there were no 10 trees available through the different commissions. The 11 state didn't have them. The short answer is, yes, there 12 is availability of seedlings from the state projected 13 and they could do that. 14 COMMISSIONER KLEIN: That would be inside 15 the deer fence? I'm talking just -- 16 THE WITNESS: Outside area. 17 COMMISSIONER KLEIN: Just on the edges of 18 the disturbed. You try not to take down to many trees 19 and now that there's a clear area and you try and build 20 a building or a parking lot and the existing trees they 21 can fill in some more if they had to? 22 THE WITNESS: Yeah, you have to be careful 23 when you're planting in the building site, but one of 24 the elements you may recall in one of my reports is a 25 recommendation that we do an EIS type study using	80 1 some sign of a stable system. One of the elements that 2 -- well, this drawing is useless. One of the elements 3 of trying to use deer fencing the way we designed it was 4 to minimize the impact on that ridge line because 5 everything to the east of that ridge line will 6 regenerate faster within the deer fencing and mitigate 7 any impact. Normally I would see a ridge line and the 8 concern is runoff, so we're trying to increase plant 9 growth in the direction of runoff that's native there 10 and also the understanding, as I understand site plans, 11 and I'm not the site engineer, the design as it was 12 explained, as I heard it, the storm water on that ridge 13 line in the impacted area will be directed away from the 14 ridge going west and I believe that's south, right. 15 South and west. 16 COMMISSIONER KLEIN: Right. Correct. 17 THE WITNESS: That's as I understood the 18 engineer. So my thinking and my working in negotiating 19 with this of course is let's increase the understory 20 growth, more plants, more water absorption, so even 21 though this, you have this ridge here and anything 22 falling here goes this way and anything falling there 23 goes that way, I'm worried about what's going that way. 24 COMMISSIONER KLEIN: And that's the deer 25 fence side?

81 1 THE WITNESS: That's the deer fence side. 2 COMMISSIONER KLEIN: And growth absorbs more 3 water and runoff and things. 4 MR. AFRAN: Could I add something to some of 5 the questions you have. First of all, under the current 6 ordinance and maybe under the earlier one as well, under 7 the current ordinance it's a 1 for 1 tree replacement. 8 COMMISSIONER KLEIN: The diameter or -- 9 MR. AFRAN: I'll read it. "If you remove a 10 tree 4 to 6 inches --" 11 CHAIRMAN BAGOFF: Hold on. Hold off on 12 reading the ordinance because we don't know if that's 13 operative right now. 14 MR. AFRAN: All right. I won't go into the 15 details. I'll say this, there are different categories 16 of radiant -- of diameter. But it is 1 for 1 17 replacement with a tree, generally 2.5 inches in 18 diameter for each of the size classes. A tree must be 6 19 feet high. So it's not that it's a little seedling, 20 it's a 6-foot high tree that has to be replaced. 21 COMMISSIONER KLEIN: Right. I think we're 22 talking different things. Seedlings are inside the 23 fenced in deer area, so that they will grow because they 24 don't want the deer to eat it. The seedlings on the 25 outside got to be a little more mature so if the deer,	83 1 there's a reason those regulations exist and the town 2 recognized that in the settlement, which was approved by 3 the court, the settlement had this zoning ordinance 4 attached to it which was approved by the court at a 5 fairness hearing which was adopted by the governing body 6 of this town and was not objected to. 7 MR. AFRAN: I would respond and say, it can 8 be looked at completely differently. That this 9 developer is getting the privilege to build 396 market 10 rate units on a site where you could only build 136 11 houses. And at the price for the developer getting that 12 privilege -- 13 CHAIRMAN BAGOFF: You're testifying. 14 MR. AFRAN: Hang on. Mr. Plocker testified 15 too. I just want to respond to what Mr. Plocker said. 16 It is not a matter that because you were given 17 affordable housing you're given special breaks. The 18 affordable housing is the price the developer pays for 19 the privilege to put 396 luxury units on a site that 20 would carry only 136 single family homes. 21 MR. PLOCKER: Which would have disturbed a 22 lot more of that property. 23 CHAIRMAN BAGOFF: Gentlemen. 24 MR. AFRAN: We're done. 25 CHAIRMAN BAGOFF: Thank you.
82 1 they do start eating them they will still grow. 2 MR. AFRAN: Correct. I just wanted to 3 clarify, I wasn't sure what Mr. DeFeo meant but the 4 current law says must be 6-foot high minimum and it's a 5 1 for 1 replacement. So in order to do -- now let's 6 assume there's 15,000 to be lost, assuming that theory 7 is right, that means the developments got to put in 8 another 8,500 trees. That's an enormous cost and so 9 that's our point. 10 CHAIRMAN BAGOFF: That's a long 11 hypothetical, so let's stop right there. It's a 12 hypothetical. 13 MR. AFRAN: The other thing I'll just add in 14 is the actual current law doesn't require that exact 15 tree plan, the specific location each tree to be removed 16 and it's species. So the new law is much more rigid, 17 the current law I'll say is much more rigid than Mr. 18 DeFeo seems to be working with. So that's the 19 distinction. 20 MR. PLOCKER: And this is an affordable 21 housing inclusionary development that is entitled to 22 certain deference, to certain elimination of cost 23 generative items. Look at the affordable housing 24 regulations, you want to site the law for a future court 25 or wherever you want to go, that's fine Bruce, but	84 1 MR. AFRAN: We have concluded our 2 presentation, unless anyone has any questions that 3 require me to weigh in. 4 CHAIRMAN BAGOFF: Thank you. Okay. We're 5 going take a five-minute break. 6 I'm sorry. Council President, go right a 7 head. 8 COUNCIL PRESIDENT RUTHERFORD: So I don't 9 know if this for you Mr. DeFeo or you Mr. Afran. I just 10 have a couple questions as I was listing to the 11 testimony. 12 The 2010 study had 182 trees per acre of 6 13 inch diameter or greater. I do recall earlier in your 14 presentation Mr. DeFeo, you had broken out the size of 15 the trees per acre. Can you help me understand where 16 you are with 6 inches or greater, the number per acre, 17 if you have that? 18 THE WITNESS: I have to find -- I don't have 19 it in front of me. Hang on. I have to find the study. 20 MR. AFRAN: If you have the actual study 21 when we break can I take a look at it, please. I never 22 seen it. 23 THE WITNESS: The PowerPoint has a 24 histogram, as I recall. 25 MR. AFRAN: You want my copy.

85 1 THE WITNESS: If you have a current copy. 2 Is that all right Counselor, if I use his copy? 3 MS. McGOVERN: Sure. 4 THE WITNESS: We used a 4 to 8 inch range. 5 So it's, I'm comparing kind of -- I'm not comparing 6 apples to apples with that. But the 4 to 8 inch range 7 we would have come up with, it's about 70 trees. That 8 size range. 9 COUNCIL PRESIDENT RUTHERFORD: 4 to 8, 70 10 trees per acre? 11 THE WITNESS: 4 to 8, yeah. 12 COUNCIL PRESIDENT RUTHERFORD: What about -- 13 THE WITNESS: It's tough to compare 6, you 14 know, it's a big range. 15 COUNCIL PRESIDENT RUTHERFORD: Do you have 16 anything above 8 inches? 17 THE WITNESS: Yes, we have trees in the 8 to 18 12 range and we went 12 to 16, 16 to 20 and the numbers 19 drop pretty -- these are numbers of trees we found in 20 the areas. So we went from 70 in 4 to 8. 8 to 12 we 21 dropped to 30. Then we dropped, 12 to 16 we dropped to 22 10, below 10. When we get above 16 to 20 you're going 23 to get into 1, 2, 3, 4. That's a little better for me 24 to see. So you just see as they get bigger and bigger, 25 which is not unusual by the way, that is get really big	87 1 MR. AFRAN: Where the difference is. 2 THE WITNESS: Either or. 3 COUNCIL PRESIDENT RUTHERFORD: If you have 4 it by 6 inches that would be great, if not I'm happy to 5 kind of adjust the math. 6 THE WITNESS: I can try and -- I can try. I 7 can't promise what I come up with, but I can try, 8 certainly. 9 COUNCIL PRESIDENT RUTHERFORD: Thank you. I 10 mean, should be a way to do it. You were able to put it 11 on the histogram. 12 THE WITNESS: Yeah, I'm just not sure of 13 it's accuracy, that's all I can tell you right now. I 14 just don't know. 15 MR. AFRAN: When that's done we appreciate a 16 copy at the time it's posted and sent to the Mayor. 17 COUNCIL PRESIDENT RUTHERFORD: Second 18 question I have is, I'm a little unclear about the 19 forest, the characterization of the forest. Is it a 20 stagnant forest or a stable forest or not? 21 THE WITNESS: Well, I suppose it depends who 22 you talk to. My professional opinion this is what I 23 call a stagnant, non-regenerating forest. That means as 24 time continues, using that histogram as an example 25 regarding those other numbers.
86 1 trees, 36 inch diameter trees, that's a big tree. So 2 you see fewer and fewer of that kind of tree anywhere. 3 COUNCIL PRESIDENT RUTHERFORD: If you were 4 to add up all the trees 4 inches or greater, can we get 5 a number for that so we can compare it to 6 inches or 6 greater that was in the earlier study? 7 THE WITNESS: I'll look and see. Again, 8 because we're doing different ranges, because they use 9 the 2 to 6, which is an inaccurate range to work with in 10 the first place, it's not an accurate study. In that 11 regards when you say 2 to 6, I got to eliminate 12 everything up between 2 and 3.9. 13 COUNCIL PRESIDENT RUTHERFORD: I'd be fine 14 with 4. 15 THE WITNESS: I can try. I couldn't do it 16 off the top of my head. 17 COUNCIL PRESIDENT RUTHERFORD: So I would 18 like to know what your study showed the total number of 19 trees per, or average number of trees per acre 4 inches 20 or greater. 21 THE WITNESS: You want to compare what was 22 the, what was theoretically the exhibit that was a prior 23 study against these findings to see if there's any 24 difference. Am I understanding you correctly? 25 COUNCIL PRESIDENT RUTHERFORD: Correct.	88 1 COUNCIL PRESIDENT RUTHERFORD: Right. 2 You're going to have a few smaller. 3 THE WITNESS: The problem is your smaller 4 trees, when they get above that -- when they get to that 5 4 inch category and above they're going to be okay. The 6 problem is, forget the 2 inches and below, the seedling 7 loss, the rate of the seedling lost is so substantial 8 and then virtually, if you had a chance to look at the 9 number of supplemental, I know you have nothing else to 10 do with your time ever, but if you ever get a chance to 11 read all that stuff, you will see there are a number of 12 studies that show forests like this, and the reason they 13 call it stagnant is because you don't get the 14 replacement of the older dying trees with the seedlings. 15 Whatever's in that range is what you got. And when I 16 say the forest is stagnant and unhealthy, understand, 17 you and I may not be on this earth by the time this 18 forest regenerates to some level. We're talking about a 19 forest, I'm talking 100 year window, not 5-year window. 20 So I'm looking at a long-term health for the forest over 21 long periods. So to answer your question, what will 22 happen is if you don't get that seedling growth, if that 23 continues to occur as it's been doing when you're 24 getting deer eating it and other animals, then you're 25 going to have a number of negative environmental

89 1 impacts. Not just trees, we keep focusing on trees, but 2 what happens in a forest like that you're small game 3 species decrease. Your bird species decrease, because 4 not all birds live in the top of trees. A lot of birds 5 live in the lower ends of the shrubs. There are no 6 shrubs to speak of that birds like. There are shrubs 7 there but not healthy. So you start to destroy the 8 ecological diversity of the entire forest over time, 9 which is why I call it stagnant and unhealthy. Stable 10 to me would mean I have a regeneration rate that's 11 comparable to the death rate and therefore I have a 12 forest that continues -- continuing to evolve and be 13 healthy with young trees replacing old trees. 14 COMMISSIONER RUTHERFORD: Now, going back to 15 this rolling mean methodology that you spoke about 16 earlier. Is there a certain minimum percentage of 17 sample size that needs to be considered before you can 18 make a conclusion? 19 THE WITNESS: Generally it's what we use 20 here two-and-a-half to three percent. 21 COUNCIL PRESIDENT RUTHERFORD: Well, what I 22 mean by that is, you have 55 or 50 plus sites. 23 THE WITNESS: Oh, I follow what you're 24 saying. 25 COUNCIL PRESIDENT RUTHERFORD: So do you	91 1 What I would like to know is, you know, they presented 6 2 inches in greater than 182 trees per acre. I would like 3 to know a comparable number from your study. 4 THE WITNESS: Okay. No problem. I'll do 5 what I can for you. 6 COUNCIL PRESIDENT RUTHERFORD: This is 7 really, this question is really for the board attorney. 8 Does the DEP statute supercede the settlement agreement 9 or governing ordinance? 10 CHAIRMAN BAGOFF: I'm going to stop you 11 right there. The DEP has nothing do with us. The DEP 12 will weigh in on this application when they apply to the 13 DEP. We have nothing to do with that. Outside the 14 purview of the board. 15 COUNCIL PRESIDENT RUTHERFORD: So my -- as I 16 listened to the testimony, Mr. Afran made an assertion, 17 he made that assertion in response to what Mr. DeFeo was 18 testifying. My understanding of that is as a board 19 member, even though the governing ordinance for this 20 particular project allows the applicant to ignore the 21 tree ordinance -- 22 CHAIRMAN BAGOFF: Doesn't ignore the 23 ordinance. There is a tree ordinance in place, so it's 24 not ignoring. 25 COUNCIL PRESIDENT RUTHERFORD: Ignoring the
90 1 have to use half the sample size, do you use a quarter, 2 a third? 3 THE WITNESS: We generally go to about half. 4 We went to 22 out of 55. At that point you run the 5 rolling mean and then you say -- 6 COUNCIL PRESIDENT RUTHERFORD: So about 40 7 percent? 8 THE WITNESS: About 40 to 50 percent yeah, in 9 that range. You start running the numbers and as the 10 numbers just continuously don't change you say, okay, 11 what point does it become an exercise of let's just go 12 out and spend more time in the forest, which as far as 13 I'm concerned is a wonderful way to spend my time, but 14 it's not necessarily the most efficient way to get good 15 data. 16 COUNCIL PRESIDENT RUTHERFORD: Understood. 17 I just want to get what that number -- what that 18 percentage of sample size is. 19 THE WITNESS: And can I ask you to go back, 20 because I don't want to forget what you want. You want 21 me to compare the histograms, if you will, or the number 22 of breakdown because there's not a histogram, I realize 23 that, but compare our numbers against the older numbers 24 and see what we come up against? 25 COUNCIL PRESIDENT RUTHERFORD: Correct.	92 1 current tree ordinance. 2 CHAIRMAN BAGOFF: There's another tree 3 ordinance and the tree ordinance for the zone. Let's be 4 clear, so the attorneys will argue this out in a 5 different venue. 6 COUNCIL PRESIDENT RUTHERFORD: All right. 7 So -- 8 MR. AFRAN: We'll argue here too. 9 COUNCIL PRESIDENT RUTHERFORD: What I'm 10 saying is the ordinance that they have in this 11 settlement agreement that we got some clarity on, we 12 call it the settlement agreement or zoning ordinance, 13 whatever it is, that may not actually govern if there's 14 something at state level that supercedes? That's all 15 I'm trying to understand. 16 CHAIRMAN BAGOFF: That's correct. 17 COUNCIL PRESIDENT RUTHERFORD: So the DEP 18 would supercede whatever it is. We can't violate what 19 they would want. 20 CHAIRMAN BAGOFF: That's correct. They 21 would have to weigh in on it after we have decided. 22 COUNCIL PRESIDENT RUTHERFORD: And is that 23 your position, board attorney? 24 MS. McGOVERN: Yeah. The DEP, their rules 25 supercede anything that we all want to do or might have

93 1 done, but they applied for DEP at the time that they did 2 it. I know whatever the standards were required at the 3 time that they applied are what applied. That's 4 typically what happens and I believe that that's what -- 5 COUNCIL PRESIDENT RUTHERFORD: Well, that's 6 a follow-up. 7 MS. McGOVERN: We already got confirmation, 8 I believe, you're not Mr. Hess, but Mr. Hess indicated 9 and confirmed when he was here, our engineer, that the, 10 that the DEP rules that were in place and the storm 11 management were on the date of this application and 12 that's the guideline that they have to follow. 13 COUNCIL PRESIDENT RUTHERFORD: So that was a 14 follow-up question, right. Because if they do govern, 15 my understanding from Mr. Afran's questioning today, was 16 that it's a time of decision not a time of -- 17 MS. McGOVERN: I understand that was Mr. 18 Afran's assertion. 19 COUNCIL PRESIDENT RUTHERFORD: But that may 20 not be accurate? 21 MS. McGOVERN: Well, I think the DEP has 22 already issued something that Mr. Hess had reported to 23 us and confirmed. That the DEP was taking the position 24 that the storm water management rules that were in place 25 at the time are in place for this application.	95 1 MR. PLOCKER: Yes. The storm water, 2 extension of LOI, I believe they are filed in the town. 3 MR. AFRAN: May I explain one moment. On 4 the storm water issue and the question of which set of 5 rules govern, the older rule or the new rule. The DEP 6 did, as Ms. McGovern just said, ruled the old rule 7 applies. We are appealing that and will be asking for a 8 hearing on the issue and later there will be an appeal 9 to the Appellate Division. That's an issue that's not 10 resolved, but it's not for this board. 11 MS. McGOVERN: Exactly, and that's my point. 12 We're not discussing that, we're not overruling DEP, we 13 can not do that. 14 MR. AFRAN: Our point only is with respect 15 to trees, which is not really a direct DEP adjudicatory 16 area. There is a rule that came about because the 17 statutory mandate and an argument at the time of 18 decision governs, not time of -- 19 MR. PLOCKER: We can't go -- 20 MS. McGOVERN: That's a fine argument that 21 is not related at this. After you do your experts I get 22 it, you're going to have that argument for the board and 23 it will culminate in, I think, closing arguments. 24 MR. AFRAN: We'll bring it out through our 25 own experts to show the differences first, but also we
94 1 COUNCIL PRESIDENT RUTHERFORD: That was 2 storm water? 3 MS. McGOVERN: Yes. 4 COUNCIL PRESIDENT RUTHERFORD: What we're 5 talking about right now -- 6 MS. McGOVERN: Trees. 7 COUNCIL PRESIDENT RUTHERFORD: -- are trees. 8 MS. McGOVERN: That's our personal ordinance 9 that you're referring to and this location has it's own 10 personal specific tree ordinance. 11 COUNCIL PRESIDENT RUTHERFORD: Right. Now 12 we're getting into circular arguments, because what -- 13 MS. McGOVERN: I see what you're saying. 14 No, I do. And the DEP, I don't believe, weighed in on 15 anything to do with the trees. 16 COUNCIL PRESIDENT RUTHERFORD: And are they 17 going to at some point? 18 MS. McGOVERN: No, I don't think they have 19 jurisdiction, because that's our specific local 20 ordinance. 21 MR. PLOCKER: I could state for the record, 22 that any required DEP permits we applied for and 23 granted. 24 MS. McGOVERN: And you have the record, they 25 have been granted?	96 1 think it governs the board. But it's an argument the 2 board has to decide for itself and if we disagree there 3 might be litigation. 4 MS. McGOVERN: Proofs have to be submitted 5 to establish which, if in fact, it does -- 6 MR. AFRAN: Well, there's no difference, it 7 wouldn't matter. We intend to show there's a difference 8 between the two. 9 MS. McGOVERN: There's a number of things 10 that have to be worked out. 11 COUNCIL PRESIDENT RUTHERFORD: My last 12 question was, with regard to the 2010, the three areas 13 that were studied, is it possible to get an overlay of 14 the current proposed project versus those areas that 15 were studied, so we could see how much, if any of it, is 16 actually in the proposed area of disturbance? 17 MR. AFRAN: We'd have to have someone do a 18 CAD and put them to the same scale. It takes a little 19 time to do. 20 CHAIRMAN BAGOFF: I'm sorry, that's up to 21 the objector? 22 MR. AFRAN: Yeah. Well, obviously you can't 23 force Mr. DeFeo to do it. We can look into if it's cost 24 prohibitive. 25 COUNCIL PRESIDENT RUTHERFORD: I would like

1 to know. And I'm not trying to run up the cost for
2 anyone, I would just like to know how applicable that
3 2010 study is to this particular project now. The
4 numbers to me are concerning. They're different than
5 what we have been presented and if they are applicable,
6 I would like to know. If they are not applicable then
7 it has a lot less weight.

8 MR. AFRAN: Well, you know, we offer a
9 simple proposition that we have two sets of numbers, Mr.
10 DeFeo's study and this earlier study. Regardless what
11 they're developing, the forest is the forest, so if one
12 study says you got 212 and the other says almost three
13 times as much, we say you have two different forests and
14 it's a question to resolve. I don't think the
15 development itself matters, but what we're saying is
16 that this, from the developer, this is an admission by
17 the developer, the developers own tree study submitted
18 here in the earlier plan. It's the same forest. So
19 we're saying it doesn't matter what the development is
20 now versus then. The trees are the same.

21 COUNCIL PRESIDENT RUTHERFORD: I understood
22 that argument and accept that argument, right. Because
23 we actually had a sidebar. I understand that argument
24 and accept that argument. In addition to that I would
25 still like to see how much of that study area was in the

1 area of disturbance, if possible. If it's not a easy
2 thing to do then --

3 MR. AFRAN: We will ask our engineer to do
4 it. The trouble is, I mean no disrespect to any
5 engineers in the room, sometimes we ask that and there's
6 a \$7,000 bill that comes with that.

7 COUNCIL PRESIDENT RUTHERFORD: Okay. I get
8 it. So --

9 MR. AFRAN: We'll try. As tough a thing it
10 is to do, we will try to look into it.

11 COUNCIL PRESIDENT RUTHERFORD: Thank you
12 very much.

13 MR. AFRAN: Can I ask one last question of
14 Mr. DeFeo, referencing something Mr. Rutherford asked.
15 Just to clarify.

16 Q. You referred to the rolling mean concept, right?

17 A. Yes.

18 Q. That simply means that you've looked at enough of
19 the spot checks to satisfy yourself that nothing's
20 really changing, you stopped and you used the data that
21 you collected up to that point?

22 A. Correct.

23 MR. AFRAN: That's all I wanted to ask.

24 THE WITNESS: Yes.

25 MR. AFRAN: Thank you very much.

1 CHAIRMAN BAGOFF: Thank you. Thank you.
2 (Hearing concludes at 8:42 PM.)
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1 C E R T I F I C A T E

2 I, ERIC S. FISHMAN, a Shorthand Reporter and
3 Notary Public of the State of New Jersey do

4 hereby certify that the foregoing is a true and accurate
5 transcript of the testimony as taken stenographically by
6 and before me at the time, place and on the date
7 hereinbefore set forth, to the best of my ability.

8 I DO FURTHER CERTIFY that I am neither a
9 relative nor employee nor attorney nor counsel of any of
10 the parties to the action; and that I am neither a
11 relative nor employee of such attorney or counsel; and
12 that I am not financially interested in the action.

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ERIC S. FISHMAN, S.R.

Dated: 1/9/2024

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